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### Powerful Speakers and Their Listeners

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# POWERFUL SPEAKERS AND THEIR LISTENERS

HELEN NORTON\*

Sometimes speakers prefer to tell lies when their listeners thirst for the truth: think of a huckster who falsely claims to potential buyers that his jalopy gets forty miles to the gallon. Listeners may hope that speakers will reveal their secrets while those speakers at times resist disclosure—consider here the worker who wonders what her co-workers are paid while her employer jealously guards that information. And at still other times, speakers seek to address certain listeners when those listeners long to be left alone, as anyone on the wrong end of a telemarketer’s call can attest. When speakers’ and listeners’ First Amendment interests collide, whose interests should prevail?<sup>1</sup>

Law sometimes—but not always—puts *listeners’* interests first in settings where those listeners have less information or power than speakers. This “listener-centered” approach understands the First Amendment to permit the government to regulate the speech of comparatively knowledgeable or powerful speakers when that expression frustrates their listeners’ auton-

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1. See OWEN FISS, *THE IRONY OF FREE SPEECH* 3 (1996) (observing that some free speech theories are “unable to explain why the interests of speakers should take priority over the interests of those individuals who are discussed in the speech, or who must listen to the speech, when those two sets of interests conflict”); Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1798 (2017) (“Recognizing both speakers’ and listeners’ rights makes cases more complex and possibly creates divergent outcomes.”). And while listeners seek liberty from deception or coercion by comparatively powerful speakers, powerful speakers in turn may seek liberty from the government’s interference with their expressive choices. See GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 194 (1966) (explaining that freedom from regulation by the government “may enlarge the freedom of the powerful, but it may also diminish the freedom of the weak”).

omy, enlightenment, and self-governance interests—values at the heart of the Free Speech Clause.<sup>2</sup> Under a listener-centered approach, the government can, for instance, prohibit those speakers from lying to their listeners or from accosting their listeners with unwelcome speech, even when the speakers would prefer otherwise.

Why put listeners' interests first in these relationships of expressive inequality?<sup>3</sup> When speakers enjoy advantages of information or power over their listeners, their speech can more readily harm their listeners through deception or coercion. In other words, they can mislead or muscle their listeners in ways that strike us as unfair and sometimes dangerous. A speaker engages in deception when she tries to make her listener believe  $x$  when she knows that  $x$  is not true. A speaker can seek to deceive her listener through lies and material omissions: the less access to information the listener has, the more difficult to identify and counter the speaker's efforts to deceive. In contrast, a speaker engages in coercion when he uses or threatens force or power to pressure his listener to choose  $y$  when the listener might otherwise choose  $z$ . Examples of coercion include a speaker's threats to punish his listeners' resistance to his message—threats that become more credible when the speaker holds physical, economic, or legal power over his listeners. A speaker can also coerce his listeners by hectoring them while "captive" until they abandon their

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2. ROBERT POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 6 (2012) (explaining the three major purposes of the First Amendment as furthering individual autonomy and self-fulfillment, advancing knowledge and discovering truth, and facilitating democratic self-governance).

3. I discussed the value of a listener-centered approach to certain First Amendment problems in earlier work. See Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016) [hereinafter Norton, *Truth and Lies in the Workplace*] (proposing a listener-centered approach to employers' speech to workers); Helen Norton, *Secrets, Lies, and Disclosures*, 27 J.L. & POL. 641 (2012) (proposing a listener-centered approach to disclosure law); see also Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights for Artificial Intelligence*, 110 NW. U. L. REV. 1169 (2016) (suggesting the value of a listener-centered approach to the free speech problems posed by the speech of artificial intelligence). This work in turn built on that of the many thoughtful commentators who have considered related issues. E.g., Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5 (1989).

opposition to his message. A speaker can sometimes both deceive *and* coerce his listeners—for instance, by lying to them when they are captive or otherwise subject to his control.

When we take the side of listeners in these relationships—that is, when we require *more* of speakers when their listeners lack information or power—we improve the quality of the communicative discourse. More specifically, we promote listeners' First Amendment interests when we enable them to receive accurate information that informs, but does not coerce, their decision-making. We also achieve related moral goals: in Kantian terms, we recognize listeners as ends in themselves rather than as mere means through which powerful speakers seek to achieve their own ends.<sup>4</sup>

In this Essay, I explore and defend listener-centered approaches to a variety of First Amendment problems. In Part I, I identify the dynamics of certain environments in which speakers' and listeners' First Amendment interests collide. More specifically, I list a number of ways in which speakers sometimes enjoy advantages of information or power (or both) over their listeners, thus enhancing their ability to deceive or coerce those listeners. In Part II, I describe how law can address these inequalities. In particular, law can forbid comparatively knowledgeable or powerful speakers from lying to their listeners, it can require those speakers to make truthful disclosures to their listeners, and it can bar those speakers (as well as the government) from coercing their listeners. I then consider how these approaches do, or could, work in various speaker-listener relationships. First Amendment law sometimes takes a listener-centered approach; this has been the case, as we'll see, in commercial and professional speech

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4. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 63–65 (James W. Ellington trans., 3d ed. 1993) (1785) (explaining that lies are morally wrong when speakers undermine listener autonomy by seeking to use their listeners as a means to the speakers' own ends, rather than treating listeners as ends in themselves); see also BERNARD WILLIAMS, *TRUTH & TRUTHFULNESS* 117 (2002) (“[W]e want to believe that what people deserve or are owed is determined not by considerations of social positions but, at the most basic levels of morality from a position of equality.”). We can also advance related instrumental goals when we empower comparatively disadvantaged listeners. See ROBERT ELLICKSON, *ORDER WITHOUT LAW* 286 (1991) (“[L]aws that serve to distribute power more broadly and equally are likely to bolster informal-control systems. For example, when lawmakers succeed in equalizing power within relationships such as landlord-tenant and husband-wife, they make it easier for those involved to work out problems informally.”).

settings. I suggest that we should extend a listener-centered approach to other communicative relationships of inequality: employers' speech to workers about the terms and conditions of employment, and service providers' speech to women seeking reproductive health care. In Part III, I flag some questions and challenges for further discussion. Although a listener-centered approach doesn't solve all free speech problems, it offers a valuable perspective for thinking about some of them—and, in so doing, it forces us to think hard about whether and when law and policy should respond to expressive inequalities.

### I. INEQUALITIES OF INFORMATION AND POWER

First Amendment theory and doctrine generally presume that “public discourse”—the universe of speech key to democratic self-governance and thus the most rigorously protected from government regulation—occurs in a relationship of equality in which we celebrate (and thus privilege) speakers' autonomy interest in saying what they want to say.<sup>5</sup> But, as Robert Post explains, expressive settings outside of public discourse may involve inequalities between speakers and listeners that invite, if not require, an emphasis on listeners' interests:

Whereas within public discourse the political imperatives of democracy require that persons be regarded as equal and as autonomous, outside public discourse the law commonly regards persons as dependent, vulnerable, and hence unequal. Clients are legally entitled to rely on the advice of their lawyers, consumers on the representations of manufacturers, shareholders on the information of corporations. That is why law holds lawyers accountable for malpractice, manufacturers for the failure to warn, and corporations for misrepresentation. Within public discourse, by contrast, the

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5. See POST, *supra* note 2, at 21 (“Within public discourse, the First Amendment protects the autonomy of speakers, not merely the rights of audiences. If persons within public discourse are prevented from choosing what to communicate or not to communicate, the value of democratic legitimation will not be served. Persons will not experience participation in public discourse as a means of making government responsive to their own personal views.”); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1185, 1214 (2016) (“[W]hat falls within public discourse and what falls outside of it does not depend on the content of the speech. Rather, it depends on a characterization of social relationships.”).

First Amendment ascribes autonomy equally to speakers and to their audience, so that the rule of *caveat emptor* applies. This contrast is quite stark, and it is the single most salient pattern of entrenched First Amendment doctrine.<sup>6</sup>

In this Essay, I focus on a variety of situations *outside* of public discourse in which speakers enjoy advantages of information or power (or both) over their listeners in ways threatening to listeners' interests in self-realization, enlightenment, and democratic self-governance.<sup>7</sup>

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6. POST, *supra* note 2, at 23; *see also* Balkin, *supra* note 5, at 1215 (“But when people engage in speech that is not characterized as part of public discourse, the First Amendment treats their behavior quite differently. Outside of the realm of public discourse, the law drops its assumption that everyone is equally able, independent, and knowledgeable, and that everyone can equally fend for themselves.”). For this reason, the majority in *Citizens United v. FEC* was describing its doctrine specifically in the realm of public discourse when it asserted that “the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.” 558 U.S. 310, 350 (2010). In other settings, courts have long treated certain speakers differently based on their expression’s differing potential for value and for harm; examples include not only commercial and professional speakers, but also students, prisoners, and public employees. *See id.* at 393 (Stevens, J., dissenting).

7. I put aside for now longstanding and important debates over whether the equality of speakers and listeners *within* public discourse is more presumed than realized. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155–58 (2010) (explaining that the majority and the dissent in *Citizens United* agreed that political expression’s primary First Amendment value is to inform listeners as voters, but that they disagreed over the question whether unfettered corporate political speech is valuable or instead dangerous to such listeners). To be sure, some argue that we can and should require more of powerful speakers even in public discourse. *See* AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 133 (1996) (“To the extent that political struggle takes place on the basis of deliberation rather than of power, it is more evenly matched. The deliberative playing field is more nearly level. Moral appeals are the weapon of the weak—not the only weapon, to be sure, but one that by its nature gives them an advantage over the powerful.”); RON LEVY & GRAEME ORR, *THE LAW OF DELIBERATIVE DEMOCRACY* 101 (2016) (“Informed deliberation in politics, being a collective and shared activity, is surely no less important than informed deliberation over consumption. . . . [T]he more that politics is practised via sophisticated marketing techniques, the more we might want to subject it to ethical standards similar to those of corporate speech.”); BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* 117 (2015) (urging a “hearer-centered” approach to corporate speech that would include “limits on the corporate electoral speech that currently forces hearers to absorb massive amounts of corporate propaganda that they do not wish to hear”).

### A. *Inequalities of Information*

Some speakers benefit from what Kim Lane Scheppele calls “[s]tructurally unequal access to information,” which “occurs when one actor can obtain information more easily than another actor can—and can do so because she holds some special position that provides a shortcut, as it were, to find out the information.”<sup>8</sup> Speakers enjoy informational advantages over their listeners for various reasons: for example, when speakers themselves produce information, when speakers acquire information through specialized training or experience, or when the law empowers speakers to hold monopoly or near-monopoly control of information. The less access to information the listener has in these relationships, the more difficult to identify and counter a speaker’s efforts to deceive.

#### 1. Information Created by the Speaker

Sometimes speakers possess more information than their listeners because they generate (and keep) key information themselves. Think of commercial actors’ speech to consumers: commercial actors know more than anyone else about the products and services they offer for others to buy. They know more about their benefits and advantages; they also know more about their limitations, shortcomings, and even dangers.<sup>9</sup>

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8. KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 120 (1988); *see also id.* at 121 (“In addition, the two actors may not be equally capable of making the effort required to find the information. This unequal capacity can occur because one actor (1) does not even know that the knowledge exists to be sought out while the other does (the problem of deep secrets), (2) has fewer resources—and so cannot invest what it takes to acquire the information while the other can (the problem of economic inequality), or (3) has less intellectual ability or social experience to begin with and so is unequally matched with more savvy partners (the problem of unequal facility).”). Elsewhere I have discussed Professor Scheppele’s work to describe how employers and workers have structurally unequal access to knowledge about the terms and conditions of employment in ways that justify imposing duties of honesty and accuracy upon employers’ speech to workers. Helen Norton, *Employers’ Duties of Honesty and Accuracy*, 21 EMP. RTS. & EMP. POL’Y J. 575, 578 (2017).

9. Contract and commercial law often regulate speech to address these sorts of asymmetries between transactional parties; examples include the doctrines of unconscionability and adhesion. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 150 (2005) (explaining how contract law corrects for inequality in parties’ bargaining power); Andrew Tutt, *Commoditized Speech, “Bargain Fairness,” and the First Amendment*, 2017 BYU L. REV. 117, 149 (2017) (describing contract law’s content-based regulation of

## 2. Information Acquired by the Speaker's Training or Experience

Sometimes speakers know more than their listeners because of their greater training or expertise. Illustrations here include medical, legal, and other experts' speech to their patients or clients about the options available for treating a health condition or resolving a legal dispute, as well as those options' potential risks and rewards.<sup>10</sup> Relatedly, sometimes speakers acquire more experience with, and thus perhaps sophistication about, certain matters or processes.<sup>11</sup> For instance, because an employer with many employees over a long period of time must repeatedly navigate the substance as well as the process of employment law, she frequently possesses more knowledge about workplace law than does an individual worker.<sup>12</sup>

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transactional speech as seeking "to level the bargaining positions of the parties and thereby help individuals to obtain a better deal in circumstances of significant information asymmetry"); *see also* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 34 (1993) ("We might conclude that the New Dealers were trying to regulate speech in order to protect the *deliberative autonomy* of everyone involved. They sought to do this by limiting certain forms of coercion and deception that had otherwise been made possible by law. Restrictions on the sharp or coercive practices of people who sell securities, food and drugs, or who manage broadcasting stations, might well promote the system of free expression.").

10. *See* Claudia Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1271 (2016) ("The professional relationship is typically characterized by an asymmetry of knowledge. The client seeks the professional's advice precisely because of this asymmetry. . . . This is not unique to the learned professions. As Kathleen Sullivan pointed out, 'Lawyers know far more about law than their clients, but information asymmetry creates moral hazards (such as the incentive to lie about the gravity of a problem) for auto mechanics as well.'" (quoting Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 580 (1998))).

11. *See* Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–99 (1974) (explaining that repeat players "having done it before, have advance intelligence" as well as more "opportunities to develop informal relationship with institutional incumbents"); Haupt, *supra* note 10, at 1268 ("[E]xtensive psychological research on the part of advertisers makes the speaker and the listener unequal. . . . Product placement, subconscious messaging and the like give a distinct advantage to commercial speakers over their audiences. The Court may have originally had it right in assuming the vulnerability of consumers, though not for the consumers' 'lack of sophistication,' but for the advertisers' overabundance of it.").

12. *See* Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 62–63.



### 3. Information Over Which the Law Gives the Speaker a Monopoly

Sometimes law encourages and protects speakers' exclusive access to information: in other words, if knowledge is power, then law sometimes makes speakers more powerful. For example, property law affords employers and other commercial actors with legal control over access to their property, which in turn empowers them to control access to information about what happens on that property.<sup>13</sup> They thus know more about their workplace and manufacturing conditions than anyone else because they have the power to exclude others from observing those conditions firsthand.

#### *B. Inequalities of Power*

At times listeners lack power as well as (or instead of) information. Again, the reasons for power differentials vary, and here too these inequalities exacerbate the harms of coercion and deception that speakers can inflict upon listeners.

#### 1. Listeners' Vulnerability to Speakers in Relationships of Trust

Listeners suffer from power disadvantages when they choose to entrust speakers with sensitive information and the authority to make important decisions.<sup>14</sup> Fiduciary law addresses many of these relationships of trust, dependence, and vulnerability.<sup>15</sup> As Deborah DeMott explains:

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13. See SUNSTEIN, *supra* note 9, at 39 ("In a system of property rights, there is (I repeat) no such thing as 'no regulation' of speech; property rights inevitably allow property owners to exclude prospective speakers. The question is what forms of regulation best serve the purposes of the free speech guarantee.").

14. See Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 450 (2016) ("When trusters entrust information about themselves, they make themselves vulnerable. Their vulnerability might include increased risk of information misuse, unauthorized disclosure, manipulation, or loss of autonomy.").

15. See Ethan J. Lieb & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1826 (2016) ("At least three general indicia characterize fiduciary relationships: discretion, trust, and vulnerability. In relationships exhibiting these indicia, a fiduciary is subject to specific duties—usually duties of loyalty and care—that govern her actions on behalf of the beneficiary.").

Fiduciary relationships stem from or create disparities of power and information, such that the relationship's beneficiary is or becomes vulnerable to the actor who occupies the fiduciary role. Such relationships require or engender trust by the beneficiary with a correlative potential for abuse by the fiduciary, often—but not necessarily—effected through deceptive or disingenuous means.<sup>16</sup>

Professionals speak to their patients and clients in these sorts of relationships, as their listeners entrust them with confidential information and rely on their advice to make important, often life-shaping, choices.<sup>17</sup> The same is often true in the information technology context, where technology users become vulnerable to those with whom they entrust important information or functions.<sup>18</sup>

## 2. Listeners' Vulnerability in Relationships Where Speakers Exercise Physical, Economic, or Legal Control

Even absent any relationship of trust, listeners become vulnerable to speakers when those speakers exert physical, legal, or economic control over them. The sorts of listeners subject to speakers' dominion in these ways include those in

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16. Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255, 1259–60 (2015); see also *id.* at 1262 (explaining that fiduciary relationships are created when “[o]ne party, having been invited to do so, ‘reposed’ confidence in another and reasonably relied on the other’s superior expertise or knowledge”).

17. See Claudia Haupt, *Licensing Knowledge*, 72 VAND. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3151985](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3151985) [<https://perma.cc/YM9J-LZ3T>] (explaining that not all fiduciaries are professionals and not all professionals are fiduciaries because the professional duty not to give bad advice is conceptually distinct from the fiduciary duty not to betray trust, even if the two duties sometimes overlap).

18. See Balkin, *supra* note 5, at 1186–87 (“Because of their special power over others and their special relationships to others, information fiduciaries have special duties to act in ways that do not harm the interests of the people whose information they collect, analyze, use, and distribute. . . . My goal, in other words, is to shift the focus of the First Amendment arguments about privacy from the kind of information to the kinds of relationships—relationships of trust and confidence—that governments may regulate in the interests of privacy.”); James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 894 (2014) (“The alternative [to thinking about search engines as editors or conduits of speech] is listener-oriented: we could try to empower users to identify for themselves the speech they wish to hear.”).

government custody,<sup>19</sup> patients in certain health care settings,<sup>20</sup> and many workers.<sup>21</sup> Listeners in these settings are less likely—and sometimes entirely unable—to question, rebut, or escape powerful speakers.<sup>22</sup>

In short, listeners sometimes have less access to key information than do speakers, sometimes listeners have less opportunity to resist or avoid speakers due to unequal power, and sometimes both are true.

## II. PROTECTING LISTENERS IN RELATIONSHIPS OF INEQUALITY

When we adopt a listener-centered approach to certain free speech conflicts, we seek to prevent speakers from deceiving or coercing their less powerful listeners. Sometimes we do so by interpreting the First Amendment to permit government to *regulate* comparatively knowledgeable or powerful speakers. And sometimes we do so by *protecting* speech that is valuable to vulnerable listeners from the government's interference. As we shall see, the government, like other powerful speakers,<sup>23</sup>

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19. See Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 92–93 (2015) (describing the power imbalances at work when law enforcement officials speak to those in government custody).

20. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (“While targeted picketing of the home threatens the psychological well-being of the ‘captive’ resident, targeted picketing of a hospital or clinic threatens not only the psychological but the physical, well-being of the patient held ‘captive’ by medical circumstance.”).

21. See Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 64–67 (explaining that employers control workers' economic livelihood, which in turn also permits employers to control workers' expression in significant ways and even to compel workers' attendance at “captive audience” meetings); see also Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819 (2017) (urging that employers should be considered their workers' fiduciaries because of their power advantages).

22. A speaker's physical, legal, or economic power over a listener often enables it to limit that listener's voice (that is, her ability to engage in counterspeech) as well as exit (that is, her meaningful ability to walk away from the relationship and enter into another one at least as satisfactory). See ALBERT HIRSCHMANN, *EXIT, VOICE, AND LOYALTY* 30 (1970) (“Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion.”).

23. See NEUBORNE, *supra* note 7, at 105 (“[P]ulling the government speech regulator completely out of the game does not mean that the flow of speech will become unregulated. If government is disabled from doing the job, someone else

can endanger listeners' First Amendment interests: the government is both a potential regulator of others' speech and a knowledgeable and powerful speaker itself.<sup>24</sup>

### A. *Some Doctrinal Possibilities*

How can law protect listeners' interests consistent with the First Amendment?<sup>25</sup> Consider the following possibilities:

#### 1. Permitting the Government to Prohibit Powerful Speakers' Lies or Misrepresentations

Lies generally advance the speaker's (that is, the liar's) autonomy interests in saying what she wants to say at the expense of her listeners' interests in receiving accurate information that enlightens their decision-making.<sup>26</sup> A listener-centered resolution of this conflict understands the First Amendment to allow the government to impose higher expectations of honesty (no deliberate falsehoods) and even accuracy (no negligent falsehoods, or perhaps even strict liability for falsehoods of

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will direct the speech traffic . . .—probably one or more powerful private speakers or conduits.”).

24. See Helen Norton, *The Government's Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342 (2018) (describing various ways in which the government may frustrate listeners' interests through its own expressive choices).

25. See Neuborne, *supra* note 3, at 27 (“Nonetheless, the fact is that a significant difference in substantive doctrine will, and should, exist between speaker-dominated first amendment settings and hearer-dominated ones.”); *id.* at 29 (“Although a healthy skepticism should surround any attempt by the government to assess the value of speech, the process of measuring instrumental value is less openly subjective than the selective apportionment of toleration that takes place in a speaker-centered setting. Accordingly, so long as the government censor's persuasion burden is significant and so long as the government is utterly disabled from the kinds of self-interested censorship that are banned in speaker-centered settings, a government regulator in a hearer-centered setting should not be disabled from demonstrating that a given message diminishes a hearer's capacity for informed and autonomous choice and is, therefore, unprotected.”).

26. See SCHEPPELE, *supra* note 8, at 177 (“[T]he effect of lies, half-truths, and failure to update information is to make the ignorant party think that she has the information and stop looking any further. Because she stops looking, the true information is effectively out of reach.”); WILLIAMS, *supra* note 4, at 211 (“The falsification or suppression of information is an important limitation of liberty in itself and impedes the exercise of liberty in many areas.”). To be sure, the Supreme Court has held that the First Amendment sometimes protects lies from government regulation; this is especially the case where the Court perceives the lies to inflict little, if any, harm to listeners. See *United States v. Alvarez*, 567 U.S. 709, 718–22 (2012) (plurality opinion); *id.* at 734–36 (Breyer, J., concurring).

any kind).<sup>27</sup> In other words, law sometimes requires speakers to tell the truth when they choose to speak on certain topics even if they would prefer to dissemble. For instance, law generally requires commercial actors to speak accurately when they extol their products' attributes to consumers,<sup>28</sup> professionals to accurately describe the risks of their recommended course of action to their patients and clients,<sup>29</sup> and a corporation's leaders to portray its economic situation truthfully when communicating with shareholders.<sup>30</sup>

## 2. Permitting the Government to Require Powerful Speakers to Make Truthful Disclosures

Powerful speakers' nondisclosures also threaten listeners' interests while enhancing their own. Scheppele describes the dangers that these nondisclosures, or secrets, pose to vulnerable listeners' autonomy:

Secrecy enables people to control others. To get another person to do one's will when that other person does not want to do so, one either can persuade the person with arguments or use physical coercion to force the person to do what one wants. But one may also hide the information that the other person would find relevant to making a decision, information that would make the decision turn out differently. This is another, powerful invisible way of exercising control: by altering the appearance of a choice that the affected

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27. See SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 132 (2014) ("Regulating lies by experts about the contents of their actual, certified, or claimed expertise . . . attaches to a feature of the speaker and the relationship between the speaker and the utterance. This relationship is singled out as meriting regulation for content-independent reasons, namely that listeners should be able to rely upon the sincerity of experts because they have or claim special access to information that listeners either do not have, or reasonably should not be expected to cultivate on their own."); Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 76–84 (describing how the lies of powerful speakers threaten especially grave harm to their listeners).

28. See *infra* notes 50–58 and accompanying text.

29. See *infra* notes 59–68 and accompanying text.

30. *E.g.*, 17 C.F.R. § 240.14a-9 (2018) (prohibiting materially false or misleading statements or omissions and requiring certain affirmative disclosures related to proxy elections).

person has to make, one can often effectively determine the outcome.<sup>31</sup>

For this reason, more information—so long as it’s accurate and material—is often better for listeners.<sup>32</sup> A listener-centered approach thus understands the First Amendment to permit the government to require comparatively knowledgeable and powerful speakers to make accurate disclosures about certain matters, even if those speakers resist their discussion.<sup>33</sup> Illustrations include governmental requirements that commercial speakers affirmatively disclose the health or safety dangers posed by their products. As I’ve written in earlier work:

This approach supports requirements that comparatively knowledgeable and powerful speakers make truthful disclosures not only of important information to which they have unique (and perhaps exclusive) access, but also important information that the speakers are in the best position to communicate even though they might otherwise be loath to disclose for self-interested reasons. Think, for instance, of requirements that cigarette manufacturers post government health warnings on cigarette packages and advertisements where smokers are most likely to see them, as tobacco manufacturers are uniquely well positioned to disseminate this important message—but unlikely to do so voluntarily.<sup>34</sup>

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31. SCHEPPELE, *supra* note 8, at 304; *see also id.* at 5 (“[S]ecrets are also used as tools of power, wrenching advantage from the unknowing actions of others. What we don’t know often *does* hurt us—and serves to benefit others who kept us in the dark. Secrets provide the unobservable weapons of the devious. So while secrets enable the social world to be partitioned and individualized, making the expression of individual autonomy in the construction of the social world possible, they also serve as staging grounds for the deployment of power, assaults on the very autonomy that they constitute.”).

32. Often, but not always. *See infra* notes 35–39 and accompanying text.

33. *See, e.g.,* Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150–52 (2d Cir. 1993) (discussing New York’s “superior knowledge” rule that requires sellers to make affirmative disclosures of fact to less knowledgeable buyers in certain circumstances).

34. Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 69; *see also* Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487, 527 (2016) (“Workplace information-forcing rules may rightly target the employer *because* of this superior access to information. It is more efficient for the employer to transfer its knowledge to the

In other words, a listener-centered approach takes a functional perspective to serving listeners' interests by emphasizing the effective and timely delivery of accurate information to enlighten, but not coerce, listeners' decision-making.

### 3. Permitting the Government to Prevent Powerful Speakers from Coercing Listeners, and Preventing the Government from Coercing Listeners Itself

But more speech is not *always* better for listeners who lack power.<sup>35</sup> Speech that is neither false nor misleading can still frustrate listeners' First Amendment interests when it is coercive, as can be the case where speakers have the legal, physical, or economic power to punish their listeners' resistance. Coercive speech also takes place in "captive audience" environments where listeners have limited opportunity to rebut or escape speakers, as well as in certain relationships where speakers abuse their listeners' trust.<sup>36</sup> And sometimes the government threatens listeners' interests by forcing them to listen to comparatively powerful speakers, speakers that can include the government itself.

In these environments, a listener-centered approach protects vulnerable listeners from coercion by restricting how,

worker, or to be the conduit for the government's provision of knowledge, than for the less informed party to expend the resources in an attempt to inform him- or herself.").

35. See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 206–07 (2017) (explaining that cheap and plentiful speech sometimes poses new dangers to some listeners and to the public more broadly); Tim Wu, *Is the First Amendment Obsolete?* (Columbia University Public Law & Legal Theory, Research Paper No. 14-573 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3096337](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3096337)

[<https://perma.cc/VG4T-2X6N>] ("The unfortunate truth is that cheap speech may be used to attack, harass, and silence as much as it is used to illuminate or debate.").

36. As Caroline Mala Corbin has observed, listeners are "captive" if they cannot readily avoid the message and if they should not have to abandon the space to avoid the message. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943–50 (2009) (identifying the home, public transportation, medical facilities, churches, funerals, and polling places as locations where audiences may be considered as captive); see also J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310–12 (1999) ("Generally speaking, people are captive audiences for First Amendment purposes when they are unavoidably and unfairly coerced into listening. . . . Captivity in this sense is a matter of practicality rather than necessity. It is about the right not to have to flee rather than the inability to flee.").

when, or where powerful speakers may address them. For instance, a listener-centered approach permits the government to forbid speakers from coercing listeners' choices through threats, such as an employer's threats of job loss or retaliation if workers assert their legal right to unionize.<sup>37</sup> A listener-centered approach also understands the First Amendment to allow the government to restrict speech that extracts listeners' assent through intimidation or exhaustion.<sup>38</sup> Along these lines, the Supreme Court upheld a governmental ban on attorneys' in-person solicitation of potential clients, concluding that such expression threatened greater dangers of coercion than other types of attorney advertising: "[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."<sup>39</sup>

Finally, a listener-centered approach interprets the First Amendment to bar the government itself from coercing less powerful listeners. Although decided on due process rather than free speech grounds, the Supreme Court's canonical decision in *Miranda v. Arizona* exemplifies a listener-centered approach, recognizing listeners' vulnerability at the hands of a speaker who exerts physical and legal control over them. The Court thus required powerful speakers (governmental law enforcement officials) to affirmatively disclose available constitutional protections like the right to remain silent and the right to counsel; it did so to protect vulnerable listeners (the subjects of custodial interrogation) from deception and coercion. After emphasizing the listeners' isolation and desperation, the Court concluded:

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37. See *Nat'l Labor Relations Bd. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (emphasizing workers' economic dependence on their employers when explaining that an employer's threat of retaliation against workers was "without the protection of the First Amendment").

38. See *Miranda v. Arizona*, 384 U.S. 436, 455–56 (1966) ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals . . ."); *id.* at 465 ("The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.").

39. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978).



[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored. . . . For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.<sup>40</sup>

To be sure, the custodial interrogation setting offers an extreme example of captive listeners; less extreme illustrations include certain educational, employment, or health care settings. For instance, the Court has held that the government's prayer or other religious speech to kids as listeners in public schools can coerce students' religious beliefs or practices in violation of the Establishment Clause—recognizing, as in *Miranda*, that psychological pressure can sometimes coerce vulnerable listeners as effectively as physical threats.<sup>41</sup> For this reason, courts have held that in certain circumstances the Constitution *constrains* the government's speech to protect its listeners from coercion;<sup>42</sup> for related reasons courts have also held that the First Amendment sometimes—*permits* the gov-

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40. *Miranda*, 384 U.S. at 467–68.

41. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992) (“This pressure, though subtle and indirect, can be as real as any overt compulsion.”).

42. *See Norton*, *supra* note 19, at 92–96 (discussing how law enforcement officers' lies to those in government custody are sometimes sufficiently coercive to violate the Due Process Clause).

ernment to regulate other powerful speakers to protect vulnerable listeners from coercion.<sup>43</sup>

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These approaches permit the government to restrain knowledgeable and powerful speakers' efforts to lie, hide, or coerce. Even so, a listener-centered perspective still leaves those speakers with the liberty to make a wide range of expressive choices: it does not force speakers to mouth opinions that they don't hold, nor does it prohibit them from sharing their opinions or additional accurate information of their choosing in noncoercive settings.

### *B. Listener-Centered Relationships: Examples and Applications*

What does a listener-centered approach to First Amendment doctrine look like in practice? First, as I've explained elsewhere, a listener-centered focus can inform our choice of the appropriate level of scrutiny to be applied to the government's decision to regulate comparatively knowledgeable or powerful speakers for listeners' benefit.<sup>44</sup> Courts can thus choose to defer, and apply rational-basis scrutiny, to the government's listener-based regulatory choices. This is the case, as we'll see, with the Court's application of rational-basis review to the government's compelled disclosures in the commercial speech setting.<sup>45</sup>

Second, even if courts instead apply heightened scrutiny to the government's regulatory choices, a listener-centered focus can inform their determination whether the government's action survives that scrutiny. In other words, the government's regulatory choices that inform and empower comparatively vulnerable listeners can satisfy not only rational-basis scrutiny but sometimes also intermediate or even more suspicious scrutiny.<sup>46</sup> Examples here include the government's restrictions on

43. See *infra* notes 50–68 and accompanying text.

44. Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 68.

45. See *infra* notes 53–54 and accompanying text.

46. See Amicus Brief of American Medical Association in support of Respondents, *Nat'l Inst. of Family and Life Advocates v. Becerra*, No. 16-1140, 2018 WL 1156609 (urging that strict scrutiny be applied to all regulation of

professional speech that survive intermediate scrutiny when they serve listeners' interests.<sup>47</sup> (Even in the campaign finance setting—which involves the regulation of speech in public discourse—the Court has applied exacting scrutiny to uphold laws that require political speakers and contributors to disclose themselves as the source of campaign contributions and communications; it upheld these laws precisely because those disclosures serve listeners' interests in knowing an expression's source as a measure of its credibility.<sup>48</sup> Similarly, the Court has held that the government's regulation of campaign speech within one-hundred feet of polling places survives even strict scrutiny, finding it narrowly tailored to protect listeners—there, voters—from coercion.<sup>49</sup>)

Consider the following possible listener-centered relationships; as we'll see, some reflect current doctrine, while others would require changes to that doctrine.

### 1. Commercial Actors' Speech to Consumers

The Supreme Court's traditional commercial speech doctrine long exemplified a listener-centered approach.<sup>50</sup> In a

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professional speech, but concluding that informed consent requirements survive such scrutiny, as well as the California law under challenge in *Becerra*).

47. *E.g.*, *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (upholding state law that prohibited licensed counselors from engaging in sexual orientation conversion efforts therapy with clients under age eighteen).

48. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010) (applying, and upholding, campaign disclosure requirements under “exacting” scrutiny in which the regulation must be substantially related to an important government interest); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (same).

49. *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion).

50. Here I focus on the Court's “modern” commercial speech doctrine that emerged in the 1970s and 1980s. As many commentators have observed, however, in recent years the Court has departed from its earlier more listener-centered approach to commercial speech. *See* NEUBORNE, *supra* note 7, at 104–05 (“Modern free speech law rests on a slippery slope so precipitous that any step toward government speech regulation aimed at controlling dysfunctional speakers, improving the quality of choices for hearers, or reinforcing the Kantian dignity of hearers and speech targets is demonized by the Supreme Court as a first step toward tyranny.”); Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: Unraveling the Commercial-Professional Speech Paradox*, 78 OHIO ST. L.J. 887, 890 (2017) (explaining how, in recent years, “the Court has given less weight to the interests of listeners, including their health interests”); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1395 (2017) (explaining that under the Court's more recent application of commercial speech doctrine, “listeners' rights are subordinated to corporate speech rights. It is deeply ambiguous whether the

setting where commercial actors possess much more information about their goods and services than do their consumers, the Court interprets the First Amendment to permit the government to *regulate* speech that frustrates listeners' interests while *protecting* speech that serves them.

The Court treats commercial speech that is false, misleading, or related to illegal activity (like advertisements for illegal drugs) as entirely unprotected by the First Amendment because listeners (that is, consumers) have no constitutionally protected interest in receiving that information.<sup>51</sup> For this reason, the Court has long interpreted the First Amendment to permit the government to prohibit commercial actors' lies and misrepresentations about their products' health-and-safety risks and many other matters.<sup>52</sup> For the same reason, the Court has applied deferential rational-basis review to governmental requirements that commercial speakers make truthful disclosures about those matters:<sup>53</sup> as an example, recall the federal statute requiring cigarette manufacturers to publish the Surgeon General's warning prominently on their advertisements and packages.<sup>54</sup>

At the same time, the Court generally protects truthful and non-misleading commercial speech from government regulation because that expression often provides great value to consumers' decision-making.<sup>55</sup> For this reason, the Court has applied intermediate scrutiny to strike down laws prohibiting sellers from publishing accurate information about legal products or services, information that includes the price of pres-

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Court's deregulatory holdings actually benefit listeners, though corporate interests are always served").

51. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–64 (1980).

52. *E.g.*, *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (“[T]he State may ban commercial expression that is fraudulent or deceptive without further justification.”).

53. *E.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (applying rational-basis test to uphold commercial disclosure requirements that serve consumers' interests as listeners).

54. 15 U.S.C. § 1333 (2012).

55. *Cent. Hudson*, 447 U.S. at 562–64.

cription drugs,<sup>56</sup> the amount of alcohol in beer,<sup>57</sup> and the availability of attorneys' services.<sup>58</sup>

## 2. Professionals' Speech to Patients and Clients

Professional speakers like doctors and lawyers enjoy advantages of both information and power over their patients and clients who rely on their recommendations when making important life decisions. As Claudia Haupt explains, professional speech involves individualized advice to a client or patient "tied to a body of disciplinary knowledge from which it gains authority within a social relationship that is defined by knowledge asymmetry[,] . . . reliance[,] . . . and trust . . ." <sup>59</sup> Patients and clients thus seek accurate information from their health care providers, lawyers, accountants, and other professional experts about the risks and benefits of a proposed course of treatment or action that informs, but does not coerce, their decision about whether to undertake that course of conduct. Think, for example, of a patient considering the pros and cons of more and less invasive treatment regimens, or a client trying to decide whether to settle for pennies on the dollar rather than risk continued litigation. Law sometimes protects these listeners' interests by *protecting* speech consistent with professional standards from the government's efforts to bend patients' and clients' choices in the government's preferred direction, and sometimes by *regulating* the quality of professional speech to ensure its trustworthiness (and thus its value to listeners) through licensing regimes, professional responsibility requirements, and malpractice liability.<sup>60</sup> Although the Supreme Court has yet to settle on its First Amendment approach to professional speech,<sup>61</sup> many lower

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56. Va. Bd. of Pharmacy v. Va. Citizen Consumer Council, Inc., 425 U.S. 748, 763 (1976).

57. Rubin v. Coors Brewing Co., 514 U.S. 476, 489–90 (1995).

58. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

59. Haupt, *supra* note 17, at 26; *see also id.* ("The client, in short, depends on a distinction between good and bad professional advice—a distinction that a strict regime of content- and viewpoint-neutrality would obliterate.")

60. *Id.* ("But this presumption of speaker equality does not apply outside of public discourse where we continue to value facts and truth. One such area is professional speech. . . . [L]istener interests are vitally important to professional speech where the very purpose of the professional-client relationship is to give accurate, comprehensive and reliable advice to the client.")

61. *See Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361,

courts to date have applied this sort of listener-centered approach to free speech problems in this setting.

More specifically, we support listeners' interests in receiving quality professional advice when we interpret the First Amendment to *protect* lawyers' and doctors' speech from governmental restrictions that are inconsistent with professional standards. Governmental restraints along these lines include the federal regulation that forbade federally funded legal services lawyers from representing clients challenging welfare laws even though professional standards generally require lawyers to vigorously pursue their clients' plausible claims.<sup>62</sup> Or the Florida law that banned doctors' discussions of gun safety with their patients even when professional standards encourage such conversations to prevent accidental injuries.<sup>63</sup>

At the same time, we also promote listeners' interests in receiving quality professional advice when we understand the First Amendment to permit the government to *regulate* professionals' speech to ensure its consistency with the relevant body of professional knowledge. Law has long done so through licensing requirements that require demonstrated proficiency with the profession's skills and standards before one can offer professional advice, as well as through the imposition of malpractice liability when professionals dispense advice that deviates from the discipline's norms.<sup>64</sup> Relatedly, professional ethics rules extensively regulate lawyers' speech to protect clients' interests, sometimes by prohibiting speech dangerous to listeners and sometimes by requiring affirmative disclosures of value to listeners. Consider, for example, the Model Rules of Professional Conduct that require lawyers to disclose potential

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2367 (2018) ("In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny."). For additional discussion, see *infra* notes 76–88 and accompanying text.

62. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking down a governmental regulation forbidding attorneys employed by the Legal Services Corporation from representing clients in challenges to existing welfare law).

63. See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc) (striking down state law that forbade doctors from asking patients about gun ownership).

64. See Haupt, *supra* note 17 (describing the government's ex ante and ex post regulation of professional speech through licensing and malpractice liability).

conflicts of interest,<sup>65</sup> that prohibit lawyers from knowingly making false statements of material fact or law,<sup>66</sup> that regulate lawyers' speech when describing their experience and practice areas,<sup>67</sup> and that regulate lawyers' descriptions of themselves and their firms.<sup>68</sup>

### 3. Employers' Speech to Workers

The workplace features a communicative relationship in which employers enjoy advantages of both information and power over workers as listeners. As I've written elsewhere:

[T]he employment relationship is riddled with information asymmetries: employers know considerably more than workers about the terms and conditions of employment, about current and future industry and economic projections, and—as repeat players with greater resources—about available legal protections. Moreover, workers also experience significant power disadvantage, as employers control over workers' economic livelihood also permits them to control workers' expression and sometimes even their physical liberty (e.g., by compelling workers' attendance at “captive audience” meetings).<sup>69</sup>

The employment relationship is thus one that justifies the choice to privilege workers' First Amendment interests when they conflict with employers'.

And conflict they often do. For instance, workers want employers to speak truthfully about their job security and prospects for advancement, while employers sometimes seek to obfuscate.<sup>70</sup> Some employers insist that workers listen to anti-union speech at the workplace, while many workers resist such

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65. MODEL RULES OF PROF'L CONDUCT r. 1.4, 1.7, and 1.9 (AM. BAR ASS'N 2002).

66. MODEL RULES OF PROF'L CONDUCT r. 4.1(a) (AM. BAR ASS'N 2002).

67. MODEL RULES OF PROF'L CONDUCT r. 7.4 (AM. BAR ASS'N 2002).

68. MODEL RULES OF PROF'L CONDUCT r. 7.5 (AM. BAR ASS'N 2002).

69. Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 37–38.

70. See Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 234–38 (2005) (describing examples of workers' detrimental “reliance on false statements or promises the employer made during pre-hiring negotiations”).

“captive audience” meetings in which employers compel not only workers’ attendance but also sometimes their silence by threatening their jobs or by punishing their counterspeech.<sup>71</sup> And workers have a significant interest in receiving information about their legal rights in the workplace, while some employers would prefer not to disclose that information. A listener-centered approach to the employment relationship resolves these conflicts by enabling the government to prohibit employers’ lies and misrepresentations about the terms and conditions of employment, to forbid employers from requiring workers to attend captive audience meetings on the perceived dangers of unionization, and to require employers to disclose accurate information about available legal protections.

Applying a listener-centered approach in the employment setting would generate different results in a number of ongoing legal and policy disputes. For instance, a listener-centered approach would encourage the National Labor Relations Board (NLRB) to rethink its longstanding unwillingness to regulate employers’ lies and misrepresentations, and to prohibit employers’ captive audience meetings, in union representation elections.<sup>72</sup> In listener-centered relationships, listeners’ interests in the truth outweigh speakers’ interests in shading it, while listeners’ interests in avoiding unwelcome speech trump speakers’ interests in addressing listeners in coercive environments.

For the same reasons, a listener-centered approach explains why the D.C. Circuit was wrong to strike down, as

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71. See Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. ONLINE 17, 19–22 (2010); see also *id.* at 39–43 (“Private-sector employers in the United States routinely hold mandatory workplace meetings during union organization campaigns to express antiunion views to their employees. Such captive audience speech occurs when employers require supervisors to convey management’s anti-union opinions to their subordinates or when employers require employees to listen to the employer’s anti-union message at mandatory meetings during work time. In conversation with supervisors, employees risk being fired for insubordination if they refuse to listen to partisan advocacy; in the case of larger group meetings, employees may be terminated for refusing to attend anti-union assemblies. Indeed, employees can be lawfully terminated for merely asking questions of their employers during such a meeting or for leaving such meetings without permission. . . . [A] recent study indicated that employees were subject to nearly *eleven* captive audience meetings during an average union campaign.” (citations omitted)).

72. See Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 42–43 (describing the NLRB’s reluctance to regulate lies and misrepresentations in union representation elections).



infringing on employers' protected speech, the NLRB's requirement that employers post notice of workers' National Labor Relations Act (NLRA) rights.<sup>73</sup> Many workers would benefit from knowing that the National Labor Relations Act prohibits employers from punishing their concerted efforts to improve their pay or working conditions even in nonunionized workplaces.<sup>74</sup> That the NLRA does so, however, remains a secret to most workers.<sup>75</sup> Again, in listener-centered relationships, listeners' desires that speakers reveal accurate and material information prevails over speakers' interests in keeping that information to themselves.

#### 4. Service Providers' Speech to Women Seeking Reproductive Health Care

A listener-centered approach would also have generated a very different outcome in *National Institute for Family and Life*

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73. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), *overruled in part on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014). The D.C. Circuit struck down the NLRB's notice-posting requirement even though many other employment statutes have long—and until recently, uncontroversially—required employers to post similar notices of workers' legal rights. See Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 68–76.

74. *E.g.*, *Custom Cut, Inc.*, 340 N.L.R.B. No. 17 (2003) (NLRB decision concluding that employer violated NLRA by retaliating against workers who discussed their pay with other employees); NLRB, *Protected Concerted Activity: West Caldwell, New Jersey*, <https://www.nlr.gov/rights-we-protect/protected-concerted-activity/west-caldwell-new-jersey> [<http://perma.cc/WK7W-ACPM>] (discussing NLRB regional office decision for Cheese Processing Company, Case No. 22-CA-061632 (2011), concluding that employer violated NLRA when it prohibited workers from discussing their pay with each other).

75. See, *e.g.*, Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 433–34 (1995) (“In the non-union setting, employees’ ignorance leads to the underutilization of legitimate workplace protests, of the voicing of group grievances, and of requests for outside help from government agencies or other third parties. In sum, lack of notice of their rights disempowers employees.”). Workers’ lack of knowledge about their legal rights is by no means limited to the National Labor Relations Act. See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1093–95 (2014) (finding that fifty-nine percent of workers surveyed had inaccurate substantive knowledge of their rights under wage and hour law and seventy-seven percent had inaccurate procedural legal knowledge—that is, they did not know where to file a wage and hour complaint). Alexander and Prasad further found that “the least politically, economically, and socially powerful and secure workers were the least likely to have accurate substantive and procedural legal knowledge.” *Id.* at 1098–99.

*Advocates v. Becerra*.<sup>76</sup> There, a 5-4 Supreme Court preliminarily enjoined a California law that required crisis pregnancy centers to accurately describe available medical services when speaking to the pregnant women they seek to influence. Indeed, the Court's decision in *Becerra* makes plain both the tensions between speakers' and listeners' First Amendment interests in the reproductive health-care setting, and the very different results that follow the choice to privilege speakers' as opposed to listeners' interests in that expressive relationship.

California, like a number of other states and localities, required facilities that seek to serve pregnant women to disclose certain information to those women. First, it required those health care facilities licensed under state law to provide women with the government's notice that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social service office at [insert phone number here]."<sup>77</sup> Second, the state required unlicensed facilities to provide the government's notice that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."<sup>78</sup>

Crisis pregnancy centers then brought a First Amendment challenge to California's law. These centers are generally affiliated with or operated by organizations opposing abortion and offer a limited range of free services to pregnant women.<sup>79</sup> Most, if not all, of these centers do not offer referrals or any other services related to birth control or abortion, and many have no professional health care providers on staff.<sup>80</sup>

Imagine that you are pregnant. You may know that you don't want an abortion. You may know that you do. You may be unsure. If you're like many (if not most), you want accurate information about available options and services before deciding your next step. You don't want to be lied to, you don't want

76. 138 S. Ct. 2361 (2018).

77. CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West 2016), *preliminarily enjoined by* *Becerra*, 138 S. Ct. 2361.

78. *Id.* § 123472(b)(1), *preliminarily enjoined by* *Becerra*, 138 S. Ct. 2361.

79. *Becerra*, 138 S. Ct. at 2368.

80. *Id.*

relevant information withheld from you, and you don't want to be bullied. Further, you want that information sooner rather than later, as delays create new health risks, limiting (and sometimes foreclosing altogether) some of your choices. When we take women's interests as listeners seriously, then we understand the First Amendment to permit the government to require service providers to make truthful disclosures to the women whose choices they seek to shape. In other words, the reproductive health care setting justifies a listener-centered approach because it features inequalities of information: service providers as speakers know more than their listeners about the services they do and don't provide.

The *Becerra* majority, however, ignored what women as *listeners* would find helpful in making key (and constitutionally protected) decisions about their health and lives. Focusing instead on the centers as *speakers* and what they do and don't want to say to the pregnant women they seek to influence, the Court failed to protect listeners' autonomy, enlightenment, and self-governance interests—values at the heart of the Free Speech Clause.

For example, after characterizing the California law as a content-based regulation of the centers' speech,<sup>81</sup> the majority then asserted that "this Court has not recognized 'professional speech' as a separate category of speech," and instead described its precedent as affording "less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking."<sup>82</sup> These circumstances, according to the majority, involved the Court's application of rational-basis review to "some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'" as well as its affirmation of the government's ability to "regulate professional conduct, even if that conduct incidentally involves speech."<sup>83</sup> After describing its past deferential review of the government's compelled disclosures as

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81. The majority opinion did not discuss the fact that in certain settings the Court's past precedent had indicated less suspicion of, and more deference to, governmental disclosure requirements that result in *more* speech than government regulations that restrict, and thus *reduce* the amount of, available speech. *E.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (upholding commercial disclosure requirements as serving consumers' interests as listeners).

82. *Becerra*, 138 S. Ct. at 2371–72.

83. *Id.* at 2372.

applying only to purely “factual and uncontroversial” disclosures about the services that the speaker itself provides,<sup>84</sup> the majority then distinguished California’s compelled disclosures as concerning the inherently controversial subject of abortion, and as directed to services that others (rather than the centers themselves) provide.<sup>85</sup>

But again, a listener-centered approach would ask instead what information would serve reasonable listeners’ interests, privileging those listeners’ interests when in conflict with the speaker’s. Pregnant women considering their next steps are generally interested in accurate information about relevant services that can help them regardless of who provides those services.<sup>86</sup> Relatedly, a listener-centered approach appropriately understands the Supreme Court’s precedent that calls for deferential review of the government’s compelled disclosure only of “purely factual and uncontroversial” information to mean “factually uncontroversial” or, more accurately, “factually uncontroverted” information.<sup>87</sup> That California offers low-cost, sometimes free, medical services that include prenatal care, birth control, and abortion is an objectively verifiable, empirically uncontroverted fact. So too that unlicensed pregnancy crisis centers have no licensed medical providers on site. That some speakers would prefer not to talk about those facts—or would prefer that their listeners never learn of them—does not make them “factually controversial.” As I’ve written elsewhere:

[U]nder the challengers’ view, a disclosure is impermissibly “controversial” for First Amendment purposes when one party does not want the matter discussed in a particular

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84. *Id.* (quoting *Zauderer*, 471 U.S. at 651).

85. *Id.*

86. Common practice undermines the *Becerra* majority’s claim that the Court’s past precedent applying rational-basis review to the government’s compelled disclosures applies only to disclosures about the speaker’s “own services.” For example, some states require that health care professionals disclose accurate and material information about lawful treatment options even if they do not provide those services themselves. Examples include state and federal laws that require certain health care providers and facilities to inform patients or residents of their rights to execute advance health care directives, request palliative care, refuse potentially life-prolonging treatment, or (in jurisdictions where lawful) to end one’s suffering with the aid of a physician. *E.g.*, 42 U.S.C. § 1395cc(f)(1) (2000); CAL. HEALTH & SAFETY CODE § 1569.156(a)(3) (West 2018).

87. *See Zauderer*, 471 U.S. at 651 (upholding commercial disclosure requirements as serving consumers’ interests as listeners).

way, or at all. Such an approach, however, would enable challengers to defeat listeners' substantial informational interests simply by manufacturing controversy over what is accurate information. For example, such an approach would potentially treat the Surgeon General's requirement that cigarette manufacturers display warnings about the dangers of tobacco as impermissibly one-sided and thus "controversial" in that it fails to note that smoking brings many people great pleasure and that some smokers live long and healthy lives. An approach more consistent with the protection of listeners' First Amendment interests would thus understand "factual and uncontroversial" in this context to refer to assertions that are provable (or disprovable) as a factual matter in the same way required of contested assertions in defamation, perjury, and antifraud law. . . . In other words, here "uncontroversial" should mean factually or empirically uncontroversial rather than politically uncontested.<sup>88</sup>

### III. HARD QUESTIONS AND TOUGH CHOICES

By proposing that listeners' interests should carry the day when they conflict with speakers' in certain expressive relationships of inequality, a listener-centered approach makes some hard First Amendment problems easier. At the same time, however, a listener-centered approach generates some difficult questions of its own.

#### A. *Identifying Limiting Principles*

Of course, speakers enjoy advantages of information and power over their listeners in a wide variety of relationships. Should we take the side of listeners in *all* of them?

Consider the four sets of relationships described in Part II: commercial, professional, employment, and reproductive health care. All involve offers or exchanges outside of public discourse in which speakers enjoy advantages of information or power (or both) over their listeners. In each of them, the speaker seeks to shape his listeners' choices in his preferred direction: to persuade them to buy what he's selling; to settle rather than sue

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88. Norton, *Truth and Lies in the Workplace*, *supra* note 3, at 74–75.

or to wait rather than operate (or vice versa); to take, keep, or leave a job; or to continue a pregnancy. All involve the speaker's delivery of information that is objectively verifiable: the attributes of a particular product, the professional consensus about a course of medical treatment or legal action, the terms and conditions of employment or the availability of legal protections in the workplace, and the existence and extent of available reproductive health care services. And all involve listeners who are making decisions (often life-shaping decisions) about their property or persons.<sup>89</sup>

But we can readily think of a number of other expressive relationships that involve informational and power inequalities yet where we may worry about the First Amendment implications of protecting listeners' interests at the expense of speakers'. (Again, I put aside for now speech that occurs in traditional public discourse, like campaign and other political speech.)<sup>90</sup> Consider, for instance, the speech of family, friends, or intimate partners to and among each other in relationships of trust, and sometimes vulnerability.<sup>91</sup> For a variety of reasons, some may be reluctant to privilege listeners' First Amendment interests in these settings by prohibiting lies, by requiring certain disclosures, or by prohibiting potentially coercive speech. Some may hope for, and thus prefer to presume, equality between these speakers and listeners even if that is not always the case. Relatedly, some may think that listeners in these relationships are unlikely to suffer significant harm, or may think that they can protect their own interests through skepticism or counterspeech. Some may fear that the

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89. See Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 75–77 (2018) (explaining that because a traditional function of government is to protect us from harm to our persons and property, the government may have greater First Amendment leeway to regulate speech that threatens such harm).

90. See *supra* notes 5–7 and accompanying text.

91. See Ethan Lieb, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 732 (2009) (“The fiduciary concept recognized by our law is a flexible one. I have argued here that it is flexible enough to encompass enforcement of certain duties of friendship that we all know well from our moral lives. Friendship—of a certain sort, to be sure—is undoubtedly a relationship of trust and vulnerability, and fiduciary law is set up specifically to give effect to and frame this sort of special relationship. . . . Nothing I have argued for here suggests that all friends qualify for fiduciary treatment; rather, courts must not fear that there is some category mistake being made by those claiming fiduciary duties from their friends or former friends.”).

government's regulation of speech in these settings threatens to chill valuable expression among these parties. Some may doubt that law is a good way to generate or maintain trust in these relationships even if they think that law has a helpful role to play in policing other, less intimate sorts of relationships. (Even so, note that law sometimes regulates communications among family members or intimate partners where information or power asymmetries threaten certain specific harms.)<sup>92</sup>

In short, we may feel that some inequalities between speakers and listeners are less unfair or objectionable than others, or that the unintended consequences of addressing some expressive inequalities are especially grave.<sup>93</sup> Although our intuitions about these matters may well differ, these intuitions, in turn, offer potential limiting principles for identifying the universe of expressive inequalities that justify a listener-centered approach. For instance, Jane Bambauer has proposed (in the informational privacy context) that a speaker's fiduciary responsibilities should be triggered *only* when the speaker has affirmatively induced a listener's trust through its assurances that it will not disclose or abuse listeners' private

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92. See *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Ct. App. 1984) (imposing tort liability for the defendant's deception that led to the transmission of a sexually transmissible disease); *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983) (imposing tort liability on the defendant for knowingly misrepresenting himself to be sterile before engaging in intercourse with the plaintiff that resulted in her ectopic pregnancy); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 675–76, 716–18 (2006) (explaining that law rarely regulates parents' speech to their children despite "[t]he speaker's legally enforced despotism, and the captive, immature, and vulnerable listener," but noting an exception with respect to speech that "undermines the child's relationship with the other parent" in certain child custody disputes).

93. Many of us are more interested in some types of inequalities than others, sometimes (but not always) based on self-interest or the limits of experience. Many Revolution-era Americans, for example, were fiercely committed to the notion that Americans should have the same rights as Englishmen—but not at all interested in inequalities involving race, sex, and wealth. EDMUND S. MORGAN, *BIRTH OF THE REPUBLIC 1763–89*, 93–94 (3d ed. 1992); see also Mary Anne Franks, *Injury Inequality*, in *INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS* 239 (Anne Bloom et al. eds., 2018) ("The selective deployment of the First Amendment is one of the barest expressions of injury hierarchy. Speech harms that implicate financial, business, and judicial interests are viewed as extremely serious. Speech harms that implicate other interests, such as racial or gender equality, are viewed as trivial.").

information.<sup>94</sup> Thinking about the hard problem of limiting principles can help us identify which expressive inequalities we find most troubling, and why.

### B. *Determining Listeners' Interests*

Even if we agree to privilege listeners' interests within a certain communicative relationship, we may still disagree as to whether we serve listeners' interests by *protecting* expression or instead by *regulating* it. For instance, we can imagine debates over what sort of information listeners reasonably want in various contexts, as some objectively verifiable facts may strike us as more material to their decision-making than others.

Moreover, listeners' autonomy interests sometimes clash with those of other listeners. Consider trolling, for instance, which involves the deliberate online posting of outrageous or otherwise objectionable commentary simply to provoke a reaction.<sup>95</sup> As I've discussed elsewhere, "[a]lthough the trolls' targets find this speech of no value and often of great harm, some number of the trolls' listeners include other members of the trolling community who consider trolling to be enjoyable precisely because others find it so unpleasant."<sup>96</sup> These tensions again force us to make some hard choices: when *listeners'* interests conflict with each other, which listeners should come first? In close cases, we might choose a tiebreaker that reflects our own preferred hierarchy of First Amendment values (which then offers additional opportunities for disagreement). For example, those who believe that the First Amendment's primary purpose is to facilitate democratic self-governance may privilege some listeners' self-governance interests over other listeners' autonomy interests when the two are in conflict—as may be the case, for example, when robot trolls deliver inflammatory falsehoods to influence election outcomes in ways that

94. See Jane Bambauer, *The Relationships Between Speech and Conduct*, 49 U.C. DAVIS L. REV. 1941, 1951–52 (2016) (“If the state could identify and regulate a fiduciary relationship any time one person trusted another person or firm, the results would trouble even the most hardcore privacy advocate.”).

95. See WHITNEY PHILLIPS, *THIS IS WHY WE CAN'T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE 2* (2016).

96. See Helen Norton, *Robotic Speakers and Human Listeners*, 41 SEATTLE U. L. REV. 1145, 1148 (2018).



deceive some listeners while delighting others.<sup>97</sup> Or one might instead prefer James Grimmelmann's suggestion that "[l]istener choices for speech trump listener choices against speech when the two conflict."<sup>98</sup> Again, we possess a variety of tools for resolving these conflicts even though we may disagree about which tool we prefer.

Finally, readily identifiable speaker-listener relationships comprise only a part of the larger First Amendment web of communicative relationships. For instance, speech sometimes takes the form of free-flowing conversation in which characterizing some participants as listeners and others as speakers is far from easy.<sup>99</sup> To be sure, the more that conditions of equality render the exchange a true dialogue between the parties, the less the need for a listener-centered approach in that setting. But when some parties to the exchange suffer disadvantages of information or power, they may be considerably less likely than their partners to describe their experience as a conversation. A listener-centered approach can acknowledge the diversity of expressive relationships even while counseling that we affirmatively investigate whether an environment is one of equality, rather than simply assume that it is.<sup>100</sup>

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97. See Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 70 (2017) ("[B]ots can spread information or misinformation, and can cause topics to 'trend' online through the automated promotion of hashtags, stories, and the like. During the 2016 campaign, the prevalence of bots in spreading propaganda and fake news appears to have reached new heights.").

98. James Grimmelmann, *Listeners' Choices*, 90 U. COLO. L. REV. 365, 392 (2019) ("The unwilling listener in a one-to-one case can have her choice not to be spoken to respected, while the unwilling listener in a one-to-many case will have to put up with the unwanted speech.").

99. See LEVY & ORR, *supra* note 7, at 78 ("To some extent, deliberative notions of expression even muddy the coherence of the speaker-listener distinction, since in the ideal deliberative forum everyone speaks and everyone listens.").

100. For these reasons, we might best describe these relationships as reflecting a continuum rather than try to sort them into mutually exclusive categories. See Richards & Hartzog, *supra* note 14, at 458 ("But the law need not face the binary choice of treating information relationships as either Fiduciary or Unprotected. Surely some middle ground exists between these two extremes.... In relationships where vulnerabilities are minimized because there is only a small amount of trust, these remedies should be applied sparingly or lightly. Where there is greater trust (or greater potential for exposures), entrustees should be held to higher duties of care and loyalty. Rather than relying on a rigid fiduciary/non-fiduciary distinction, we propose a more flexible approach that recognizes the role of trust in all information relationships."). I too want to resist formal categories and instead look at the functional relationships between speakers and listeners. See Norton, *supra* note 8, at 575 ("Efforts to articulate employers' legal duties of honesty and accuracy should thus be informed by a

## CONCLUSION

A listener-centered approach doesn't solve all free speech problems. Instead, it supplies a different and often helpful framework for thinking about some of them.<sup>101</sup> When we turn our attention from speakers to listeners, we see that listeners in some expressive relationships suffer disadvantages of information or power that undercut their First Amendment autonomy, enlightenment, and self-governance interests.

When we adopt a listener-centered approach, we thus focus on a different set of questions than when we frame our inquiry around speakers' interests. What do listeners reasonably want from speakers in relationships of expressive inequality? Listeners generally seek accurate information that informs, but does not coerce, their decision-making. This is the case for decisions, among others, about whether to buy certain products or services, whether to embark on a certain medical or legal course of action, whether to take or leave a job or seek improved working conditions, and whether to continue or terminate a pregnancy. The higher the stakes for the listener, the more severe the consequences of deception and coercion.<sup>102</sup> When we take listeners' interests seriously in these relationships, we improve the quality of the communicative discourse, and we recognize listeners as ends in themselves—rather than as mere means through which powerful speakers seek to achieve their own ends.

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functional, rather than formalist, understanding of the information and power dynamics within this relationship.”).

101. See Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 900 (2017) (“Even if, however, most outcomes remained the same, taking the interest of all participants in the speech process seriously would deepen First Amendment analysis.”).

102. See Haupt, *supra* note 10, at 1271 (explaining that the dangers of informational asymmetries “are exacerbated when the client’s personal health or freedom or significant financial interests are at stake”).