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IS THERE AN OBLIGATION TO LISTEN?

Leslie Gielow Jacobs*

This Article thoroughly considers the question whether the constitutional guarantee of "freedom of speech" includes an obligation to listen. It first reviews the scopes of the right to speak, the right to listen, and the right to be left alone from things other than unwanted speech, and the relevance to each of physical location. It concludes that, consistent with constitutional doctrine and the Court's articulations, the government's ability to protect individuals from unwanted speech should not vary according to the listener's location. After noting that the actual protection of unwilling listeners may differ because of the different physical realities of the home as opposed to public places, this Article nevertheless proposes an ideal scope of the obligation to listen, which, when met, should allow the government to protect individually targeted listeners from unwanted speech regardless of their physical locations.

INTRODUCTION

The First Amendment explicitly guarantees "freedom of speech."[1] Implicit in this guarantee is the right to listen.[2] The Supreme Court has also found that the right not to speak is part of the Constitution's free speech guarantee.[3] But what about a right not to listen? Can the government enforce an individual's desire to avoid unwanted communication?

The current answer to this question seems to be that the unwilling listener's right to government protection depends upon the listener's location. In the context of an abortion protest, the government may choose to protect unwilling listeners from speech targeted into their homes,[4] but it may not choose to protect unwilling

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1. U.S. CONST. amend. I.

2. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 8 (1986) (recognizing that "the First Amendment protects the public's interest in receiving information").

3. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"); *see also* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

4. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("There simply is no right to force speech into the home of an unwilling listener."); Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970) ("In today's complex society we are inescapably captive

listeners from similarly individually targeted communications when listeners venture out of their homes onto "a public street or sidewalk."[5] Specifically, there is no right "to be left alone"[6] from "unwelcome speech"[7] that can support an injunction's requirement that a speaker "cease and desist" from individually directed communication after the targeted listener has heard and rejected it.[8]

In many instances this geographical line corresponds to appropriate free speech principles: first, that the right of even a very few potentially willing listeners should trump the desire of many unwilling listeners to avoid the communication;[9] and second, that unwilling listeners who can take private action to avoid unwanted communications should do so rather than seek government intervention.[10]

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audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.").

5. Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997) (quoting Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1435 (W.D.N.Y. 1992) (upholding a "cease and desist" provision of an abortion protest injunction, but doubting "that the District Court's reason for including that provision—'to protect the right of the people approaching and entering the facilities to be left alone'—accurately reflects [the] First Amendment jurisprudence in this area"); *see also id.* at 386 (Scalia, J., concurring in part and dissenting in part) (stating that "[t]he most important holding in today's opinion" is that "[t]here is no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics.").

6. *Schenck*, 519 U.S. at 387 (Scalia, J., concurring in part and dissenting in part) (quoting *Pro-Choice Network*, 799 F. Supp. at 1435). Scalia further noted that the Court rejected this purpose. *See id.* at 390 (Scalia, J., concurring in part and dissenting in part).

7. *Id.* at 386 (Scalia, J., concurring in part and dissenting in part).

8. *Id.* at 387 (Scalia, J., concurring in part and dissenting in part) (quoting *Pro-Choice Network*, 799 F. Supp. at 1440). The injunction at issue stated in part as follows:

> [N]o one is required to accept or listen to sidewalk counseling, and . . . if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of [the injunction] pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility.

Id.

9. *See generally id.* at 383 ("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." (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994) quoting Boos v. Barry, 485 U.S. 312, 322 (1988)) (internal quotation marks omitted)).

10. *Compare* Cohen v. California, 403 U.S. 15, 21–22 (1971) (noting that unwilling listeners can take private actions to avoid unwanted speech in a public courthouse), *with* Frisby v. Schultz, 487 U.S. 474, 487 (1988) (upholding a statute banning picketing a person's residence because that resident is "trapped within the home" and "left with no ready means of avoiding the unwanted speech").

But a geographical location line does not perfectly serve these Free Speech Clause interests. On one side of the spectrum, the Supreme Court has recognized this imperfection, rejecting some government efforts to protect listeners in their homes as too broad.[11] On the other side of the spectrum, however, the Court seems to imply that a rigid rule rejecting any listener's right to be left alone from unwanted speech in public appropriately implements Free Speech Clause values. That is, the Court interprets the Constitution to impose an obligation to listen to unwanted expression on publicly situated individuals.

This Article examines whether the Constitution does, or should, contain this implied obligation to listen. Part I sets out the current scope of the right to speak, detailing how both the purposes of the Free Speech Clause, and the doctrine developed to fulfill them, focus on protecting communicative interchange rather than speech alone. Part I also explains that the significance of the speaker's physical location in Free Speech Clause doctrine stems most fundamentally from assumptions about the balance between relevant interests that relate to location. Part II sets out the scope of the right to listen, similarly noting that the ostensible significance of the listener's physical location becomes important only when it correctly signals the balance between competing constitutional interests of free speech and privacy.

Part III examines the scope of the right to be left alone. Contrary to the Court's recent broad implication, the government can, in many ways, protect such an individual right regardless of the individual's physical location. Specifically, the government can protect individuals from nonspeech harms that result from either nonspeech or speech activities, whether the individual is at home or on a public street or sidewalk. The government has limited ability, however, to protect an individual from harms that result from speech. Moreover, the right to be left alone, like the right to speak or the right to listen, depends on physical location. However, unlike other free speech rights where geography is significant, the Court does not implement a balance of Free Speech Clause interests in analyzing the government's ability to protect individuals from speech harms.

Part IV posits whether there is, or should be, a right not to listen to unwanted speech when on a public street or sidewalk. This Part examines a number of possible explanations for the distinction

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11. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 147 (1943) (rejecting "stringent prohibition" on all door-to-door soliciting when "leaving to each householder the full right to decide whether he will receive strangers as visitors" would protect the unwilling listener).

between listeners in their homes versus public places but concludes that no explanation justifies the geographical distinction in a way that relates to underlying Free Speech Clause values. This Part then considers the more fundamental question of whether the First Amendment should contain an obligation to listen regardless of physical location.

In answering this question, Part IV sets out the ideal scope of the obligation to listen according to the concept of preserving the possibility of communicative interchange that is the focus of the free speech guarantee. The ideal scope of the obligation is a "one bite" rule, which applies regardless of the listener's physical location. This rule would allow a speaker an initial interchange with any listener, after which the listener could choose to reject further communications. This Part then explains that, in light of the ideal, the physical location of the listener only seems relevant because of differences in the ability to isolate instances of the ideal that correspond to the home and public places. Specifically, it is easier to tailor a speech restriction to protect unwilling listeners in the home as opposed to in public places. This fact means that such protections in public places are less likely to be valid. This practical reality, however, should not skew the theoretical ideal. This Article concludes that, when a restriction is obviously tailored to suppress only individually targeted communications that listeners have heard and rejected, unwilling listeners should be protected regardless of their physical location.

I. THE RIGHT TO SPEAK

A. The Interactive Focus of the Free Speech Right

The First Amendment, by its terms, protects "freedom of speech."[12] These words, and those of the Supreme Court interpreting the free speech right,[13] may suggest that the speaker's interest is the primary focus of the guarantee. But these words are deceptive. Both the Free Speech Clause's purposes and the doctrine developed by the Court to fulfill them have a distinctive listener focus. That is, these sources clarify that the First Amendment protects speech, not primarily because of the liberty value to the speaker of

12. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

13. *See, e.g.*, *Cohen*, 403 U.S. at 26 (referring to "the freedom to speak foolishly and without moderation" (quoting Baumgartner v. United States, 322 U.S. 665, 673–74 (1944))).

uttering words, but because with speech comes the possibility of a most profound constitutional value: communicative interaction.

1. Free Speech Clause Purposes—Numerous justifications have been offered for the free speech guarantee;[14] probably none are exclusive.[15] Instead, these justifications necessarily interrelate[16] and share a fundamentally instrumental focus. That is, free speech is valued not so much as a good in itself, but because of the good things that result from it.[17] And these good things depend not on speech alone but also on communicative interaction.

One cluster of justifications centers around the collective individual good achieved when citizens are exposed to a wide range of differing points of view. From this general notion comes the more specific commitment to a marketplace of ideas in which truth is most likely to emerge.[18] Other related values within this general cluster that freedom of speech may serve include promoting social stability by providing a public outlet for numerous competing

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14. *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (surveying the many proffered justifications for the free speech guarantee).

15. *See, e.g.*, Board of Educ. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("We have . . . no one Free Speech Clause test. . . . [The different tests] simply reflect[] the necessary recognition that the interests relevant to the Free Speech Clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context."); Greenawalt, *supra* note 14, at 125–27 (arguing that the free speech guarantee is best explained by reference to a plurality of values).

16. For example, the justification that a regime of free speech promotes truth discovery, *see infra* note 17 and accompanying text, also relates to the justifications that it aids the proper functioning of democracy by creating an active and informed citizenry and that it promotes individual autonomy, understanding, and rationality. *See infra* notes 20–23 and accompanying text.

17. *See, e.g.*, Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 114 (1990) ("The core meaning of the constitutional right to speak is instrumental . . . ."); Greenawalt, *supra* note 14, at 130 ("During most of the twentieth century, consequentialist arguments have dominated the discussion of freedom of speech . . . ."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4 ("[C]ourts that invoke the marketplace model of the [F]irst [A]mendment justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit.").

18. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[Those who won our independence] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."); JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 13–48 (R.B. McCallum ed., Basil Blackwell & Mott Ltd. 1946) (1859) (articulating the "search for truth" rationale for prohibiting government suppression of speech).

points of view[19] and promoting tolerance of differing points of view.[20]

Other justifications for free speech focus on self-government. Free speech, it is argued, promotes the system of liberal democracy, both by exposing abuses of political power[21] and by enabling citizens to choose most wisely and continue to evaluate the laws under which they will live.[22]

In addition, the value of individual autonomy is often said to underpin the free speech guarantee. Although this purpose, unlike the previous clustered justifications, appears to have an exclusive speaker focus,[23] it too hinges on communicative interaction. It is as a listener that an individual is exposed to the many viewpoints from which he chooses those that he will adopt as his own. And, even as a speaker, the self-fulfillment of speech comes primarily from interchange, not only from self-expression.[24]

2. Free Speech Clause Doctrine—From Free Speech Clause values, the Supreme Court has developed a complex doctrinal framework under which it evaluates individual claims to "freedom of speech." Because it permeates Free Speech Clause values, this doctrine, too, reflects the purpose of protecting communicative interchange. Most fundamentally, whether an alleged act bears the potential of communicative interaction determines whether it falls within the

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19. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (noting that the "process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process" and thus that freedom of speech "provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society"); Greenawalt, *supra* note 14, at 142 ("Though liberty of speech can often be divisive, it can, by forestalling [the frustration caused when people believe they have been denied the opportunity to present their interests in the political process], also contribute to a needed degree of social stability.").

20. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 10 (1986) ("[The free speech principle] involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.").

21. *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

22. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

23. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

24. *See, e.g.*, Greenawalt, *supra* note 14, at 144–45 (describing the various ways that communication has positive results for the speaker's emotional and mental development and how curtailing free speech would frustrate these gains); David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1896 (1987) (discussing the role of discussion of facts and values central to the priority of free speech).

realm of Free Speech Clause protection. The distinction between expressive and nonexpressive conduct illustrates this priority.

Whether one categorizes conduct as expressive or nonexpressive is highly significant to the speaker's free speech rights, because only conduct deemed expressive receives Free Speech Clause analysis.[25] To be expressive, one must at least intend to communicate a message through conduct,[26] but this alone is not sufficient.[27] In addition, an audience must be reasonably likely to understand the message.[28] Thus, at this crucial juncture in Free Speech Clause analysis, constitutional doctrine distinguishes between conduct that fulfills the speaker's interests alone and that which is part of a potential interchange. Only the latter is granted Free Speech Clause protection.[29] Throughout Free Speech Clause analysis, the primacy of government purpose in determining the level of scrutiny with which the Court will review all types of speech regulation[30] also reflects a concern with protecting communicative interchange.

If the First Amendment's focus was on the speaker's right to express herself without respect to a potential audience, government purpose would not matter. Whatever the government's purpose, the impact on the speaker would be the same.[31] Restrictions of attempts to communicate, whether of conduct or speech and whether directed at speech or only incidental to a nonspeech objective, thwart the speaker's interest in exactly the same way. Instead of the speaker, it is the audience that is dramatically affected by government purpose. Content-directed government actions are most suspect because they "raise[] the specter that the

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25. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 703–05 (1986) (distinguishing cases "involving governmental regulation of conduct that has an expressive element" from cases involving activities that "manifest[] absolutely no element of protected expression").

26. *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (requiring as the first prong of its two-prong test for symbolic conduct "[a]n intent to convey a particularized message").

27. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

28. *See Spence*, 418 U.S. at 411 (requiring as the second element of its two-prong test for symbolic conduct a likelihood "that the message would be understood by those who viewed it.").

29. *See id.*

30. *Compare* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."), *and* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."), *with O'Brien*, 391 U.S. at 377 (The Court applied its lenient balancing test to a government regulation that incidentally restricted expressive conduct because "the governmental interest [was] unrelated to the suppression of free expression.").

31. *See, e.g.*, Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981) (noting that both content-based and content-neutral restrictions "reduce[] the sum total of information or opinion disseminated").

Government [sic] may effectively drive certain ideas or viewpoints from the marketplace,"[32] thereby perverting reflections about truth and self-government in its own favor.[33] These concerns relate to information and idea flow, not the outgoing act only.[34] This confirms the doctrinal priority of protecting speech because it is potentially part of a communicative interchange.

B. The Relevance of the Speaker's Physical Location

In a number of ways, Free Speech Clause doctrine explicitly acknowledges the relevance of the speaker's location. Specifically, a speaker has a broad right to speak on her own property.[35] She also has a broad right to speak on publicly owned property that has traditionally or by government designation been held open for expression.[36] She has less right to speak on public property not dedicated to expression.[37] Finally, a speaker has no federal constitutional right to speak on privately owned property other than her own.[38]

Although geography may appear to be a determining factor in Free Speech Clause analysis, it is, in fact, a shorthand reference to constitutional principles that do not depend upon physical location. Specifically, physical location in Free Speech Clause doctrine represents the probability that government action will restrict communicative interaction, as well as a presumptive balance

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32. *R.A.V.*, 505 U.S. at 382 (quoting Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

33. *See, e.g.*, *R.A.V.*, 505 U.S. at 382 ("The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed." (citations omitted)).

34. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) ("We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); Cohen v. California, 403 U.S. 15, 24 (1971) (stating that free speech is designed and intended to remove governmental restraints from the arena of public discussion).

35. *See* City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994) (characterizing speech from the home as "a venerable means of communication that is both unique and important").

36. *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 46 (1983).

37. *See id.* at 46, 49.

38. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 48 (1966) (rejecting the assumption, in the context of a peaceful trespass protest at the county jail, "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."). *But see* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (upholding an interpretation of the California Constitution that required private shopping mall owners to allow others to reasonably exercise their free speech rights on the premises).

between the speaker's constitutional right and the competing rights of others.

With respect to the home, speech from it is highly protected, in part because the possibility is great that a communicative interchange will result.[39] A speaker's interest in communicating from the home is high because the combination of residence and speech "carries a message quite distinct"[40] from any other, which means that "[no] adequate substitutes exist for [this] important medium of speech."[41] Moreover, that the speaker owns the property from which he speaks indicates that the exercise of his free speech right at that location is less likely to conflict with the legitimate rights of others than speech in other locations[42] and thereby diminishes the legitimate reasons that the government can have to regulate expression in order to serve the broad public interest.[43] That speech occurs from the speaker's home thus signals a heightened individual speech interest, which reverses the usual presumption that the government may restrict individual behavior to pursue majoritarian interests.

By contrast, speech that occurs on another's privately owned property presents a lower probability of communicative interchange, at least when the speech is targeted at the property owner and the owner objects to it. And, although a subset of such speech on another's property that is symbolic public expression may have a high possibility of communicative interchange,[44] the means of expression presumptively conflict with the owner's legitimate property right.[45] Private property rights trump the free speech interests of those who trespass for the purpose of communicating a

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39. *See, e.g., Gilleo*, 512 U.S. at 54–55 ("Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. . . . [R]esidential signs have long been an important and distinct medium of expression.").

40. *Id.* at 56.

41. *Id.*

42. *See id.* at 58 ("Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing." (citations omitted)).

43. Quite literally, it removes the "place" justification for content-neutral speech restrictions. *See id.* at 56 (noting that government may regulate the time, place, or manner of expression if it "'leave[s] open ample alternative channels for communication'" but that there are no adequate substitutes for signs displayed from the home (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

44. *See* Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance*, 59 OHIO ST. L.J. 185, 238–40 (1998) (arguing that publicly directed civil disobedience has Free Speech Clause value).

45. *See supra* notes 42–43.

message, and so the government may criminalize such conduct.[46] That the speech occurs on the private property of another thus signals a constitutional balancing that favors the legitimacy of the government action.

On the other side of the physical location spectrum, speech that occurs in a public forum is protected because it is presumptively part of a communicative interchange.[47] Even if there are no apparent listeners, the possibility always exists that one will appear because, after all, it is a *public* forum. Moreover, because speakers cannot use the private property of others to convey their messages without purchasing such a right, which will be beyond the means of many,[48] it is important to retain the public arena open to ensure the fullest possible expressive interaction. Not only is the public location a proxy for a high possibility of communicative interchange, it also signals a low likelihood that speech will interfere with others' legitimate interests. No private property rights are impacted and those whose privacy is disturbed can presumptively preserve it by taking private action.[49]

All of the above presumptions, which seem to depend upon physical location, are rebuttable by a showing of government interest. That demonstrates that it is the free speech values, not geography alone, that drives constitutional doctrine.[50] In sum, physical location is important to free speech doctrine because of legitimate interests that it signals in most instances. But where those interests do not apply, Free Speech Clause doctrine allows for a result at odds with the presumption that arises from physical location.

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46. *See* Bruce Ledewitz, *Perspectives on the Law of the American Sit-In*, 16 WHITTIER L. REV. 499, 535–36 (1995) (noting that there is no "doubt about the amenability of [expressive] sit-ins as such to State criminal prosecution").

47. *See* Hague v. Committee for Indus. Org., 307 U.S. 496, 515–16 (1939) (stating that from "time out of mind, [streets and parks] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

48. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

49. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) ("[T]he burden normally falls upon the" offended listener "to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" (quoting Cohen v. California, 403 U.S. 15, 21 (1971))).

50. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 199 (1992) (stating that a content-based speech restriction in a public forum is valid if it is necessary to serve a compelling government interest); City of Ladue v. Gilleo, 512 U.S. 43, 58–59 (1994) (suggesting that "more temperate measures" that might restrict some speech from the home would comport with the Constitution).

II. THE RIGHT TO LISTEN

A. Scope of the Right to Listen

The interactive focus of the free speech right[51] means that included within the express guarantee of "freedom of speech" is the implicit guarantee of a right to listen. Not only is the right to listen constitutionally protected, it predominates over the other rights encompassed within the free speech guarantee. The Constitution protects the right to listen even when the speaker does not, alone, possess a constitutionally recognized interest in self-expression.[52] "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."[53] In the instances where they conflict, the Free Speech Clause also protects the right to listen over the right to speak.[54] More significantly, because the conflicts are more numerous, the Free Speech Clause protects the right to listen over the right not to do so.[55] In this busy, crowded nation, the interests of willing, or potentially willing, listeners and the interests of unwilling listeners will often conflict.[56] When conflicts occur, the interests of the willing or potentially willing listeners will almost always prevail in the constitutional analysis, no matter how few in number the willing listeners may be as compared to those who do not want to receive the communication.[57]

Paul Robert Cohen's expletive-emblazoned jacket worn in the Los Angeles County Courthouse presents the quintessential example of

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51. *See supra* Part I.A.

52. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978))).

53. *Id.*, 475 U.S. at 8.

54. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387–88 (1969) (stating that the government may limit speakers to prevent "chaos" and to ensure the possibility of "meaningful communications"); Kovacs v. Cooper, 336 U.S. 77, 86 (1949) ("Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of . . . public order.").

55. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 322 (1988) (stating that "adverse emotional impact on the audience" does not justify punishing speech (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988))).

56. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–11 (1975).

57. *See, e.g., id.* at 210 ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").

constitutionally protected offensive expression.[58] In response to the government's argument that it could prohibit Cohen's speech to protect "unwilling or unsuspecting viewers,"[59] the Court responded that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[60] Unwilling viewers did not have privacy interests that would justify the speech suppression, because, rather than being "powerless to avoid [the offensive] conduct,"[61] they "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[62] Requiring unwilling listeners to experience the offensive communication, albeit briefly, is necessary to protect "the arena of public discussion."[63] The offensive words had a "communicative function"[64] crucial to the Court. Although distasteful to some, the words conveyed a message that might move some listeners.

In other cases in which it has evaluated offensive speech regulations, the Court has relied on these same considerations, protecting the rights of potentially willing listeners to receive speech when unwilling listeners have the ability to avoid it. The Court invalidated a city ordinance prohibiting the door-to-door distribution of handbills, noting that it "submit[ted] the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature is in fact glad to receive it."[65] The Court noted the following:

> [T]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.[66]

Similarly, the Court invalidated a city ordinance prohibiting outdoor movie theaters from showing nudity that might be visible to

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58. Cohen was convicted of disturbing the peace for wearing a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles County Courthouse. *See* Cohen v. California, 403 U.S. 15, 16 (1971).

59. *Id.* at 21.

60. *Id.* (quoting Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970)).

61. *Id.* at 22.

62. *Id.* at 21.

63. *Id.* at 24.

64. *Id.* at 26.

65. Martin v. City of Struthers, 319 U.S. 141, 144 (1943).

66. *Id.* at 147.

passersby.[67] The Court found that the ban might deter the showing of even "educational" films to willing viewers,[68] while "the offended viewer readily can avert his eyes."[69]

The so-called hostile audience cases confirm the constitutional judgment that listeners' reactions to speech are not generally a sufficient justification for suppressing the communication. So, for example, the Court overturned Jesse Cantwell's breach of the peace conviction for peacefully playing a record critical of organized religion, and the Catholic Church in particular, to passersby who, after initially granting permission, found its contents offensive.[70] The Court found his "effort to persuade a willing listener" to adopt his point of view constitutionally protected, "however misguided others may think him," absent evidence that his speech would endanger a substantial government interest apart from the citizens' sensibilities.[71] Later cases have virtually eliminated hostile audience reaction as justification for suppressing speech, placing the burden on the government to supply adequate police protection against onlooker violence.[72]

1. Limits to the Right to Listen

a. "Incidental" Restrictions—As noted above,[73] much turns on the government's purpose in taking an action that suppresses speech. If the government regulates conduct rather than speech, or if the government regulates speech in a way that does not depend upon an expression's subject matter or particular message, it may incidentally protect listeners from speech they do not want to encounter. So, for example, when the government prohibits draft card burning with the alleged purpose of preserving the efficiency of the draft,[74] viewers who dislike the message of the symbolic act are no longer required to witness it.[75] But this is an incidental effect of an ostensibly conduct-directed regulation. Where there is no

67. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975).
68. *See id.* at 211.
69. *Id.* at 212.
70. *See* Cantwell v. Connecticut, 310 U.S. 296, 302–03, 311 (1940).
71. *Id.* at 310.
72. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111, 111, 113 (1969) (overturning disorderly conduct conviction of demonstrators who refused to disperse when onlookers became unruly); Cox v. Louisiana, 379 U.S. 536, 550 (1965) (overturning a breach of the peace conviction of demonstrators which was based upon "the reaction of the group of white citizens looking on from across the street" absent a credible threat of violence that the police would not be able to handle); Edwards v. South Carolina, 372 U.S. 229, 237 (1963) (stating that the Constitution "does not permit a State to make criminal the peaceful expression of unpopular views.").
73. *See supra* Part I.
74. *See* United States v. O'Brien, 391 U.S. 367, 386 (1968).
75. *See id.* at 377.

plausible nonspeech purpose for regulating a symbolic act, such as flag burning, the government cannot prohibit it and unwilling listeners are obliged to turn away.[76]

Similarly, the government has a freer hand in protecting citizens from disruptive noise levels[77] and other generally undesirable nonspeech effects of expressive activities.[78] The government may even, in some instances, justify an ostensibly content-based speech regulation on the grounds that its rule addresses the nonspeech secondary effects of the expressive activity.[79] But such content-neutral secondary effects such as "crime, maintenance of property values, and protection of residential neighborhoods,"[80] which "happen[] to be associated with [the] type of speech [featured at adult movie theaters],"[81] differ from "the emotive impact of speech on its audience."[82] Thus, "[l]isteners' reactions to speech are not the type of 'secondary effects' " that may insulate a regulation from the strictest level of review.[83] Rather, the offended audience must endure the communication, at least for the time necessary to leave or otherwise insulate themselves from the unwanted expression.[84]

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76. *See* United States v. Eichman, 496 U.S. 310, 317 (1990) (stating that the federal Flag Protection Act of 1989 "suffers from the same fundamental flaw [as the Texas statute]: It suppresses expression out of concern for its likely communicative impact"); Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements." (citations omitted)).

77. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 784, 803 (1989) (regulating musical performance volume); Grayned v. City of Rockford, 408 U.S. 104, 108, 121 (1972) (restricting noise outside school); Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (restricting noisy trucks).

78. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994) (holding in part that health effects of protest activities may justify restrictions on expression).

79. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47–51 (1986) (analyzing a zoning ordinance that limits adult theaters to certain sections of the city as content-neutral because it "aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community"); *see also* Young v. American Mini Theaters, Inc., 427 U.S. 50, 71–73 (1976) (holding that a state may legitimately use the content of adult materials as the basis for placing them in a different classification than other motion pictures because it is justified by the city's interest in preserving the character of its neighborhoods).

80. Boos v. Barry, 485 U.S. 312, 320 (1988).

81. *Id.* at 321.

82. *Id.*

83. *Id.*

84. *See* Madsen v. Women's Health Ctr., Inc., 572 U.S. 753, 773 (1994) (noting in part that an injunction cannot limit sign displays outside of an abortion clinic because medical personnel or patients could simply shut the shades); *Boos*, 485 U.S. at 322 (finding foreign diplomats' dignity interests no more compelling then those of American citizens in justifying a ban on critical placards outside the embassies); United States v. Grace, 461 U.S. 171, 183 (1983) (invalidating a prohibition on carrying a sign or banner outside the Supreme Court). The exception to this general rule that places the burden on listeners to avoid unwanted communications is obscenity, and to a lesser extent, profanity. The government may entirely

b. Captive Audience Protections—Although the free speech guarantee privileges the right to listen, the Court has nevertheless recognized that the government may sometimes choose to restrict the rights of some to listen in order to protect the right of others not to do so. The Court has carefully defined the circumstances under which such protection of unwilling listeners is appropriate. According to the Court, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[85] In other articulations, the Court has said that the government's power to protect listeners from unwanted speech depends upon whether the listeners are "captive,"[86] meaning that they cannot take private action to avoid the unwanted communication.

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suppress communications that meet the definition of obscenity. *See* Miller v. California, 413 U.S. 15, 24 (1973). The trier of fact must use the following three-prong test to determine whether a communication is an obscenity:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citation omitted). The government may also restrict indecent expression more broadly than other types of expression. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978) (holding that the FCC may prohibit the broadcast of a vulgar monologue during afternoon hours when children may be part of the audience). *But see* Reno v. ACLU, 521 U.S. 844, 849 (1997) (holding that Communications Decency Act provisions that prohibit knowing transmission to minors of "indecent" or certain "patently offensive" communications abridge free speech protected by the First Amendment). Although the Court has created other categories of unprotected expression, obscenity is the only one where the Court has accepted the government's interest in protecting an unwilling audience from offense as the primary justification for suppressing speech. *See* Dun & Bradstreet, Inc. V. Greenmoss Builders, Inc., 47 U.S. 749, 751 (1985) (noting that defamation is unprotected in part because the communication is false); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (noting that incitement is unprotected by the First Amendment because of the likelihood of imminent nonspeech-related danger); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (upholding conviction for using fighting words because they are likely to result in public disorder). Because it privileges the interests of unwilling listeners over those who may want to receive the expression, this obscenity exception stands in tension to the general thrust of the free speech guarantee, which is to protect the free exchange of ideas. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 919 (2d ed. 1988) (noting that suppressing obscenity because it presents thoughts and impressions that challenge the social order "cannot be squared with a constitutional commitment to openness of mind").

85. Cohen v. California, 403 U.S. 21, 22 (1971).

86. Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when [a] 'captive' audience cannot avoid the objectionable speech.").

These two requirements—substantial invasion of privacy interests and listener captivity—overlap in the instances in which the Court has found a legitimate government interest in restricting speech to protect unwilling listeners. In the course of invalidating a local ordinance banning door-to-door solicitation,[87] the Court noted several constitutionally permissible ways that a city could protect individuals in their homes from unwanted speech.[88] In contrast to the broad ban, the valid alternatives left the decision whether to listen to a proffered communication "where it belongs—with the homeowner himself."[89] Thus, "[a] city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . ."[90]

The Court has also upheld a federal statute that would require that the Post Office comply with a homeowner's request not to receive certain types of mail.[91] "In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail."[92] Although the Court acknowledged that the prohibition might "operate[] to impede the flow of even valid ideas," it responded that "no one has a right to press even 'good' ideas on an unwilling recipient."[93] It concluded that "[n]othing in the Constitution compels us to listen to or view any unwanted communication."[94]

In several other decisions, the Court has found government efforts to protect unwilling listeners to be valid even though they did not, like a "No Solicitors" sign or the statutory mail rejection, depend upon previous expressions by the listeners that the communications were unwanted. A plurality found a city's purpose to protect captive commuters from unwanted communication in part to justify a ban on streetcar placards.[95] The Court noted that "'[t]he streetcar audience . . . is there as a matter of necessity, not

87. *See* Martin v. City of Struthers, 319 U.S. 141, 149 (1943).

88. One example is "[g]eneral trespass after warning statutes." *Id.* at 147. Another is a model ordinance "which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed." *Id.* at 148.

89. *Id.*

90. *Id.*

91. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 729–30 (1970) (discussing 39 U.S.C. § 4009 (1964), currently found at 39 U.S.C. § 3008 (1994)). This section provides a procedure for a household member to insulate himself from "[any pandering] advertisements which offer for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." 39 U.S.C. § 3008(a).

92. *Rowan*, 397 U.S. at 736.

93. *Id.* at 738.

94. *Id.* at 737.

95. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).

of choice,'"[96] and whereas "'[t]he radio can be turned off,'" this is not true of "'the billboard or street car placard.'"[97] The Court upheld a local ban on targeted residential picketing in part to protect "the unwilling listener."[98] Although the Court characterized the right that justified the government's protection as "a special benefit of the privacy all citizens enjoy within their own walls,"[99] it also noted an earlier case involving public handbilling, where the Court "spoke of a right to distribute literature only 'to one willing to receive it.'"[100] Finally, in another case where the government more clearly sought to limit speech into the home based upon noise rather than its offensive content, the Court again noted both the Free Speech Clause's general limit to the opportunity to "reach the minds of willing listeners"[101] and the more specific lack of a speaker's right to "insert a foot in the door and insist on a hearing."[102]

B. The Relevance of the Listener's Physical Location

As Free Speech Clause doctrine relates the speaker's physical location to the scope of the right to speak,[103] it also relates the listener's physical location to the scope of the right to listen. A listener has the broadest right to listen on his own property.[104] He has a very broad right to listen on publicly owned property that has traditionally or by government designation been held open for expression.[105] The listener has a diminished right to listen on public property not dedicated to expression.[106] Finally, a listener's right is

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96. *Id.* at 302 (quoting Public Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

97. *Id.* (quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)).

98. Frisby v. Schultz, 487 U.S. 474, 484 (1988).

99. *Id.*

100. *Id.* at 485 (discussing Schneider v. State, 308 U.S. 147 (1939)).

101. Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

102. *Id.* at 86.

103. *See supra* Part I.B.

104. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (holding that the government cannot criminalize reading or viewing obscenity in the person's home).

105. This is the flip side of the speaker's broad right to communicate in a public forum. *See supra* notes 47–49 and accompanying text.

106. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985) (noting that, in a place of employment, the government may restrict outsider's speech to employees "to avoid interruptions to the performance of the duties of its employees").

at its lowest ebb when the speech at issue is directed into private property that is not his own.[107]

Although these rules may appear to depend upon geography, like the right to speak rules, they stem from constitutional values that do not depend upon physical location. Specifically, the geographical lines reflect the probability that government action will restrict communicative interchange, as well as a presumptive balance between listener's constitutional rights and competing rights of others.[108]

In the home, the choice to listen evidences a high probability of communicative interchange, and the private location creates a presumptive lack of captive unwilling listeners. On public property, government restrictions of the right to listen have a strong probability of limiting communicative interchange because of the many different types of listeners who may legitimately be there. In these locations, unwilling listeners are presumptively free to leave and avoid unwanted communications. That the government may more easily restrict the right to listen on government property not dedicated to expression reflects a recognition that there may be more competing interests in those locations. One of these is the interest of unwilling listeners who are not free to escape unwanted communications.[109] Finally, that listeners' interests are lowest with respect to speech directed onto another's private property reflects presumptions about the possibility of communicative interaction and the balance of competing interests.

One presumption is that the possibility of communicative interaction between the speaker and the non-targeted listener is low or could be achieved through more direct communication.[110] Another presumption is that the possibility of communicative interaction between the speaker and the targeted listener is low as well where the listener does not want to listen to the communication. Moreover, the unwilling listener's location on her own private property heightens her privacy interest and suggests that there are other ways for willing listeners to receive the communication. In all of

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107. *See* Frisby v. Schultz, 487 U.S. 474, 487 (1988) (upholding ban on targeted residential picketing "even if some . . . picketers have a broader communicative purpose").

108. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302–03 (1974) ("American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech[; however,] the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded . . . to the speech in question.").

109. *See id.* at 304 (noting the "risk of imposing upon a captive audience" through card advertising in rapid transit cars).

110. *See Frisby*, 487 U.S. at 483 (stating that a ban on picketing a residence "permits the more general dissemination of a message").

these ways, the seemingly geographical lines of listener protection reflect presumptions about the balance of Free Speech Clause values.

III. THE RIGHT TO BE LEFT ALONE

Contrary to the Court's recently expressed doubts,[111] its First Amendment jurisprudence leaves plenty of room for the government to protect individual citizens' rights to be left alone, wherever they may be, including "on a public street or sidewalk."[112] Instead of a focus on the place of the protection, a focus on the harms sought to be eliminated and the type of activity restricted explains the scope of permissible regulation.

A. The Right to Avoid Nonspeech Harms

Crucial to the Court's analysis of whether an individual has a legitimate right to be left alone is the nature of the harm from which the individual seeks to be protected. Nonspeech harms can be caused by either nonspeech or speech activities. What sets them apart from speech harms is that the harm results from something other than the harm-causer's message. Where the harm is speech-neutral in this way, the Court has recognized a broad individual right to be left alone.

1. Nonspeech Harms Resulting from Nonspeech Activities—To a limited extent, the Constitution affirmatively protects individuals' rights to be left alone from nonspeech harms that result from nonspeech activities. Specifically, the Court has interpreted the substantive component of the Due Process Clause to protect individuals from various types of intrusions.[113] Because this is an

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111. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997) ("We doubt that the District Court's reason for including that [cease and desist] provision—'to protect the right of the people approaching and entering the facilities to be left alone'—accurately reflects our First Amendment jurisprudence in this area." (quoting Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1435 (W.D.N.Y. 1992))).

112. *Schenck*, 519 U.S. at 383.

113. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 847–48 (1992) (right to abortion before fetal viability); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 262 (1990) (right to choose not to receive unwanted medical treatment); Turner v. Safley, 482 U.S. 78, 79 (1987) (right of prisoners to marry); Moore v. City of East Cleveland, 431 U.S. 494, 500–03 (1977) (right of nonnuclear family members to live together); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (right of married persons to use birth control); Rochin v. California, 342

affirmative constitutional protection, the guarantee only operates against government action. Nevertheless, in articulating the fundamental right to be left alone from certain types of government action, the Court has embraced a concept of individual self-determination,[114] the protection of which can also justify government action against intrusive private action.

Even without a constitutionally protected individual interest, the government may choose to protect individual citizens from a broad range of nonspeech-related harms that result from nonspeech activities. Free Speech Clause doctrine does not restrict the government's action where neither the perpetrator's nor the victim's communicative interests are impaired.[115] Consequently, mere rationality tests the validity of the government's decision to protect the private victim.[116]

The government routinely asserts an interest in protecting an individual from nonspeech harms as the reason for its actions that restrict the liberties of others. Criminal and tort law protect individuals' rights to be left alone from others who may harm their persons or property. Property law protects the individual's interest in being left alone in his land use decisions.[117] Contract law, facilitating as it does interpersonal transactions, is perhaps less precisely viewed as protecting a right to be left alone. Nevertheless, its rules vindicate an interest in personal self-determination, enforcing freely made personal decisions.[118]

In sum, government actions protecting individual rights to be left alone are not anomalies. They are, rather, routine results of the democratic process. In countless ways, the government restricts some individuals' liberties because the democratic majority has determined that the other individuals affected by the exercise of some individuals' liberties should have the right to be left alone.

U.S. 165, 172–73 (1952) (right against nonconsensual stomach pumping); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (right to direct children's education).

114. *See, e.g.*, *Casey*, 505 U.S. at 852 (stating that, with respect to the right to choose abortion, "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

115. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (finding that the Free Speech Clause does not prohibit the government from criminalizing, and enhancing the penalty for committing, bias-motivated crimes).

116. *See id.* at 488 (purposes for enhancing the penalty for particular types of crimes need only be "reasonable" (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 16 (1979)).

117. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82 (1979) ("It is true that one of the essential sticks in the bundle of property rights is the right to exclude others." (quoting Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979))).

118. *See, e.g.*, JOHN H. JACKSON & LEE C. BOLLINGER, CONTRACT LAW IN MODERN SOCIETY 298 (1980) ("A person becomes obligated under contract law because he or she *agreed* to some obligation.").

2. Nonspeech Harms Resulting from Speech Activities—When a harm is caused by a speech activity, the First Amendment becomes a potential limit on government efforts to protect the affected individual since it is the harm-causer's "freedom of speech," rather than the impacted individual's right to be left alone, that is explicitly guaranteed. Nevertheless, that the prohibited act may involve speech does not, alone, immunize the act from government restriction based upon its individual harm-causing potential. Speech, such as incitement[119] or extortion,[120] may constitute a crime. Similarly, defamation may be the basis for tort liability[121] and words, of course, can constitute a prohibitable breach of contract. In each instance, the direct connection between the content of the expression and nonexpressive harms justify the prohibition.[122]

Verbal harassment constitutes the outermost border of speech activity whose nonspeech harms may justify restrictions. Numerous jurisdictions enforce telephone harassment statutes, often without articulating a clear constitutional justification.[123] The *Model Penal Code* defines telephone harassment as a call made "without purpose of legitimate communication."[124]

This focus on the potential for interpersonal speech exchange underlies the Supreme Court's recognition that the government may protect citizens from face-to-face harassment, even though restrictions on speech may be its means.[125] Although the Court has not specifically defined harassment, the justification for prohibiting harassing speech seems to be that the strident and persistent means of delivery transform what might at first have been an effort

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119. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that the government may criminalize "inciting . . . imminent lawless action.").

120. *See* 18 U.S.C. § 1951(a) (1994) ("Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . shall be fined under this title or imprisoned.").

121. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1983) (holding that tort remedy is appropriate for speech involving no matters of public concern); New York Times Co. v. Sullivan, 376 U.S. 254, 283–84 (1964) (permitting tort liability upon a showing of actual malice).

122. *See, e.g.*, KENT GREENAWALT, SPEECH, CRIME, & THE USES OF LANGUAGE 58 (1989) (terming these types of utterances "situation-altering" and subject to government regulation because they are "outside the scope of a principle of free speech.").

123. *See* Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 194–200 (1994) (surveying the judicial defenses of telephone harassment statutes).

124. MODEL PENAL CODE § 250.4(1) (1962).

125. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 385 (1997) (noting that the restriction on protesters' speech rights "is the result of their own previous harassment and intimidation of patients"); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994) (protecting psychological and physical well-being of captive protest targets are government interests strong enough to justify restricting free speech rights).

at a free speech exchange into a nonspeech harm that the state may prohibit.[126] Consistent with this understanding, the Court upheld a ban on targeted residential picketing in part because those whose protest "is narrowly directed at [a] household . . . generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."[127] This means of expression diminishes the speech's potential for communicative impact, which the First Amendment protects, while heightening the probability that it is experienced by its target, and perhaps other potential targets, as coercive.[128] Repetition of the speech, especially after the target has indicated a desire not to hear it, is another factor that decreases the possibility that the expression will be part of a communicative interchange and thus may transform it from protected expression into unprotected harassment.[129]

Even when speech has the potential for communicative interchange, the Constitution permits some regulation of it in order to protect others' rights to be left alone. Sometimes, the government may proscribe speech because of the means of conveying it are particularly intrusive. The doctrine of time, place, and manner restrictions recognizes that the government has greater freedom to regulate speech without respect to its content for the purpose of

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126. *See Schenck*, 519 U.S. at 385 (referring to "harassment and intimidation"); *Madsen*, 512 U.S. at 760 (enjoining protesters from "physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting" clinic patients).

127. Frisby v. Schultz, 487 U.S. 474, 486 (1988).

128. *See* Pro-Choice Network v. Schenck, 67 F.3d 377, 396 (2d Cir. 1995), *rev'd in part and aff'd in part*, 519 U.S. 357 (1997) (Winter, J., concurring) (stating that targeted residential picketing "seeks to compel the homeowner to buy peace by abandoning convictions and to warn those who might share the homeowner's convictions to alter their views or suffer the same fate.").

129. *See Schenck*, 519 U.S. at 384–85 (noting the district court's finding that "[m]any of the [protesters] ha[d] been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff" (quoting Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1425 (W.D.N.Y. 1992))); *Frisby*, 487 U.S. at 498 (Stevens, J., dissenting) (commenting that after protesters have communicated their message to the home resident, there is "little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family"); Brownstein, *supra* note 123, at 200–02. Brownstein notes three possible justifications for using repetition as a basis for non-protection of the speech:

> [T]he more a statement is repeated, the more doubtful we become that the speaker's purpose involves communication of information or opinion[;] . . . repeated phone calls . . . are of little value in objective terms [because w]hatever message the caller hoped to communicate has already been received[;] . . . repeated phone calls almost always involve a listener who has indicated in unmistakable terms that they do not want to continue to be spoken to by the person placing the call."

Id. at 200.

protecting citizens' rights to be left alone from the hubbub of unrestricted communications at certain times and in certain places.[130] Time, place, and manner restrictions usually vindicate a general public interest in being left alone from auditory[131] or visual[132] clutter.

Consequently, in these many ways, the Court has recognized that even when speech is part of the harm-causing activity, there may be a right to be left alone.

3. The Relevance of the Victim's Physical Location—In most of the above-mentioned instances, the victim's physical location is irrelevant to the government's ability to protect her right to be left alone from nonspeech harms. Criminal, tort, and contract law protections follow the right-holder wherever she may venture, from her own home, onto the public streets, and even into the private home of another. Property law, by its very nature, has a geographic locus to its protection. But the geography relates to the location of the item protected. If something in a very public place threatens to injure the property, the law can reach out and stop it.[133]

Similarly, so long as the speech does not have communicative interchange value, the ability of the government to protect individuals from nonspeech harms caused by speech activities follows the individual from the home and into public places. Threats are prohibitable wherever they might occur. Telephone harassment need not be directed into the home to be outlawed.[134] Courts may enjoin verbal harassment even when it occurs on a public street or sidewalk.[135] The definition of defamation includes its public nature.[136] For all of these nonspeech harms that result from nonspeech or speech activities that do not have communicative interchange value, the location of the victim does not affect the government's power to protect her.

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130. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 89 (1949) ("[T]he need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance [banning them].").

131. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) ("The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the [area] and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park.").

132. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981).

133. *Cf.* Illinois v. City of Milwaukee, 406 U.S. 91, 92–93 (1972) (finding that releasing sewage in Lake Michigan can constitute a public nuisance).

134. *See* Brownstein, *supra* note 123, at 196–97.

135. *See, e.g.*, Schenck v. Pro-Choice Network, 519 U.S. 357, 385 (1997) (holding that the government may restrict protesters' "harassment" of others on a public sidewalk).

136. *See* 2 DAN B. DOBBS, LAW OF REMEDIES § 7.2(1) (2d ed. 1993) ("Both libel and slander require a 'publication' or communication by the defendant to someone other than the plaintiff.").

It is only when a speech activity potentially has communicative interchange value with someone other than the protected victim that the victim's location becomes relevant to the government's ability to protect her, even from nonspeech harms. Sometimes the government may nevertheless act to protect individuals from nonspeech harms, but the magnitude of the individual interests that form the reason for the government's action must be weighed against the free speech value of the communicative interchange that might be restricted. The location of the victim is relevant in this balance only because it signals the magnitude of both the likelihood of communicative interchange with others and the victim's privacy interest. Where the victim is in her home, the Court has found a greater government interest in protecting her from intrusion than when she is in some other location.[137] Specifically, speech targeted at a home may have "a broader communicative purpose,"[138] but its location, compared to other, more public ones, makes it less likely that the publicly communicative purpose will be realized and more likely that it will severely intrude on a victim who has "no ready means of avoiding the unwanted speech."[139]

In sum, the government has broad discretion to protect an individual's right to be left alone from nonspeech harms even when they result from speech occurring on a public street or sidewalk. Even where Free Speech Clause restrictions apply, physical location is only a signal for when a particular balance between competing constitutional interests is likely to attach. In circumstances where the presumption that arises from physical location does not hold true, constitutional principles, rather than rigid geography, will prevail.

B. The Right to Avoid Speech Harms

Speech harms are those that come from the content of an expression. That is, the communicative impact of the speech activity inflicts a psychic wound, such as anger, shame, resentment, or offense. Unlike regulation to prevent nonspeech harms, which may often raise no free speech clause question, regulation to prevent

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137. *Compare* Frisby v. Schultz, 487 U.S. 474, 486 (1988) (restricting targeted residential picketing even though the activity may have "a broader communicative purpose"), *with* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773 (1994) (stating that the clinic may protect its patients from the harm caused by outdoor placards by "pull[ing] its curtains").

138. *Frisby*, 487 U.S. at 486.

139. *Id.* at 487.

speech harms always presents a constitutional issue, and, because it is aimed at the content of expression, invokes a high degree of judicial suspicion.[140]

1. Scope of the Right to Avoid Speech Harms—As with nonspeech harms, there are several ways that an individual can effectuate a right to avoid speech harms. The first is through private action designed to avoid it. The second is by obtaining government protection from it.

a. Private Efforts to Avoid Unwanted Speech—An individual's ability, through private action, to avoid unwanted speech has been prominent in the Court's decisions evaluating government actions designed to protect individuals from unwanted speech.[141] The individual's right personally to avoid harm is at least of the same scope with speech harms as with nonspeech harms. If it is possible to avoid an encounter with harmful speech, an individual may do so.[142] In fact, the Court expects the individual to do so, finding this private ability to avoid speech to undercut government assertions that a speech restriction is necessary for public protection.[143]

In addition, the individual interest in avoiding speech harms may actually extend more broadly than the interest in avoiding nonspeech harms, rising to the level of a constitutional right where it is the government that seeks to inflict the speech harm. An analogy to the right to speak suggests that government efforts to compel an individual to listen to unwanted speech might well run afoul of the free speech guarantee.

Although not explicitly mentioned in the Constitution, the Court has found the right not to speak flows from the free speech guarantee. According to the Court, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[144] Pursuant

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140. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 319 (1988) (noting "the 'First Amendment's hostility to content-based regulation'" (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980))).

141. *See, e.g.*, *Frisby*, 487 U.S. at 487 ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech.").

142. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 821–22 (1974) ("[T]he constitutional right of free speech has never been thought to embrace a right to require a journalist or any other citizen to listen to a person's views . . . .").

143. *See, e.g.*, Spence v. Washington, 418 U.S. 405, 412 (1974) ("[A]ppellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display.").

144. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)); *see also* Riley v. National Fed'n of the Blind, 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

to this understanding, the Court has invalidated government efforts to compel individuals to speak words chosen by the government[145] or to grant access to[146] or fund[147] the expression of other private speakers.

Similarly, a right against compelled listening might well flow from the right to listen affirmatively embodied in the free speech guarantee. In the context of compelled listening, the Court has noted that "full capacity for individual choice . . . is the presupposition of First Amendment guarantees."[148] A government requirement that individuals listen to unwanted speech would seem the same as a compelled speech requirement because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[149] However, "[n]othing in the Constitution compels us to listen to or view any unwanted communication."[150] Thus, the government probably may not, without a compelling justification,[151] either require individuals to listen to government-chosen speech or to listen to more neutrally designated private speakers.[152]

b. Government Efforts to Protect Individuals from Speech Harms—In contrast to the broad range of an individual's ability privately to avoid speech harms, the scope of her right to seek government

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145. *See, e.g.*, *Wooley*, 430 U.S. at 717 (state license plate motto); *Barnette*, 319 U.S. at 642 (flag salute and pledge of allegiance).

146. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 20–21 (1986) (holding that utility is not required to grant space in its billing envelope to others' expression); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 244, 258 (1974) (holding that a newspaper is not required to grant space to political candidates to reply to attacks upon them).

147. *See, e.g.*, Keller v. State Bar, 496 U.S. 1, 16 (1990) (holding that mandatory state bar dues cannot be used, in part, to fund lobbying); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977) (holding that union service charges used, in part, to fund lobbying cannot be collected from employees who object to the politics or feel coerced into paying).

148. Bellotti v. Baird, 443 U.S. 622, 635 n.13 (1979) (quoting Ginsberg v. New York, 390 U.S. 629, 650 (1968) (Stewart, J., concurring)).

149. *Barnette*, 319 U.S. at 642.

150. Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970).

151. Even the most dangerous speech restrictions can be justified if the government shows that the "'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" Burson v. Freeman, 504 U.S. 191, 198 (1992) (quoting Perry Educ. Ass'n v. Perry Local Educs. Ass'n, 460 U.S. 37, 45 (1983)). In *Burson*, the Court found that a state regulation establishing "campaign-free zones" around polling places met this demanding standard. *Burson*, 504 U.S. at 211.

152. *Cf.* Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (concluding that the "constitutional rights" of listeners preclude the government from "transforming its vehicles of public transportation into forums for the dissemination of ideas upon [a] captive audience."). The commuters at issue in *Lehman* were compelled to listen out of practical, but not legal, necessity. *Id.* at 306–07. A hypothetical legal requirement that all citizens attend a public issues symposium—or be jailed—would present the issue of compelled listening more clearly.

protection constricts dramatically. That a harm comes from "speech" implicates the Constitution's free speech guarantee directly. That is, any time that the government seeks to protect one individual from a speech harm, it necessarily abridges the speech of another. And it is "freedom of speech," rather than freedom from unwanted speech, that the Constitution explicitly guarantees.[153] Thus, the Constitution might seem to have already dictated the priority of the interests. Despite the wording, however, the Court has never interpreted the free speech guarantee to be absolute.[154] In certain circumstances, the Court has held that the Free Speech Clause leaves room for the government to choose to protect some private individuals from the unwanted speech of others.

Most bluntly, the Court has noted that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[155] The instances where the listener's interest prevails in the balance, however, are quite limited, consisting almost exclusively[156] of instances where the communication enters the home.[157]

The Court's few holdings and implications establish the boundaries of the government's ability to protect a homeowner's right to be "let alone" from unwanted communication. The Court has held that the government may enforce an individual homeowner's decision not to receive indecent communications through the mail[158] and has implied that the government may enforce a homeowner's decision not to receive much broader types of information.[159] The Court has emphasized that government actions to implement individual decisions not to receive communications may survive constitutional scrutiny, while broad bans based upon presumptions about homeowner preferences will be invalid.[160] Nevertheless, in

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153. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

154. *See* Kovacs v. Cooper, 336 U.S. 77, 85 (1949) ("Of course, even the fundamental rights of the Bill of Rights are not absolute.").

155. *Rowan*, 397 U.S. at 736.

156. *But see Lehman*, 418 U.S. at 304. This exception is explicable on the ground that the public buses subject to the speech restriction were government property that the Court found not to be a communication forum.

157. *See infra* notes 158–167 and accompanying text.

158. *See Rowan*, 397 U.S. at 738.

159. *See id.* at 737 ("The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property."); Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (stating that a blanket ban on door-to-door solicitation violates freedom of speech, but leaving the power to reject communications "with the homeowner himself" comports with the Constitution).

160. *Compare Rowan*, 397 U.S. at 737 ("In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer."), *with* Bolger v. Youngs Drug Products Corp., 463 U.S. 60,

one instance the Court upheld a ban on targeted residential picketing as "narrowly tailored to protect only unwilling recipients of the communications,"[161] despite the fact that the blanket ban did not require the homeowner to indicate affirmatively that the expression was unwanted.[162]

Outside the home, the government's ability to protect individuals from unwanted speech is much more limited. As with communications into the home, the government cannot prohibit certain types of communications in public places on the ground that a majority of listeners would likely deem the communications unwanted.[163] The Court has also held that, in a public place, the government cannot protect individuals even from individually targeted communications "[a]bsent evidence that the protestor's speech is independently proscribable . . . or is so infused with violence as to be indistinguishable from a threat of physical harm."[164] Such a prohibition "burdens more speech than is necessary" to further the government's legitimate interests.[165] The Court has not had occasion to review a government effort to enforce an individual decision to reject broad types of information in a public place.[166] It has, however, implied that, when the listener is located in a public place, the government may not enforce an individual's right to be left alone from a particular communication that the individual has heard and rejected.[167] These rules, which seem to differ according to the place of the communication, raise the relevance of physical location to the right to be left alone from unwanted communication.

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72 (1983) ("[W]e have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially by offended."). *See generally Martin*, 319 U.S. at 147–48 (invalidating a blanket ban on door-to-door solicitation but noting that a regulation enforcing a homeowner's indication that "he is unwilling to be disturbed" would be valid).

161. Frisby v. Shultz, 487 U.S. 474, 485 (1988).

162. *See id.* at 487 ("The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance . . . can scarcely be questioned.").

163. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 875 (1997) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it." (quoting FCC v. Pacifica Found., 438 U.S. 726, 745 (1978))).

164. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994) (invalidating a no approach zone outside an abortion clinic); *see also* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 657 n.1 (1981) (Brennan, J., dissenting) ("[Fairgoers] have no general right to be free from being approached.").

165. *Madsen*, 512 U.S. at 774.

166. An example of this type of effort, in the abortion clinic context, would be an injunction that prohibited anyone from approaching any individual seeking clinic services who wore a sign saying "Don't Approach Me."

167. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 377–80 (1997).

C. The Relevance of the Listener's Physical Location

Constitutional doctrine seems to draw a line around the home, protecting only those within it from unwanted communication.[168] The rules concerning the home recognize that, at least sometimes, individuals have an interest in screening and choosing the communications that they will receive.[169] The government may choose to enforce this interest[170] even though the individuals may screen out information of high Free Speech Clause value.[171] That is, at least in some instances, the government may enforce an individual's choice to be left alone from speech harms.[172] But the Court's articulations concerning public location suggest that, in other instances, the listener does not have such an interest.[173]

These lines seem to depend upon physical location. But in all other contexts, the ostensibly geographical lines in free speech jurisprudence have revealed more fundamental constitutional judgments stemming from core Free Speech Clause purposes.[174] The question is whether the same is true with respect to the line around the home. Because this line depends on the listener's location, protecting one in the home even from speakers located in traditionally public places,[175] the more specific question is whether

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168. *See e.g.*, Frisby v. Schultz, 487 U.S. 474, 484 (1988) (noting that as to "protection of the unwilling listener[,] . . . the home is different"); Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970) ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.").

169. *See Rowan*, 397 U.S. at 736 (referring to "individual autonomy" as the interest that "permit[s] every householder to exercise control over unwanted mail").

170. *See Frisby*, 487 U.S. at 484–85 ("[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.").

171. In *Rowan*, the Court noted that if "the householder [is] the exclusive and final judge of what will cross his threshold undoubtedly [this will have] the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider." *Rowan*, 397 U.S. at 736. However, the Court concluded that "the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 738.

172. *See Frisby*, 487 U.S. at 485 ("[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."); *Rowan*, 397 U.S. at 736 (upholding a homeowner's right to reject mailings "he finds offensive").

173. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 386 (1997) (Scalia, J., concurring in part and dissenting in part) (describing the Court's "holding" to be that "[t]here is no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics.").

174. *See supra* Parts I.B, II.B.

175. *See Frisby*, 487 U.S. at 480 ("[A] public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood.").

the listener's physical location relevantly relates to underlying Free Speech Clause values.

1. The Listener's Physical Location as a Shorthand for the Possibility of Communicative Interaction—One potential explanation for the seemingly geographic line around the home is that it is an accurate shorthand for the possibility of communicative interaction. Because the listener located in the home is the only one within the forbidden circle of communication, a speech prohibition tailored to expression targeted into that location does not preclude other listeners from engaging in communicative interaction with the restricted speaker.[176] When the government regulation simply enforces the preference of the listener not to receive the communication, the probability that the regulation restricts a communicative interaction is further reduced.[177]

Nevertheless, the blunt judgment about the probability of communicative interaction is not perfect. In some instances, communication ostensibly targeted at an individual homeowner also sends a public message.[178] The Court's judgment that the government may still prohibit such expression privileges the homeowner's privacy interests over the possibility of communicative interaction in the particular way chosen by the speaker.[179] Also, government regulations that enforce a homeowner's decision not to receive certain broad categories of communications leave open the possibility that particular communications might, when specifically heard, turn out to be wanted.[180] Even if the communications are unwanted, particular communications might still enter the listener's consciousness, influencing her opinions and perhaps her actions.[181] Thus, the constitutional rule that allows the government to enforce individuals' decisions not to receive these types of in-

176. *See, e.g., id.* at 483 ("General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. . . . [O]nly focused picketing taking place solely in front of a particular residence is prohibited.").

177. *See, e.g., Rowan*, 397 U.S. at 737 (stating that the "right to communicate must stop at the mailbox of an unreceptive addressee.").

178. *See Frisby*, 487 U.S. at 486 (noting that picketers targeting a particular residence might "have a broader communicative purpose").

179. *See id.* (stating that, despite the possibility that picketers might seek to send a public message, their "activity nonetheless inherently and offensively intrudes on residential privacy").

180. *See Rowan*, 397 U.S. at 736 (noting that allowing a homeowner to exercise control over unwanted mail will deprive him of information that he might otherwise "receive and consider").

181. *See id.* at 736, 738 (allowing a homeowner to decline to receive certain types of mail "undoubtedly has the effect of impeding the flow of ideas, information, and arguments" that might be "valid").

formation exists *despite* the fact that it potentially precludes some communicative interaction.

By contrast, rules that the Court has struck down or questioned in the public forum context seem better tailored to preserve the possibility of communicative interaction than some of the home rules that it has approved. Most particularly, the cease-and-desist provision reviewed by the Court applied only to one-on-one communications in which the listener had heard and specifically rejected a speaker's message.[182] Moreover, the speakers, although required to retreat from their targets, "remain[ed] free to espouse their message" from a greater distance.[183] In this situation there is very little danger that the protective action eliminates potentially willing, or otherwise fruitful, communicative interaction, as opposed to the broad bans that the Court has approved around the home.

Even a no-approach provision, which the Court has invalidated in the public context,[184] seems better tailored to preserve the possibility of communicative interaction than the blanket information bans that the Court has indicated are permissible as to the home. Where abortion protesters surround an abortion clinic, their general anti-abortion message is not difficult to intuit. That they are ready and desirous of providing more specific information can be made quite clear by general signs and information-offering gestures. Thus, all individuals entering the clinic are almost certain to know the general gist of the proffered information and to know that they can, at any moment, indicate a desire to receive it. Such an interplay between speaker and listener is much more precise than, for example, a "No Solicitors" sign[185] or a rejection of "pandering" advertisements,[186] which stop all speakers within the definition without advising the homeowner of the specific content of the message.

With respect to the right to speak and the right to listen, the core goal of preserving the possibility of interchange between

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182. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 371 (1997) ("[T]he 'cease and desist' provision . . . forces sidewalk counselors who are inside the buffer zones to retreat 15 feet from the person being counseled once the person indicates a desire not to be counseled.").

183. *Id.* at 385.

184. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994) ("[I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic . . . .").

185. *See* Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (stating that it is up to the homeowner to decide by sign, or other appropriate indications, "whether distributors of literature may lawfully call at a home").

186. *See Rowan*, 397 U.S. at 729–30 (discussing 39 U.S.C. § 4009(a) (1964 ed., Supp. IV), current version at 39 U.S.C. § 3008(a) (1994)).

speakers and potentially willing listeners explains the ostensibly geographic lines apparent in the doctrine. The juxtaposition of the public forum and home cases relating to the right not to listen reveals that this fundamental free speech value does not adequately explain the significance of the listener's physical location.

2. The Home as a Shorthand for the Constitutional Balance Between the Right to Speak and a Listener's Autonomy Interest in Avoiding Unwanted Speech—"The Constitution extends special safeguards to the privacy of the home."[187] Specific constitutional text protects the home.[188] Although the provision speaks most clearly of physical security, the Court has interpreted "the sanctity of the home"[189] to more broadly limit government intrusion into that sphere.[190] Thus, the Constitution implies an individual autonomy interest located in the home.

In addition to implementing the communicative interchange priority, the significance of the home in free speech doctrine reflects this individual autonomy interest. With respect to the right to listen, the government may not criminalize possession in the home even of materials that it could ban in public.[191] It is not the state's business to "tell[] a man, sitting alone in his own house, what books he may read or what films he may watch."[192] Because the speech consumption occurs within the home, some of the interests that justify public restrictions are not present to the same degree.[193] Moreover, the government interests that still apply to home consumption are not sufficient to outweigh the individual's strong autonomy interest in listening to the broadest range of communications.[194] In the context of the right to listen, the location of the home represents a shorthand for the balance between government interests in restricting the flow of communication and the individual's right to choose what items of information will become a part

187. United States v. Orito, 413 U.S. 139, 142 (1973).

188. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their . . . houses . . . shall not be violated . . . .").

189. Payton v. New York, 445 U.S. 573, 601 (1980).

190. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 559 (1969). (overturning a conviction based upon private use of obscene material within the defendant's home).

191. *See id.* at 559.

192. *Id.* at 565.

193. *See id.* at 567–68 (noting that government interests in protecting minors and facilitating the laws against the distribution of obscenity do not apply with the same strength to private use within the home).

194. *See id.* at 567 (rejecting as insufficient a governmental interest in protecting society from anti-social acts induced by private use of obscene material).

of his thoughts and mind,[195] with the home emerging as a special place of self-formation.

Similarly, the home has a special autonomy-related significance with respect to the right to speak. When a person places a sign at her home, she sends "a message quite distinct from placing the same sign someplace else."[196] That is, the location, and particularly its immediate connection to the identity of the speaker, is a crucial ingredient of the message. This "communicative importance"[197] of the place of expression is part of the individual's autonomy interest in "choos[ing] the content of his own message."[198] Thus, in the right to speak context as well as that of the right to listen, the home signifies a place of heightened individual autonomy interest vis-a-vis government interests in restricting expression.

But transposing this geographical concept into evaluations of the right *not* to listen does not result in the same accurate shorthand for the relative magnitude of the individual's autonomy interest as against the government's interest in restricting expression. This is because, unlike the right to speak or the right to listen, which opposes the government action, an asserted right not to listen is in harmony with the government and in fact requires government action to make it effective.[199] Thus, with the right not to listen, the government's interest is the individual's interest. The question then becomes whether the geographical lines retain their significance as shorthand references to the balance between the competing interests when it is a private speaker, rather than the government, who threatens to inflict the unwanted harm.

Viewing the balance as between the listener's autonomy interest and that of a private speaker, rather than the government, alters the significance of the home. The constitutional significance of the home is that it is a refuge from intrusive government action,[200] the one discrete location specially immune from democratic, utilitarian judgments that may legitimately prevail against individual interests in all other locations. That a man's home is his castle is an important

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195. *See id.* at 565–66. The Court felt that, when the government criminalizes the possession of obscenity by an individual in his own home, it unconstitutionally asserts "the power to control men's minds. . . . [and] the moral content of a person's thoughts." *Id.* at 565.

196. City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994).

197. *Id.* at 57 n.15.

198. Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 573 (1995) (noting that autonomy in choosing the content of one's own message is "the fundamental rule of protection under the First Amendment").

199. *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) (noting that the state may legislate to protect residential privacy).

200. *See supra* notes 187–95 and accompanying text.

concept to hold up against otherwise completely pervasive majoritarian decisions.

But the legitimate priority of one private interest against another in locations outside the home is not so firmly established. Rather, the presumption is that the choice of which private interests to privilege with protection from other private interests lies within the domain of democratic decision-making.[201] As noted earlier, with respect to government decisions to protect private individuals from nonspeech harms inflicted by other private individuals, the Constitution does not attach special significance to the home.[202] Where the interests involved are simply one private will against another, the government may choose between them without respect to physical boundaries. The question is whether the fact that the intrusive private action is speech reintroduces the relevance of physical location.

Answering this question requires distinguishing between private speech interactions that the Court has determined to have Free Speech Clause value and those it has placed beyond constitutional protection. The home boundary retains its significance, even between private speaker and listener interests, where the speech has Free Speech Clause value beyond the one-on-one interchange that is the reason for the government regulation. Specifically, the physical location of the listener has constitutional significance in the instances where the speech may reach beyond a single unwilling listener. "Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech."[203] This type of circumstance, where a government action may restrict a communicative interchange, raises the presumption that the government's action is censorship and therefore inimical to Free Speech Clause values.[204] The home-as-a-castle concept becomes relevant to dispel the presumption that the government is acting as marketplace censor.[205] Only in the home is the listener "captive" to the extent that the government

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201. *See* Schneider v. State, 308 U.S. 147, 161 (1939) ("[L]egislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.").

202. *See supra* Part III.A.3.

203. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541–42 (1980).

204. *See* Cohen v. California, 403 U.S. 15, 23 (1971) (characterizing as "self-defeating" the proposition that the state may "effectuate . . . censorship" to avoid hostile reactions to offensive speech).

205. *See id.* at 21 (government may protect unwilling listeners "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner").

may legitimately assert private interests as the reason for restricting speech that has the potential for communicative interchange.[206]

Pursuant to the Court's current articulations of the relative scopes of the right to speak and the right to listen, however, that the harm-inflicting activity happens to be speech should not reintroduce the relevance of physical location so long as the government, in regulating, is choosing solely between two private interests. The right to speak and the right to listen both protect speech with an interactive potential from government restriction.[207] As currently understood, these rights do not protect speech unless there exists someone in the targeted audience potentially "'willing to receive it.'"[208] Consequently, where a private speaker targets only another private person unwilling to receive the communication, the listener's physical location should not matter in determining the scope of the government's power to protect her because, where the restriction can be tailored to reach only this one-on-one context, the Constitution does not specially protect the speaker. Thus, a presumptive balance between the right to speak and the listener's autonomy does not explain the significance of physical location in evaluating government protections of unwilling listeners.

d. Conclusion—Both the home and the public forum carry special significance in free speech doctrine. With the right to speak and the right to listen, the home lends an added weight to an individual's autonomy interest vis-a-vis hostile government action. With respect to the right to be left alone from speech harms, the home also has a special significance when a government action to further that right conflicts with the right to speak. In the latter situation, that the unwilling listener is at home lends weight to the government's protection efforts. But, in the instances where the protective government action only shields an unwilling listener without also restricting speech that might reach willing recipients, the government action does not conflict with a recognized free speech right. Because there is no constitutional right to limit the government action, the special significance of the home does not define the scope of permissible government action. As with regulating

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206. *Compare* Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The resident is figuratively, and perhaps literally, trapped within the home."), *with* Spence v. Washington, 418 U.S. 405, 412 (1974) (stating that the protester burning a flag in a public place "did not impose his ideas upon a captive audience [because a]nyone who might have been offended could easily have avoided the display.").

207. *See supra* Parts I.A, II.A.

208. *See Frisby*, 487 U.S. at 485 (addressing public handbilling, the Court has spoken "of a right to distribute literature only 'to one willing to receive it'" (quoting Schneider v. State, 308 U.S. 147, 162 (1939))).

nonspeech harms, the government should be as free to protect unwilling listeners from individually targeted speech harms in public as at home.

The Court's and Justices' recent articulations regarding the right to be left alone from speech harms do not evidence this recognition. Rather, both imply that there is no right to be left alone from unwanted speech in a public place, no matter whether the speech is publicly or individually targeted.[209] These implications are inconsistent with what the Court has said about the right to speak,[210] the right to listen,[211] and the right to be left alone.[212] They raise the question whether, contrary to the Court's articulations about these rights, there is, or should be, an obligation to listen.

IV. IS THERE AN OBLIGATION TO LISTEN TO UNWANTED SPEECH WHEN ON A PUBLIC STREET OR SIDEWALK?

The question whether there is an obligation to listen is, of course, really a question about the scope of the right to free speech. The Court's recent implication that, when an individual is on "a public street or sidewalk" the government cannot choose to protect her from individually targeted communications that she has heard once and rejected,[213] suggests that "freedom of speech" includes the right to press speech on an unwilling listener. The implied scope of this right conflicts with the Court's many other statements that willing communicative interchange forms the heart of the Free Speech Clause's protection[214] and that individuals have a cognizable autonomy interest in choosing not only to listen, but

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209. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 384–85 (1997) (holding that the district court erred in issuing an injunction to protect the right of listeners to be left alone); *see also id.* at 386 (Scalia, J., concurring in part and dissenting in part) ("There is no right to be free of unwelcome speech on the public streets . . . [outside] abortion clinics.").

210. *See Frisby*, 487 U.S. at 485.

211. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541–42 (1980).

212. *See supra* note 171.

213. *See Schenck*, 519 U.S. at 383 (doubting that there is "any generalized right 'to be left alone' on a public street or sidewalk").

214. *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("[I]ndividuals are not required to welcome unwanted speech into their own homes."); Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); Kovacs v. Cooper, 336 U.S. 77, 86 (1949) (stating that a speaker has no right to "insert a foot in the door and insist on a hearing"); Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (stating that the right to speak to homeowners does not extend to those who indicate they are "unwilling"); Schneider v. State, 308 U.S. 147, 162 (1939) (stating that the right to distribute literature in a public area extends "to one willing to receive it").

also not to listen.[215] Although one way to reconcile these conflicting implications is to align them with the geographical distinction between public places and the home,[216] simply to state the distinction is not to explain it. The question remains, why, when there are no listeners other than the one who is unwilling, the home should be special with respect to protecting the autonomy of the individual to choose not to listen, while a public forum effectively imposes an obligation to listen.

A. Possible Explanations for the Geographical Distinction

Numerous possible explanations underlie the right to listen's geographical distinction. Although they individually or together may support a presumption based upon the listener's physical location, they do not support the current rigid geographical line.

1. Listeners Are "Captive" in Their Homes Whereas They Are Capable of Avoiding Unwanted Speech When on a Public Street or Sidewalk—The scope of the free speech right implied by the Court is perhaps best illustrated by example. In invalidating Jesse Cantwell's breach of the peace conviction for playing a phonograph record criticizing the Roman Catholic Church to consenting passersby on the street in an effort to proselytize them, the Court noted that he was engaged "only [in] an effort to persuade a willing listener"[217] and that, upon being told that the speech was unwanted, "he would take the victrola and [go away]."[218] The Court's recent statements about the scope of the free speech right in a public forum imply that Cantwell's regard for the receptivity of his audience was mere politeness, irrelevant to the permissible scope of government restrictions. In fact, so long as he refrained from nonspeech conduct that the government could prohibit, Cantwell had the constitutional right to target individual listeners regardless of their consent, to ignore their requests that he cease his communications, and to continue to pursue them with his victrola until they reached property from which he could lawfully be excluded.

These listeners do not fit the profile of the presumptively "free" public forum listeners whom the Court has contrasted to the listeners "captive" in their homes. In describing the "special benefit

215. *See supra* note 148 and accompanying text.
216. *See, e.g., Frisby*, 487 U.S. at 484 ("[T]he home is different.").
217. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).
218. *Id.* at 309.

of the privacy all citizens enjoy within their own walls,"[219] the Court has emphasized the physical captivity of the home resident,[220] contrasting it with the "ease of avoiding unwanted speech in other circumstances."[221] Yet cases noting the easy ability of offended listeners to avoid unwanted communications have mostly involved publicly targeted speech from which listeners could quickly "avert[] their eyes"[222] or "walk[] away"[223] out of earshot. Where cases have involved individually targeted communications, they have similarly assumed that the listener had the ability, literally or figuratively, to "say 'no'" to the speaker and thereby avoid further unwanted communications.[224] These cases did not involve efforts by a speaker to follow and continue to foist communication upon a listener after being told that the speech was unwanted.

A response to the pursued listener's dilemma, however, is that it is possible to avoid the speech through private efforts. Nothing stops individuals stepping out into a public thoroughfare from wearing earplugs, covering their eyes or erecting psychological barriers to entry, or at least being prepared to take these measures to avoid repeated, unwanted expression. But, the free speech cost of these ongoing protective measures is substantially greater than the limited evasive actions thus far required by the Court.[225]

Earplugs, blinders, and psychological defense mechanisms screen out not only the unwanted expression, but also any other expression that may be competing for the listener's attention. A pursued listener forced to take private evasive action risks losing wanted communications along with that which he seeks to avoid. Thus far, the Court's maxim that individuals must tolerate even outrageous speech to fulfill the values of free expression has not been applied to instances of repeated, individually targeted,

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219. *Frisby*, 487 U.S. at 484.

220. *See id.* at 487.

221. *Id.* (citing Cohen v. California, 403 U.S. 15, 21–22 (1971)).

222. *Cohen*, 403 U.S. at 21.

223. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 657 n.1 (1981) (Brennan, J., dissenting) ("Because fairgoers are fully capable of saying 'no' to persons seeking their attention and then walking away, they are not members of a captive audience.").

224. *See, e.g.*, Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983), *aff'd*, 386 F.2d 449 (2d Cir. 1967)) (stating that the homeowner may take the "'short, though regular, journey from mail box to trash can'" to avoid continued exposure to unwanted mail (quoting Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967))).

225. *See, e.g.*, *Frisby*, 487 U.S. at 487 (distinguishing instances where the listener has "ready means of avoiding the unwanted speech").

unwanted expression where the burden of private avoidance threatens other free speech interests.[226]

Of course, another response to the plight of the pursued public listeners is that they will eventually reach their homes or some other type of protected property. The existence of an ultimate refuge thus distinguishes the burden of listening to repeated unwanted speech in public as opposed to in the home. While this distinction exists between an individually targeted listener in public and in the home, there also exists the distinction between the unwilling public listener who can easily avoid the speech and one who is pursued. The fact that the former distinction exists does not explain why it is more constitutionally significant than the latter. Rather, as the ease of avoiding speech has been the articulated basis for including within the free speech guarantee the right to impose it even on listeners who are unwilling, whether the ease exists would seem to be more significant than physical location in determining the scope of the free speech right in situations that fall between the decided cases.

2. Constitutionally Permissible Conduct Restrictions Sufficiently Protect the Unwilling Public Listener—As noted above, the Free Speech Clause does not restrict the government's choice whether to protect individuals from nonspeech harms imposed by either the nonspeech or speech conduct of other private individuals.[227] So, the government may choose to protect unwilling listeners from nonspeech harms caused by speech or conduct. In the context of an unwilling public listener pursued by a persistent speaker, these harms would include harassment,[228] intimidation,[229] as well as the harms inflicted by threats[230] and stalking.[231] Undergirding the implication that the government cannot choose to protect individuals from speech harms on a public street or sidewalk is the assumption that the government's power to punish the imposition of

226. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772–73 (1993) ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

227. *See supra* Part II.A.1–2.

228. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 385 (1997) (justifying a speech restriction based upon "previous harassment . . . of patients").

229. *See Madsen*, 512 U.S. at 774 (noting that the government may "burden[] speech . . . to prevent intimidation).

230. *See id.* (stating that threats are "independently proscribable").

231. *Cf. id.* at 773–74 (implying that a court could protect an individual from being "'stalked or shadowed'" if the conduct led to duress or intimidation).

nonspeech harms sufficiently protects the legitimate interests of the unwilling listener.[232]

Taken at face value, this assumption as to the scope of protection that an unwilling listener may legitimately expect from the government appears to be an acknowledgment that, in contrast to a listener's protection in the home and in conflict with some of the Court's more general articulations, a speaker's right in a public place implies an obligation to listen.[233] That is, the nonspeech harms against which the Court has recognized that the government may legitimately provide protection are exactly that—conduct rather than expression.[234] Their definitions generally require more than the annoyance, offense, or psychological distress that may come from a gentle, but repeated, unwanted message and instead require some sort of physical obstruction,[235] physical harm,[236] or fear thereof.[237] If indeed the Constitution imposes this limit on the scope of government protection, then it effectively also imposes, through the free speech right, an obligation to listen.

The other possible explanation of the judicial assumption that protection from nonspeech harms adequately addresses the interests of the unwilling listener is that a further unacknowledged assumption underpins it. This assumption is that when speech "goes too far" and the burden on the speaker, although not rising to the level of obstruction, physical harm, or fear, nevertheless becomes in judicial judgment "severe," then the government may protect the unwilling listener through one of the nonspeech harm prohibitions.[238] Protections against "harassment" are particularly

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232. *See, e.g., id.* at 774 (limiting protesters' speech as necessary to "prevent intimidation [or] to ensure access to the clinic").

233. *See supra* notes 225–226 and accompanying text.

234. *See, e.g.,* Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997) (doubting that a "right . . . to be left alone . . . accurately reflects . . . First Amendment jurisprudence" and distinguishing *Madsen*, 512 U.S. at 753, as "sustain[ing] an injunction designed to secure physical access to the clinic, but not on the basis of any generalized right 'to be left alone' on a public street or sidewalk").

235. *See, e.g., Madsen*, 512 U.S. at 774 (stating that the government may only limit speech activities as is necessary "to ensure access" to facilities).

236. *See, e.g.,* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."); Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.").

237. *See, e.g., Madsen*, 512 U.S. at 774 (stating that the government may restrict speech "so infused with violence as to be indistinguishable from a threat of physical harm").

238. *See, e.g.,* Pro-Choice Network v. Schenck, 67 F.3d 377, 395–96 (2d Cir. 1995) (Winter, J., concurring) (distinguishing speech to "the general public" or to a voluntary listener from instances "where specific individuals are targeted at locations difficult or

susceptible to this use, and may, in practical effect, provide a scope of protection similar to an explicit recognition of government power to protect targeted unwilling listeners.[239] The problem with this assumption is that it leaves the scope of the unwilling public listener's protection to judicial discretion, which is, in turn, confined by a doctrine that defines the scope of the free speech right so broadly that courts must resort to fine nuances in characterization of speaker conduct to defend their decisions to protect unwilling listeners.[240]

In sum, absent subterfuge or creative wordplay, conduct restrictions do not protect unwilling listeners from speech harms. If they are the sole types of protection that the government can accord to unwilling listeners in public places, then the Free Speech Clause effectively imposes an obligation to listen.

3. In the Context of Speech Outside Abortion Clinics, the Short Duration of Unwanted Speech Explains the Obligation to Listen—Another possible explanation for the Court's skepticism that the government may choose to protect a targeted listener's right to be left alone on "a public street or sidewalk"[241] is that the further geographical qualification—that the unwilling listener be seeking "entrance to or exit from abortion clinics"[242]—is crucial to this constitutional judgment. According such significance to this location qualification would mean that perhaps the government may choose to protect a targeted listener's right to avoid unwanted speech in other circumstances even if the listener is in a public location.

In one sense, limiting the scope of the obligation to listen in this way can indeed help justify it. The most obvious distinction between persistent speech outside an abortion facility and speech in other public locations is spacial and temporal. Even pursuit in this

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inconvenient for them to avoid, [where] the First Amendment's tolerance of *plausibly* coercive or obstructionist protest is least" (emphasis added) (citation omitted)).

239. *See, e.g., id.* at 396 (Winter, J., concurring) (finding "no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion"); *see also Schenck*, 519 U.S. at 381 n.11 (upholding a "cease and desist" provision based on the conclusion that it was a legitimate effort to "accommodate" the speakers' rights when "the District Court was entitled to conclude . . . that the only feasible way to shield individuals . . . from unprotected conduct . . . would have been to keep the entire area clear of defendant protesters.").

240. *See, e.g., Pro-Choice Network*, 67 F.3d at 391–92 ("The purpose of [the 'cease and desist'] provision is not . . . to suppress speech because of the anxiety its content produces in its audience, but rather to provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." (citation omitted)).

241. *Schenck*, 519 U.S. at 383.

242. *Id.* at 386 (Scalia, J., concurring in part and dissenting in part).

circumstance must take place within limited geographical boundaries and thus a limited time frame. These limitations, in turn, can be seen to translate into limitations on the speech harms that may be imposed on the unwilling listener.[243] These limitations may therefore support a per se judgment that, when they apply, the unwilling listener's burden will never outweigh the speaker's free speech right and so there is no right to be left alone within these boundaries.

But this type of line drawing is arbitrary in a number of respects. First, like the other possible explanations, it does not explain why a targeted unwilling listener receives different protection outside an abortion clinic than inside the home. Second, while potentially limiting the scope of an obligation to listen to unwanted speech, it fails to explain what variables might change the speaker/listener balance in other situations. In particular, it fails to explain where or when, after an initial rebuff by a listener, the government may restrict a speaker's continuing efforts of persuasion. Is two city blocks too long a pursuit? Or, does ten minutes of peaceful but persistent targeted speech become too long? Or two hours? Or two days? By failing to provide guidance as to these issues, the Court ensures that a limitation of the obligation to listen in the area outside abortion clinics will become arbitrary in application as different government actors reach different conclusions about the permissible scope of protection of unwilling listeners in other physical locations.

For all of these reasons, a limitation of the implied obligation to listen in the abortion protest context, while perhaps attractive in the short run, only compounds the doctrinal confusion because it fails to relate the relevancy of physical location to underlying Free Speech Clause values.

4. Allowing No Right to Be Left Alone in a Public Forum Is Necessary to Ensure That Publicly Directed Speech Is Fully Protected—According to

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243. *But see, e.g.*, Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992), *aff'd sub nom.* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), *vacated in part on reh'g en banc*, 67 F.3d 377 (2d Cir. 1995), *rev'd in part and aff'd in part*, 519 U.S. 357 (1997). The court noted the following:

> [T]he risks associated with an abortion increase if the patient suffers from additional stress and anxiety [caused by abortion protest activities]. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Id. at 1427.

the Court, recognizing a right to be left alone from unwanted speech in a public place would conflict with the general principle 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.'"[244] This principle stems from circumstances where the government sought to limit publicly directed speech on the ground that some listeners did not like its message.[245] The Court's recent implication is that the same need for "breathing space" exists when the government attempts to restrict individually targeted expression on the ground that its sole target does not want to receive it. But contrary to the Court's assumption, the need for "breathing space" differs fundamentally depending upon whether the regulated speech was publicly or solely individually directed.

The need for "breathing space" to protect free speech derives from the imprecision of any government action that might be crafted to limit the speech harms caused by protected expression.[246] In most instances, "[w]here a single speaker communicates to many listeners"[247] limiting speech for the benefit of some listeners restricts the speech available to others. In such instances, the need for "breathing space" dictates that only exceedingly strong privacy interests of unwilling listeners can justify restricting speech to those potentially willing to receive it.[248] By contrast, when a single speaker communicates with a single listener, restricting the speech when that listener is unwilling does not limit the flow of speech to other listeners. The speaker can continue to communicate with all other listeners without restriction.[249] Such a tailored limitation would not seem to touch the "breathing space" that must circulate around protected expression.

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244. *Schenck*, 519 U.S. at 383 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994) quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

245. *See, e.g., Boos*, 485 U.S. at 315 (discussing a statute that prohibited display of signs near an embassy that "tends to bring that foreign government into 'public odium' or 'public disrepute'"); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (protecting a cartoon that was offensive to the portrayed individual but directed at the general magazine readership).

246. *See, e.g., Boos*, 485 U.S. at 322 ("A 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler*, 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.'" (quoting *Hustler*, 485 U.S. at 561)).

247. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 547 (1980).

248. *See id.* at 542 ("[G]overnment [may] prohibit speech as intrusive [only when] the 'captive' audience cannot avoid objectionable speech.").

249. *See Schenck*, 519 U.S. at 385 ("[C]ounselors remain free to espouse their message outside the 15-foot buffer zone [after being asked to 'cease and desist' by an individual target].").

A reason for the flat rule that there can be no right to be left alone in a public place might be that there is no way to craft such a tailored speech limitation. That is, where speech occurs in a public place, it is impossible to segregate solely individually directed from potentially publicly directed expression. Sometimes this might be true, when speakers use the means of identifying particular individuals through words or images to send a more public message. In such instances, the "breathing space" rationale might dictate that the speech not be limited to protect the unwilling listener.[250] Other times, however, it is possible to segregate solely individually directed expression. The circumstance of "sidewalk counselors"[251] speaking to clinic entrants and a "cease and desist" limitation of it would seem to present quintessential examples, respectively, of solely individually directed expression and a government action precisely tailored to limit only speech harms and no valuable expression directed at other, potentially willing, recipients. So a flat rule against recognizing a right to be left alone from speech harms in public places cannot be justified by the necessary imprecision of any government regulation.

In addition, as noted earlier,[252] a "cease and desist" provision is much better crafted to observe the Free Speech Clause's prime concern with preserving the possibility of communicative interaction than are the speech restrictions that the Court has approved around the home. Consequently, a purpose of preserving "breathing space" for the exercise of First Amendment freedoms does not explain the distinction between the listener's location in the home as opposed to public places with respect to the scope of the free speech right and the governmentally protectable right to be left alone.

5. Conclusion—None of these possible explanations adequately address the Court's recent implication that, at least in public places, the Free Speech Clause extends so far as to guarantee speakers the right to continue to press communications on listeners who have clearly indicated that they do not want to receive it. That the Court has nevertheless implied that this right exists suggests that something other than the usual goal of preserving the

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250. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773 (1994) (rejecting the ban on "images observable" from clinic windows).

251. Sidewalk counselors seek to engage in a one-on-one communication with people entering or exiting abortion clinics. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1423–24 (W.D.N.Y. 1992), *aff'd sub nom.* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), *vacated in part on reh'g en banc*, 67 F.3d 377 (2d Cir. 1995), *rev'd in part and aff'd in part*, 519 U.S. 357 (1997).

252. *See supra* Part II.B.2.

possibility of willing communicative interchange underpins the free speech guarantee. Specifically, it raises the question whether, when a listener is in a public place, the Free Speech Clause should effectively impose an obligation to listen.

B. Defining the Scope of the Obligation to Listen

As illustrated by the failure of the above explanations, examining the scope of the obligation to listen from within the Court's decisions, which assume the relevance of physical location, does not explain it. It is more illuminating first to detach the physical location issue and to determine the appropriate scope of the obligation to listen by measuring it against the Free Speech Clause's guiding principle of enhancing the possibility of communicative interaction. After determining an ideal scope of the obligation to listen, it is then possible to apply it in different physical locations to determine whether, because of the attributes of the home as opposed to public places, its scope should differ.

1. The Ideal Scope of the Obligation to Listen Determined According to the Concept of Communicative Interchange—The concept of communicative interchange that underpins the free speech guarantee involves an exchange of ideas between a willing speaker[253] and a willing listener.[254] In a number of different circumstances, the Court has indicated that the "willingness" component of the concept has constitutional significance. In the context of speaking, the right to refrain from doing so when one is unwilling is part of "'the sphere of intellect and spirit'" protected by the free speech guarantee.[255] In the context of listening, too, the ability to avoid unwanted communications is an aspect of "individual autonomy."[256] In both respects, individual autonomy connotes control over the formation of the self and its actions in the world.[257]

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253. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands [bearing the state's motto on a license plate], an idea they find morally objectionable.").

254. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 821–22 (1974) ("[T]he constitutional right of free speech has never been thought to embrace a right to require a journalist or any other citizen to listen to a person's views . . . .").

255. *Wooley*, 430 U.S. at 715 (quoting Barnette v. West Virginia State Bd. of Educ., 319 U.S. 624, 642 (1943)).

256. Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970).

257. *See, e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 887 (1994).

In practical application, these related concepts of individual autonomy and willingness have led to a permissible range of government actions to protect individuals in their homes. Specifically, the Court has accepted the government purpose to protect the individual autonomy interest in "willing" communicative interactions as a constitutional value that can justify what might otherwise appear to be an unconstitutional speech restriction.[258]

As noted earlier, the scope of the autonomy protection around the home is broad. The Court has upheld, in its efforts to protect the "willingness" of the acts of listening, government actions that enforce individual decisions to reject further communications from particular speakers after receipt and review of a first communication;[259] that enforce individual decisions not to receive broad types of communications without any initial contact with the message,[260] and that prohibit certain types of communications from entering the home without an individual rejection based on the assumption that they are so likely to be unwanted.[261] As demonstrated above,[262] explanations that relate to preserving the possibility of communicative interchange, as it has thus far been articulated by the Court, do not justify the line that the Court has seemed to draw between permissible government efforts to protect listener autonomy in public places and in the home. The failure of these explanations suggests that if willing interchange is indeed the Free Speech Clause's focus, then the scope of protection for the individually targeted listener should apply equally in public as well as in the home.

Potential applications of this conclusion, however, draw it into question. Specifically, in addition to validating government actions such as "cease and desist" provisions,[263] the translation of home rules into public places would validate government actions to enforce, for

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258. *See* F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." (citing *Rowan*, 397 U.S. at 734; *id.* at 890.

259. *See Rowan*, 397 U.S. at 734 (upholding a statute that gave the mail addressee "complete and unfettered discretion in electing whether or not he desired to receive further material from a particular sender").

260. *See* Martin v. City of Struthers, 319 U.S. 141, 148 (1943) ("A city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . .").

261. *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988) ("Because the [targeted] picketing . . . is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it.").

262. *See supra* Part IV.A.

263. This would be the analog to a government action enforcing an individual's decision not to receive further mail from a particular sender. *See Rowan*, 397 U.S. at 734.

example, individually-worn "Don't Approach Me" signs[264] or even more specific demands not to criticize the sign wearer.[265] These applications, although protecting only individually targeted listeners from speech that they are unwilling to receive and preserving the speakers' abilities to engage in publicly directed expression, seem intuitively inimical to a robust free speech regime. This invitation raises the question whether "willing communicative interchange" defines the appropriate scope of Free Speech Clause protection or whether, in fact, the communicative interchange central to the First Amendment includes some obligation to listen.

At the same time that the Court has seemed to focus on protecting the possibility of willing communicative interchange, it has also noted a speaker's right to reach a listener through insults or shame,[266] embarrassment,[267] and perhaps most importantly, persuasion.[268] The latter, at least, implies a conversational effort of some duration. It also would seem to imply some opportunity to reach, and potentially change, initially closed minds. Although this type of communication could occur through publicly directed expression, one-on-one, particularly face-to-face efforts, might be persuasion's most effective means.[269] If this type of persuasion is a constitutional value, then government actions to protect unwilling listeners even from individually targeted communications will adversely affect free speech at the same time that it protects individual autonomy interests.

Constitutional values and an understanding of the situated self[270] dictate that the free speech right should include some ability to

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264. This would be the public place analog to the "No Solicitors" sign approved in *Martin*, 319 U.S. at 148.

265. This would be the public place analog to the targeted picketing ban in *Frisby*, 487 U.S. at 488.

266. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992) (White, J., concurring) ("The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."); Pro-Choice Network v. Schenck, 67 F.3d 377, 395 (2d Cir. 1995), *rev'd in part and aff'd in part*, 519 U.S. 357 (1997) (Winter, J., concurring) ("[S]hame is a form of persuasion . . . [that] must be tolerated.").

267. *See, e.g.*, NAACP v. Clairborne Hardware Co., 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.").

268. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 712 (1992) (Souter, J., dissenting) ("The First Amendment inevitably requires people to put up with annoyance and uninvited persuasion."); Eisenstadt v. Baird, 405 U.S. 438, 459 (1972) (Douglas, J., concurring) ("The First Amendment protects the opportunity to persuade to action whether that action be unwise or immoral, or whether the speech incites to action.").

269. *See, e.g.*, Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1861–62 (1988) (stating that proximity alone has some expressive value).

270. *See, e.g.*, 1 CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS 8 (1985) ("The community is . . . constitutive of the individual, in the sense that the self-interpretations which define him are drawn from the interchange which the community

interact individually even with unwilling listeners. The marketplace of ideas metaphor contemplates an exchange and the emergence of "truth," or at least common understandings, after consideration and reflection. An understanding of the situated self includes a recognition that cultural information and attitudes critically detract from the natural autonomy of the self.[271] Facilitating autonomy, understood as the fullest possible self-awareness and self-direction despite these preexisting forces,[272] might include protecting an individual's exposure to information different from that which would form an individual's initial predilections. That is, recognizing the limits of natural autonomy lessens the weight of the government's interest in protecting absolutely an individual's decision not to receive speech.

Acknowledging the free speech value of persuasion even through communicating with unwilling listeners does not, however, defeat the individual autonomy interest. The value of choice as to which communications to receive and incorporate into the self still apply to individuals who are also, in part, constituted by forces beyond their autonomous control.[273] Defining the scope of the free speech clause's obligation to listen requires balancing these competing notions of individual control and the free speech value of preserving receptivity to unfamiliar communications.

The Court's decisions suggest a range of possible balances between the competing interests. First, the government could restrict speech based upon the presumption that its listeners would not want to receive it.[274] Second, the government could enforce indi-

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carries on."); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 503 (1987) (noting numerous critiques of the Kantian conception of the self "for denying our experience as socially and historically situated beings constituted in some crucial sense by the communities in which we live and by the forms of life in which we participate").

271. *See, e.g.*, THOMAS NAGEL, THE VIEW FROM NOWHERE 119 (1986) (noting "the unchosen sources of our most autonomous efforts").

272. *See, e.g.*, Fallon, *supra* note 257, at 888 ("[T]he self is a creature in and of the world, but one capable of at least partially transforming herself through thought, criticism, and self-interpretation.").

273. *See, e.g.*, DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 71–72 (1986) ("Freedom or autonomy identifies the capacity of persons to formulate and act on higher-order plans of action, which take as their self-critical object one's life and the way it is lived . . . .").

274. This is analogous to a ban on targeted residential picketing as in *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) ("[T]he picketing prohibited . . . is speech directed primarily at those who are presumptively unwilling to receive it."), or on offensive words in public places as in *Cohen v. California*, 403 U.S. 15, 21 (1971) ("[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."), and like the "no approach" provision invalidated by the Court in the context of abortion clinic protest in *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 773–74 (1994) (holding that a ban on physically approaching any person seeking services of the clinic in an area within 300 feet of the clinic must be invalidated absent evidence that the

vidual decisions not to listen to particular types of communications without the individual's first having heard them. These communications could be identified specifically, such as "Don't Talk to Me About the Upcoming Elections" or even "Don't Approach Me with Your Anti-Union Propaganda." These communications could also be identified more generally, such as "Don't Approach Me."[275] Third, the government could enforce an individual decision not to listen to communications from particular speakers after first having heard them.[276] Finally, the government could have no power to enforce an individual's decision not to listen.[277]

Government action in the first category, limiting speech without an individual rejection, would seem almost always to limit the possibility of communicative interaction without sufficient autonomy justification.[278] This is especially true since incorporating the mechanism of individual rejection into the government action would be an easily available alternative means to protect the individual autonomy interest in almost every instance.[279] Absent a strong interest in operating by means of presumption in a particular instance,[280] the value of protecting the possibility of communicative interchange dictates that the government secure an individualized rejection before silencing the speaker to protect an unwilling listener.

Government action in the second category seems similarly too heavily weighted toward protecting individual autonomy at the expense of the possibility of communicative interchange. Although

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protesters' speech is independently proscribable or is infused with violence such that it is indistinguishable from a threat of physical harm).

275. This is like a "No Solicitors" sign at a home. *See* Martin v. City of Struthers, 319 U.S. 141, 149 (1943).

276. This is like a "cease and desist" provision, *see* Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997), or a statute allowing homeowners to require particular speakers not to send any further mail into the home, *see* Rowan v. United States Post Office Dep't, 397 U.S. 728, 730 (1970).

277. *See Schenck*, 519 U.S. at 383 (doubting that there is a "right 'to be left alone' on a public street or sidewalk").

278. *See, e.g., Cohen*, 403 U.S. at 25–26 (noting the "emotive" function of words that some find offensive).

279. *Compare Schenck*, 519 U.S. at 383 ("cease and desist" provision), *with* Madsen v. Health Ctr., Inc., 512 U.S. 753, 773–75 ("no approach" provision). An individualized rejection requirement would also have been an appropriate addition to the targeted residential picketing ban upheld by the Court. *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988) (noting that "hypothetical applications of the ordinance" such as "to picketers present at a particular home by invitation of the resident [might] present somewhat different questions" although failing to reach the issues in "dispos[ing] of appellee's facial challenge").

280. Previous unprotected and illegal conduct by a particular individual subject to an injunction might provide for such a reason. *See Madsen*, 512 U.S. at 773 (noting that the state court crafted the "no approach" provision to protect clinic patients from being " 'stalked' or 'shadowed' ").

implemented according to an individual listener's rejection, this type of action suppresses speech according to its category before the listener has been exposed to the message of the particular speaker. It thereby limits a vast number of potential communicative interchanges based on a broad categorization. In other areas, the Constitution is hostile to broad classifications when individual instances within the group might not fit the stereotype.[281] This bias against broad generalizations should apply to speech restrictions as well. Different speakers bring different nuances to conversations within the broad classes. These nuances might well strike responses even in listeners who did not expect them. Government actions that might potentially shield listeners from all of these possibilities based on a single judgment cuts too deeply into the value of potential communicative interchange that underlies the free speech guarantee.

Government actions in the third category represent the best balance between the competing interests. While actions in the first two categories unduly limit the possibility of communicative interchange, establishing a rule allowing no government power to protect an unwilling listener would favor the possibility of communicative interchange far beyond when it is likely to happen while failing to dignify at any point an individual's autonomy interest in rejecting unwanted communication. In contrast to an absolute prohibition on listener protective government action, requiring that the government act only after a listener has evaluated a particular message and rejected it gives each new speaker an opportunity to engage in a communicative interchange with each new listener while also enforcing the listener's particularized judgment to reject it.

Although it might be argued that a rejection might be quick and reflexive, and therefore some time period must be allowed for the speaker to enhance the possibility of persuasion, any such rule limiting the time period for rejection would be arbitrary and would insufficiently weight the listener's judgment. A speaker who must cease an individually targeted interchange still remains free to en-

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281. For example, the Equal Protection Clause demands that government classifications be tailored to ensure that limiting the actions of those within the group serves the purpose of the regulation. *Compare* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (holding that racial classifications must be narrowly tailored to serve a compelling government purpose), *and* United States v. Virginia, 518 U.S. 515, 523 (1996) (holding that gender classifications must be supported by an "exceedingly persuasive justification"), *with* Williamson v. Lee Optical, 348 U.S. 483, 491 (1955) (acknowledging that economic classifications must be rationally related to a legitimate government objective).

gage in publicly directed speech of the same content.[282] Allowing the speaker "one bite of the apple" with respect to the means of one-on-one communication appropriately balances the free speech values of communicative interchange and each listener's autonomy to choose from the vast range of communications offered in the marketplace, those that will form a part of the individual's consciousness.[283] The "one bite" rule is thus the constitutional ideal with respect to listener-protective government actions.

2. The Relevance of Physical Location—Although a "one bite" rule with respect to individually targeted communication may be the ideal constitutional balance, neither the current rule with respect to the home nor that with respect to public places corresponds to it. Instead, as detailed earlier, these current rules constitute the extremes at either side of the ideal balance.[284] Taken together, the two rules might be viewed as in effect achieving a similar balance, with the home as a place of great escape from public places where there is no escape whatsoever from unwanted communication. The question is whether this balance through extremes that depends on physical location best implements underlying constitutional values. This Part will examine each location in turn to determine whether the constitutional ideal should differ according to geographical considerations.

a. The Home—As detailed earlier,[285] the Court has established a special status for the home with respect to the government's ability to protect unwilling listeners from speech harms. The Court's articulations as to the right of a listener to avoid unwanted communications in the home has been broad, implying no limit to the government's ability to protect homedwellers' decisions to reject communications directed at them only. But does the free speech goal of protecting the possibility of communicative interchange support such a broad scope of government protection of listeners in the home?

The Court has approved government enforcement of individually placed "No Solicitors" signs, noting that such action leaves the

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282. *See, e.g., Frisby*, 487 U.S. at 483 (stating that a targeted picketing ban "permits the more general dissemination of a message").

283. *See* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?*, 67 NW. U. L. REV. 153, 193 (1972) (advocating a "one shot" principle).

284. *Compare* Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (approving a "No Solicitors" ban without individualized rejection), *with Schenck*, 519 U.S. at 383 (implying that the government cannot protect an individual's right to be left alone from unwanted communication on a public street or sidewalk even after an individualized rejection).

285. *See supra* Part III.B.2.

decision to reject speech with the homeowner where it belongs.[286] Government enforcement of a homeowner's decision to reject communications endorsing Democratic political candidates or advocating gun control, however, seems less compatible with free speech values. Although both types of government action simply enforce individual homeowners' decisions to reject unwanted communications targeted at them only, the latter uses government power to suppress speech because of its content,[287] which represents the quintessential Free Speech Clause danger.[288] Yet if a homeowner has a special right to avoid speech harms, then this means of discriminating among them should not matter.

Examination of the scope of the special status of the home, and the ideal scope of the protection of the possibility of communicative interchange reveals why this content discrimination, even in the home, poses a constitutional danger. The home has a special status in constitutional doctrine as an individual's one refuge from otherwise completely pervasive majoritarian action.[289] As noted above,[290] this justification for its unique treatment does not extend to government efforts to protect unwilling listeners in the home from private speakers. These efforts put the weight of majoritarian action on the side of the home-dweller restricting the free flow of communication. Thus, the reasons that support special treatment of the home in other contexts do not support the distinction with respect to government action protecting unwilling listeners from speech harms.

Because a government action protecting an unwilling listener in the home is a majoritarian action restricting the possibility of communicative interchange beyond the ideal balance of speech flow and autonomy interests, its speech justification should bear the same weight regardless of the listener's physical location. Although this conclusion would seem to dictate the same treatment of unwilling listeners regardless of physical location as a matter of theory, other protections unique to the home dictate a broader range of permissible government protection in practice.

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286. *See Martin*, 319 U.S. at 149.

287. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (defining a speech restriction as content-based if its justification focuses on "the direct impact that speech has on its listeners").

288. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

289. *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("Our prior decisions have often remarked on the unique nature of the home . . . and have recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." (quoting Carey v. Brown, 447 U.S. 455, 471 (1980))).

290. *See supra* Part III.B.2.

In particular, property concepts give home-dwellers a greater right to exclude intruders than individuals possess in public places.[291] A "No Solicitors" sign is ambiguous as to whether the homeowner is seeking protection from speech harms or nonspeech intrusions.[292] However, because of the home location, the presumption of protection from nonspeech intrusions allows enforcement of the exclusion.[293]

By contrast, a sign excluding Democrats from offering communications is clearly directed at speech only.[294] The ideal protection of communicative interaction requires even a homeowner to reject particular speakers rather than broad classes of communications.[295] A government action enforcing this content-based exclusion, even in the home, would therefore not comport with the free speech guarantee.

In sum, the apparent different treatment of the home with respect to speech harms is actually only different treatment with respect to nonspeech impacts. Where the protection a homeowner seeks is ambiguous, property concepts lead to the presumption that the homeowner can exclude unwanted intruders. But where all the homeowner plausibly seeks to exclude are speech harms, Free Speech Clause values dictate that the "one bite" rule should apply regardless of the unwilling listener's physical location. The government can enforce an individual decision not to listen to communications only after the listener has heard and rejected communications from a particular speaker.

b. Public Places—As noted above, the ideal balance between listener autonomy and the value of communicative interchange would protect a speaker's initial contact with a potential listener but allow the government, should it choose, to enforce the listener's decision to reject it. Although theory dictates that this

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291. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970) (stating that circumscribing homeowner's ability to reject unwanted mail "would tend to license a form of trespass").

292. *Compare id.* at 737 (noting the Court's traditional respect for "the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property" as a ground for circumscribing a "mailer's right to communicate"), *with* Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (suggesting the city may "make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed").

293. *See, e.g.*, *Frisby*, 487 U.S. at 487–88 (stating that targeted residential picketing disturbs the quiet enjoyment of the home, creating discomfort from " 'knowing that a stranger lurks outside [the] home' " (quoting *Carey*, 447 U.S. at 478–79 (Rehnquist, J., dissenting))).

294. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 99 (1972) (stating that the regulation is content-based because it "describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter").

295. *See supra* Part IV.A.

balance obtain regardless of the listener's physical location, the overlap in practice of nonspeech autonomy interests with speech-related autonomy interests means that unwilling listeners may receive greater protection in the home. Recognition of this practical effect could lead to restricting the permissible scope of government protection of the unwilling listener in the public sphere to compensate for the greater protection at home. Again, however, it is not necessary to distort the theoretical ideal to recognize that overlapping speech interests in the public sphere may effectively lead to speaker protections beyond the ideal balance in the same way that the opposite effect occurs in the home.

Free Speech Clause doctrine appropriately protects communications deemed unwanted by some, or even most, listeners when they are plausibly also directed at listeners who have not rejected them. Circumstances make it more difficult to isolate solely individually directed communications in public places than in the home. The communicative interchange value dictates that the presumption, when the direction of speech is ambiguous, should be that it is publicly as well as individually directed. Given this presumption, an individual rejection will not be enough to support government action to protect the unwilling listener. Only when it is clear that a listener has received and rejected a targeted communication, will the ideal balance apply.

Despite the fact that it may be more difficult to isolate instances of solely individually directed communications in the public sphere, it is not impossible to do so. Sidewalk counselors communicating with individual clinic patients in fact present an example of a segregable instance of solely individually directed communication. That the presumption in the face of ambiguity is that the speech is both publicly and individually directed should not cause the Court to ignore the appropriate ideal balance when the ambiguity does not obtain.

c. Conclusion—That the home is a refuge from the cacophony of the public sphere will protect most listeners in their homes from unwanted communications targeted solely at them. Similarly, the principle that public places must remain open for even outrageous communications will protect most speakers in most public places from government efforts to suppress their speech to serve the autonomy interests of unwilling listeners. Both of these rules, however, represent presumptive balances of constitutional interests and practical circumstances. These underlying values, rather than rigid geographical distinctions, must form the most fundamental guide to determining the validity of any particular government action. So,

for example, when a homedweller seeks to exclude speech solely because of its message, the ideal "one bite" requirement should limit the government's ability to protect the unwilling listener regardless of her location in a home. So, too, where the interests presented in a public place exactly duplicate the interests in the home that the Court has balanced in favor of allowing the government to protect an unwilling speaker, then the constitutional balance, rather than the rigid rule of physical location, should determine the validity of the government action.

CONCLUSION

With respect to protection of an unwilling listener from speech harms, the home should not be special. Rather, a balance between the free speech value of preserving the possibility of communicative interchange and the listener's autonomy interest in rejecting repeated unwanted communications should determine the validity of a government action to protect an unwilling listener. In practical effect, such government actions will be more likely valid with respect to listeners in the home than with respect to publicly located listeners. This difference, however, does not relate to the doctrinal ideal, which is that a speaker get "one bite" of an individually targeted prospective listener, after which the government may enforce the listener's decision to reject further communications. Rather, the apparently different treatment of speakers and listeners according to their physical locations relates to the practical difficulties of isolating situations that fit the constitutional ideal. In the home, other legitimate interests weigh in favor of the listener, and so in ambiguous situations, listener interests may prevail. Similarly, in public places, speaker interests with respect to listeners other than the one seeking protection weigh in favor of the speaker, rendering government efforts to protect one listener invalid when others are present. In both instances, however, the sameconstitutional ideal should remain the ultimate guidepost—preserving a possibility of communicative interaction that includes regard for an individual's self-conscious decision to reject unwanted communications.