

ARTIFACTUAL SPEECH

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INTRODUCTION

A debate about the meaning of the First Amendment is now taking place in the academic literature and in the opinions of the Supreme Court of the United States: Is “speech” an artifact of communicated meaning or is it instead a manifestation of communicative intention? The debate goes to the core of what is meant by freedom of speech.

While the debate between the two strands of speech theory has been going on for many years, and while the competing views can be found in many decided cases,¹ one case in particular is emblematic of the debate and illustrative of the competing views and their strengths

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¹ For examples of artifactual speech theory, see generally *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2279 (2000) (declaring unconstitutional a school district’s policy allowing student-led prayer before football games and noting that “[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’” (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring))); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (noting that a New Hampshire statute requiring vehicles to bear “Live Free or Die” license plates effectively required “mobile billboard[s]” and constituted “an instrument for fostering public adherence to an ideological point of view [plaintiff] finds unacceptable”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding unconstitutional a Virginia statute declaring it unprofessional conduct for a pharmacist to advertise prescription drug prices in part because the statute’s effect was to “keep[] the public in ignorance of the entirely lawful terms that competing pharmacists are offering”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (holding the FCC’s equal time rules constitutional and noting that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount” (citations omitted)).

For examples of intentional speech theory, see generally *Texas v. Johnson*, 491 U.S. 397, 410-11 (1989) (affirming reversal of conviction under Texas anti-flag burning statute in part because defendant was prosecuted for expressing the “‘idea through activity’ . . . of dissatisfaction with the policies of this country” (quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974))); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding Ohio’s Criminal Syndicalism Act unconstitutional because it “punish[ed] mere advocacy [of violence as a means of political reform] and . . . forb[ade], on pain of criminal punishment, assembly with others merely to advocate the described type of action”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding, in part, that First and Fourteenth Amendments “prohibit[] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”).

and weaknesses. That case is *Boy Scouts of America v. Dale*,² decided just last Term.

Dale involved the constitutionality of a state law prohibiting discrimination in public accommodations based on sexual orientation. The law was enforced against the Boy Scouts of America, which had dismissed Dale from his post as an assistant scoutmaster because he was openly gay. The Scouts claimed, and the Court agreed, that the law violated its First Amendment freedom of expressive association. “[T]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform”³ would “at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁴

The logic of the Court’s reasoning was that (i) Dale himself expressed a message of legitimacy of homosexuality by public awareness of his sexual orientation, which took on public symbolic meaning; (ii) Dale’s formal association as a scoutmaster with the Boy Scouts caused Dale’s message of the legitimacy of homosexuality to be attributed to the Boy Scouts, becoming, in effect, the Boy Scouts’ message; (iii) by having the unwanted and disagreeable message attributed to it, the Boy Scouts would be forced by any legal prohibition on Dale’s exclusion to express a message with which it did not concur; and (iv) therefore the Boy Scouts was denied either (or both) its First Amendment right not to speak and its right to speak its own message.⁵

The Boy Scouts’ speech was not a product of its intention. It was instead assigned to the Boy Scouts as an artifact of meaning constructed by an interpretive audience. How do we judge whether an organization’s claim to be free of an unintended message is to be credited as a First Amendment speech claim? Is the claim judged, as the Court implied at one point (giving “great deference” to the organization’s claim), simply on the view of the purported speaker—governmental, organizational, or individual? Does the organization itself judge whether an unwelcome message is attributed to it and thus is required to be carried by it? Is attribution instead based on the views of an outside group, based on the existence of a reasonable perception by the audience that the speech is in fact that of the or-

² 120 S. Ct. 2446 (2000).

³ *Id.* at 2455.

⁴ *Id.* at 2454.

⁵ The associational claim, on reflection, seems only incidental to the Court’s analysis. The Court treated the Boy Scouts as a First Amendment speaker and the nondiscrimination law as a direct abridgement of the Boy Scouts’ speech, rather than as an incidental burden on expressive conduct. *United States v. O’Brien*, 391 U.S. 367 (1968), which “enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech,” was deemed inapposite. *Dale*, 120 S. Ct. at 2456.

ganization?⁶ Is it the audience's perception that determines whether the organization's association with the speech is sufficient to support the conclusion that the organization *endorses* the message? Is the attribution judgment a function of what insiders in the organization—the Scout hierarchy or the scouts themselves—would believe, in which case the attribution question would depend on what the members in fact knew and what Dale said and did in his official capacity? Or is it, as the Court also suggested, what members of the general public would believe? Interestingly, the attribution question parallels the question of endorsement in the Establishment Clause field, where the inquiry is whether members of the audience, knowing of the speech and its origin, would reasonably believe that the message was endorsed by government, though presented by a wholly private party.⁷

The ambiguity and potential reach of the Court's attribution analysis were at the heart of the disagreement between the majority in *Dale* and Justice Stevens, in dissent. "Under the majority's reasoning," Stevens observed, "an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism."⁸ His exclusion from the Boy Scouts is justified, under the majority reasoning, by the Boy Scouts' right to refuse to broadcast the message inescapably attached to Dale, or to refuse to permit Dale unintentionally to contradict or garble the Boy Scouts' specific statement. The majority's opinion, in short, is one of attribution on attribution; artifact built upon artifact—attribution to the Boy Scouts of a message constructed by an audience and attributed to Dale. This interpretive house of cards was simply too much for Justice Stevens, who doubted that actual attribution existed in any of the forms identified by the majority.

The competing arguments about the meaning of speech boil down, in the end, to a sharp definitional divide. On the one side are those who argue, much like the *Dale* majority did, that the First Amendment should protect communicative stimuli of human or corporate origin: words, acts, images, identities, and even institutional policies and programs that are of communicative significance to the

⁶ This approach was a major source of division among the Justices in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (concerning the meaning viewers would attach to a private party's (the KKK's) display of a cross on the grounds of a state capitol).

⁷ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2278 (2000) ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73, 76 (1985) (O'Connor, J., concurring))); *Capitol Square*, 515 U.S. at 777 (1995) (O'Connor, J., concurring) ("[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid.").

⁸ *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting).

actor or to those who perceive the act.⁹ On the other side are those who argue, like Justice Stevens did in his dissent in *Dale*, that speech should consist only of purposeful communicative acts by individuals that reflect the individual's freely formed communicative intention; speech by institutions, such as corporations, is protected only under the Free Press guarantee.¹⁰

Between these two poles a middle ground exists. Those who hold it argue that the First Amendment is primarily aimed at protecting speech by individuals, and thus affords strongest protection to such expression in the name of individual liberty. Speech that does not qualify as an exercise of an individual's liberty, such as a corporate advertisement or an unintended act with communicative significance to others, like one's dress or one's sexual orientation, should be protected by the First Amendment if and when it actually has communicative impact; but its protection should be expressly dependent on its importance to the self-governing and democratic ends of the Constitution.¹¹

⁹ See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748, 765 (1976) (noting that the "free flow of commercial information is indispensable" to "intelligent and well informed" "private economic decisions"); *Miller v. California*, 413 U.S. 15, 18-19 (1973) (noting that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles" (footnote omitted)); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969) (emphasizing "the First Amendment goal of producing an informed public capable of conducting its own affairs"); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1965) ("It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government."); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 17-51 (1993) (calling for a "New Deal" in free speech theory that would enable government to intervene to aid less powerful speakers and vulnerable hearers); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 583 (1990) (examining speech as a public good and concluding that "the special quality of speech is not its relationship to the private self of the speaker, but its relationship to the welfare of the community"); Owen M. Fiss, *Why The State?*, 100 HARV. L. REV. 781, 792 (1987) (discussing the "activist state" and arguing that "rich public debate rather than autonomy is . . . the key first amendment value").

¹⁰ See, e.g., *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6-24 (1989) (rejecting the "classic marketplace of ideas theory" and arguing that First Amendment protection hinges on the individual's right to speak, regardless of whether the individual's expression proves beneficial); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 7 (1990) (arguing that "a commitment to protecting dissent is a vital, but underappreciated, part of the meaning of the first amendment and of American democracy"); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the First Amendment serves only one true value—"individual self-realization"—which refers "to development of the individual's powers and abilities . . . [and] to the individual's control of his or her own destiny").

¹¹ See Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 737 (1995) (considering the protection of "speech [that] has become increasingly abstracted from the individual human enterprise of speaking").

My purpose is to probe the contending arguments about the meaning of speech under the First Amendment. I will focus first, and primarily, on the two main competing views, only later turning to the middle ground view. The first view, which focuses the First Amendment's protection on the stimulus of speech itself, I will call the artifactual position. The second view, which focuses the First Amendment's protection on expressive acts of individuals, I will call the liberty view. The first focuses on speech, the second on speaking. In examining these two views and the arguments made for them, I will look to the text and history of the Constitution, the purposes of the free speech and press guarantees, the logical soundness of the premises upon which the competing views rest, and the practical difficulties each presents.

I conclude that neither view can lay claim to exclusive or even dominant support in the text or historical purposes of the First Amendment, as those guides are in the end fundamentally ambiguous. I further conclude that both views are intellectually incoherent in terms of their internal logic and consistency with the established purposes of the First Amendment. The artifactual view, for example, limits its protection to communicative stimuli of human (individual, group, institutional, corporate) origin, a limit that cannot be squared with its central premise that the First Amendment protects speech. If speech consists of words or images or acts or phenomena that are in fact communicative to those who receive and perceive them, and if, therefore, "speech" is dependent on an audience's perception and use of a stimulus, then there is no apparent justification for eliminating the vast body of stimuli that are of non-human origin.

The liberty view, likewise, is incoherent. It limits protection of speech acts to those that are intended by the actor and are understood communicatively by an audience. If the First Amendment protects the liberty of expressing one's own views, one's success in doing so should not be relevant, at least as a definitional matter. More basically, by denying First Amendment protection for a wide array of political, economic, and social speech whose origin is institutional or, even, inadvertent, the liberty view entirely disregards the self-governing and social, political, and economic purposes that the First Amendment was seen, at least in part, as protecting. It is thus impossible to square with the undeniable structural purposes of the First Amendment.

I. THE ARTIFACTUAL THEORY: PREMISES AND PROBLEMS

The artifactual theory of speech extends the Constitution's protection to speech itself. While in its many variants the basis upon which the theory rests is articulated as individual liberty as well as social value and constitutional purposes, such as self-government, and while the mix of these advantages yields varying kinds and levels of

constitutional protection for various types of speech, the Constitution's protection is attached definitionally to the speech as a communicative fact. As Justice Harlan put it in the seminal case of *Cohen v. California*, the First Amendment claim rests, in the end, on the "fact of communication."¹²

The artifactual theory thus rests on a clearly articulated definitional line: the fact of communication resulting from an expressive artifact. But the clarity with which the line can be articulated disguises a concept that is far from simple. The concept rests on a number of logical premises that are debatable, ambiguous, and perhaps incoherent.

The first premise is that protected speech is contingent on the perception of it as communicative by persons other than the speaker. Attaching protection to speech makes questions of origin, authorship, authority, and intention unimportant. Only if a communicative artifact is *understood as expressive*, as conveying a message or meaning, is it protected speech under the First Amendment. And it is protected, as was the unwelcome message in *Dale*, irrespective of the knowledge or intention of the person or thing that produced it.

Such a view nicely avoids the complex, even inscrutable, definitional complexities of the alternative theory, which protects the human free-willed act of expression. If an instance of speech by a person turns out, upon examination, to be inadvertent, that fact makes no difference, for the presence of a communicative fact (and, more importantly, its meaning) is not dependent on knowledge or intention of a person or thing that originates the speech. Similarly, the fact that speech is originated by an artificial entity such as a corporation or an organization is a matter of constitutional indifference. The speech still receives First Amendment protection if others understand it as expressive. Indeed, under the artifactual theory, there is no reason to disqualify communicative stimuli produced by a machine, an inanimate object, or even by a different species. After all, a painting is expressive—it conveys meaning to the viewer—even though it is inanimate, and this is especially true when the expressive meaning bears no relation to the original communicative design of its producer. Soup cans can become artifacts of new meaning. So can a picture of the Marlboro Man.

The artifactual theory thus replaces a human and speaker-centered view of free speech with one grounded in the fact of communication alone. The fact of free speech, therefore, and also its value, is shifted from speaker to audience. If free speech is not premised on the "right" or "liberty" of the audience, a disputed proposition to which we shall turn, it is at least grounded in an audience, serving, as we will see, either the audience's edification or liberty of

¹² *Cohen v. California*, 403 U.S. 15, 18 (1971).

thought, or some larger social and political ends for which the audience's acts of perception are instrumental. But before we turn to this difficult and important distinction, let us stay with the more elemental premise of the artifactual theory, which is that speech occurs when a stimulus is understood expressively, turning thereafter to whether it is the act of expressive understanding by a person that is protected or whether it is instead the meaning so understood that constitutes speech under the First Amendment.

If speech is grounded in the fact of communication—the fact of something being understood expressively—a host of complications are immediately apparent. What is an expressive understanding? Is it simply the fact that a person has interpreted a stimulus metaphorically, as saying something more than the thing itself: not letters only but words, not words but a new message; not a soup can but a symbol of culture; not a beggar's tin cup but a metaphor of despair? Must the understanding be rational and reasoned, or can it be a feeling, a purely sensory experience, such as Yo Yo Ma playing Bach in the deep woods, or love at first sight? The stimulus of fear visited by the cross burning in the *R.A.V.* case,¹³ the stimulus of lust fostered by obscenity (which the Supreme Court implicitly acknowledges to be "speech" in artifactual form by the Court's Herculean efforts to define it out of the Constitution on other grounds),¹⁴ and the stimulus of gay rights arising metaphorically from Dale's very existence suggest that both possibilities, and perhaps others, qualify for First Amendment status.

But what about the problem of varying meanings that arise when different persons receiving a stimulus have different expressive understandings? Is the important point the fact of *an* understanding—indeed *any* qualifying understanding? Or must the understanding, to satisfy the prerequisites of constitutional status, fall within a narrower range? Must the understanding be "reasonable," as the Court has sometimes suggested?¹⁵ If so, is this requirement inconsistent with the view that the expressive understanding can be purely sensory or aesthetic, and idiosyncratic? Are only reasoned "understandings" protected, and, if so, is this a matter of speech definition or instead of value-laden preferences imposed after the definitional question has been answered? Is obscenity speech, but its meaning so awful that it is given no constitutional weight? What if

¹³ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹⁴ See *Miller v. California*, 413 U.S. 15 (1973) (holding that obscene material is not protected by the First Amendment because, *inter alia*, it appeals to the prurient interest of the audience).

¹⁵ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that flag burning is protected speech as long as "the likelihood was great that the [intended] message would be understood by those who viewed it" (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974))); *Cohen*, 403 U.S. at 18 (noting that conduct intended to express a view but which, "on its face, does not necessarily convey any message," arguably could be regulated). The Court's free speech/Establishment Clause jurisprudence asks whether a "reasonable observer would view a government practice as endorsing religion"—as expressing a message of endorsement. See *supra* note 7 & accompanying text.

is given no constitutional weight? What if the meaning differs from that intended by the speaker? Does the speaker's intention carry no weight, and may the speaker therefore get the advantage of speech protection due to the fact of communication even though no communication was intended?

This, of course, was what happened in *Dale*, where the Boy Scouts disclaimed any intention to speak the symbolic message attributed to it, yet was granted the status of a speaker—an involuntary one, to be sure, but a speaker nonetheless. If a racist slur is not intended to be communicative but is in fact so understood, is the slur protected by the First Amendment?¹⁶ If a speaker, for example, intends to convey a qualifying message, such as the banality of sex, but those who witness the stimulus of the speaker understand instead a message of prurience and obscenity, is the speaker just out of luck?¹⁷

The artifactual theory implies that this will be the case, for the "speech moment" is not the production of a stimulus but its reception. The speaker is instrumental only to the First Amendment's practical enforcement. Indeed, the artifactual theory should not, to be consistent, place the First Amendment claim of "right" in the hands of the speaker at all. The claim should belong, instead, to the audience, which serves as the interpreter, the giver of meaning, and either the beneficiary of liberty lodged in the act of perception or the instrument of a larger social good that grows out of the collective perceptions of millions of persons and millions of meanings. This is the point raised, but deferred, earlier. Does the artifactualist's theory rest on the speech right attaching to the audience, or is the audience just an intermediate step to a larger explanatory idea of the First Amendment? On this question the theory breaks into parts, with some proponents holding one view, some holding the other, and some trying desperately to hold both.

One view—a minority view, it must be said—rests on the premise that the speech right belongs to the audience.¹⁸ This is the view articulated by the "right to receive ideas" school of First Amendment thought. The purpose of the First Amendment, it is said, is to encourage the dissemination of information and views and communicative stimuli to the audience, the viewers or receivers, or the public. But what purpose would that, as an end in itself, serve? The purpose is to educate, presumably, and to stimulate. By so doing, exposure to ideas and information communicates new ideas and stimulates men-

¹⁶ See generally RANDALL P. BEZANSON, *The Burning Cross*, in SPEECH STORIES 93 (1998) (discussing *R.A.V.*).

¹⁷ See generally RANDALL P. BEZANSON, *The Artist: Carnal Knowledge as Art, Pornography as Subordination, and the V-Chip as Family Values*, in SPEECH STORIES, *supra* note 16, at 115 (discussing *Jenkins v. Georgia*, 418 U.S. 153 (1974)).

¹⁸ Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (arguing that the First Amendment imposes an affirmative obligation on a monopoly newspaper to serve the public as a watchdog).

tal and emotional activity, thus enhancing the capacity of the individual as a free-willed and thinking human being. In short, the audience-centered view of free speech is based on protecting liberty, but not the liberty of the speaker. Instead it protects the liberty of the recipient of communicative stimuli (with, as we shall see, the speaker's liberty, or right, made subordinate to the receiver's liberty). The receiver's liberty, it is assumed, will be enlarged and deepened by exposure to intellectual stimuli, reasoned thought, and aesthetic experience. The point is a valid one, as we now know that the brain's development is stimulated and expanded by mental activity of all sorts. A cacophony of speech is thus a useful and basic human enterprise.

And a cacophony it is. If it is intellectual and aesthetic stimulation the First Amendment protects, the fact of stimulation is central and meaning is incidental. The fact of stimulation, and indeed its manner, subject, and object, are truly idiosyncratic. I see a Marlboro Man and want a cigarette; my friend sees a cultural icon. I see Dale and feel good about liberty and equality; the Boy Scouts sees him and thinks moral crookedness. All meanings are of equal stature as stimulants, or as instruments of mental or sensory stimulation. A general, or reasonable, meaning given by an audience plays no part in this scheme; indeed, the fact that most people are not stimulated makes no difference. The audience, in other words, is important only as a universe of persons in whom stimulation might occur (and when it does, those who enjoy it receive constitutional protection). The audience, as a collective group, plays no definitional or instrumental role in whether there is a generally understood communication or what meaning it might reasonably be assigned. Stimulation is individuated; meaning is idiosyncratic. Indeed, this view has so deconstructed communication that one is left to wonder why the Constitution used the word "speech" at all.¹⁹ This is a good, and I think a devastating, question raised by anyone who, having taken the artifactual turn, then takes a further turn away from the audience and toward the fact of individual stimulation.

Let us, then, remain with the audience as a body that is at once the beneficiary and the locus of definition of "speech." The main problem here is a cart and horse dilemma. If the audience's liberty is dependent on persons or things producing the needed stimuli, and the producer has no independent freedom to produce but is instead subordinate to the audience—if, that is, the speaker's First Amendment claim is only that of the audience, and the speaker's standing to raise the audience's speech claim is made dependent on the audience's (often unascertainable) expressive understanding—then how can the fullest realization of the audience's interest be achieved? In

¹⁹ Thus the title of Stanley Fish's book, *THERE'S NO SUCH THING AS FREE SPEECH* (1994).

whose hands, but government's, can the power to require or restrict speakers from speaking in the interest of audience elucidation be placed? After all, was not Dale's claim to speak snuffed out by, and thus subordinated to, the Boy Scouts' claim of involuntary speech?

The problem, in other words, is which comes first, freedom to speak or freedom to hear: free expression by speakers, which audiences then may enjoy though not control, or freedom to receive speech which may, if not naturally forthcoming, be compelled? And if speech is stimulation, and stimulation is idiosyncratic, how can we know when and how it will occur, with what effect, and to what public or private end? The answer is that we do not—and we cannot—know, so government cannot manage speech. The audience's interest must be satisfied by a thoroughly deconstructed world of random stimuli.

There are at least two additional difficulties with the audience-centered view, to which we shall later turn: there is no reason to limit the cacophony to stimuli of human origin; and there is little evidence in the history of the First Amendment that would support mental stimulation as a principal goal of the speech guarantee. But let us set these problems aside for the moment.

The alternative justification for the audience-centered artifactual theory rests on the premise that speech itself produces a more informed and educated citizenry better capable of engaging in self-government and better equipped to preserve freedom in a democratic society. It is these ends, not individual liberty, to which the First Amendment is principally directed. The audience's elucidation is thus treated not as an end of the First Amendment, but instead simply as a means for achieving other structural ends of democracy and a free civilization.

This view, too, can be described as a "right to receive" theory, but it is of a different ilk. The structural ends of self-government and freedom serve as animating forces in defining the scope and nature of protection accorded the free speech. They serve to justify virtually complete immunity for some speech because its content is deemed central to the business of self-government and freedom. They also serve to disqualify other speech that does not serve, or even diserves, those ends, not because the other stuff is not speech, artifactually speaking, but because it is not useful speech when judged by the structural purposes of the First Amendment.²⁰ Directly political speech, even false political speech, is given nearly complete immunity

²⁰ The classic formulation of this approach is found in the definition of obscenity, which excludes from the constitutional definition of speech material that "lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). Commercial speech, in contrast, is given some constitutional stature under the First Amendment, but only because of its instrumental informational value and, thus, not if it misleads or is false. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 771 (1976).

from government regulation, but non-political speech, including false non-political speech, is given markedly less protection.

The late arrival of commercial speech on the First Amendment scene also nicely illustrates the point. Commercial speech is protected, the Court says, because of the audience: It provides information people need when making individual choices in a free economic market.²¹ Commercial information was not always important to the structural ends of the First Amendment, but it is hard to dispute its importance in the late twentieth-century, post-industrial, information age. In other words, the standard of value can change, as can the breadth of the audience's right—really, need—to receive information. But the audience's "right to receive" commercial speech depends on its truthfulness and accuracy, which are judged not by the text of the speech or the advertiser's intention, but rather by the audience's perception. The speech must be neither false nor misleading—ideas lodged firmly in the communicative understanding of the recipient.²²

This is as it should be, of course, in the artifactual view. But how do we judge perception? What is misleading to one person may be perfectly clear to another. Moreover, one communicative stimulus—a picture of a Campbell's soup can or the symbolic message of Dale—may yield radically different meanings from person to person. How do we iron these differences out? More to the point, *who* irons them out? The answer most commonly given is that it is the government's First Amendment, so it is the government's job. This, at least, is the gist of the Court's view, which seems to be that only the understanding given an advertisement by a reasonable, reasonably experienced, and reasonably skeptical person will count when deciding what meaning the commercial speech artifact will be given and whether that meaning comports with or conflicts with the structural purposes of the Constitution.²³ These are questions for the courts; to wit: government.

Similar arguments are made about political speech by the structuralist right to receive theorists, but the argument is slightly different. The argument is that humans are less than fully autonomous and critical (surely right) and that communicative stimuli can operate insidiously to implant prejudices and preconceptions merely by

²¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980) ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."); *Va. State Bd. of Pharmacy*, 425 U.S. at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

²² *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

²³ Cf. *Texas v. Johnson*, 491 U.S. 397, 404, 409 (1989).

exposure to them, especially in the absence of competing stimuli.²⁴ Thus, the freedom of political speech, the most important and the most dangerous speech of all, must be contingent upon factors that will protect against these risks. Political speech must be fair, in the sense that its origins (who made it, who paid for it) are disclosed. More importantly, political speech must be balanced and not one-sided, whether the imbalance results from persuasiveness, money, or some other form of monopolistic control. Equality of voice for competing ideas is thus an acceptable objective of the Constitution and thus an acceptable subject of regulatory control over political expression.²⁵

There are some pretty serious problems with this branch of the artifactualist view. First, when it gets down to regulating speech for structural purposes—imposing disclosure requirements, equal time requirements, setting preferences for certain types or subjects of speech, and the like—the artifactualists seem to have forgotten their own main premise: that speech is a communicative stimulus whose meaning is lodged in an audience whose understandings are far from uniform (and, it should be added, far from understood). Truth, accuracy, balance, fairness, and equality as regulatory instruments are thus likely to be incoherent, resting on assumptions that topple like a house of cards built on a foundation of inconsistent assumptions.

Second, the artifactual view of speech and its meanings, driven to theoretical conception as an instrument of expression in the service of self-government and preservation of a free society, places the definition of structural purposes, the means by which they will be achieved, and their regulatory enforcement against offending speech in the hands of the very government over which people are to have control and from which they are to be free. This is accomplished largely by justifying government action on the skeptical impulse that people are not free agents—at least not interpretive free agents able

²⁴ See, e.g., Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992) (arguing that current free-speech doctrines are both overprotective—protecting speech that causes serious societal harm—as well as underprotective—failing to protect speech necessary to a deliberative democracy); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986) (arguing that “to serve the ultimate purpose of the first amendment we may sometimes find it necessary to ‘restrict the speech of some elements of our society in order to enhance the relative voice of others,’ and that unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free” (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976))); STANLEY FISH, *There’s No Such Thing as Free Speech, and It’s a Good Thing, Too* in *THERE’S NO SUCH THING AS FREE SPEECH* 102, 115 (1994) (“[T]he risk of not attending to hate speech is greater than the risk that by regulating it we will deprive ourselves of valuable voices and insights or slide down the slippery slope toward tyranny.”).

²⁵ The consistency of an equality principle with free speech is at the center of the Court’s campaign finance jurisprudence. Compare *Buckley*, 424 U.S. at 54 (equality is an unacceptable justification for regulation of speech, particularly political speech), with *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 666 (1990) (sustaining Michigan law limiting political endorsements by corporations because of the greater financial resources at corporations’ disposal).

to discern for themselves—but are instead easily manipulated by artifacts of communication and thus must be protected against them. Since people cannot discern, government should do the discerning for them—a position that leaves no room for an intervening liberty to speak or be free from unwanted speech, which *Dale* recognized. A liberty to express the hateful or unconstructive message would impose too heavy a dose of free will and would disturb the attitude-shaping enterprise of government.

At a more basic level, however, the deeply skeptical premise of nondiscernment—whether true or not—is flatly inconsistent with the premise that underlies the structural objectives of self-government and free social and political order. If one tries to preserve freedom by denying its possibility, the remaining game will be only about who holds power. This, as Robert Post has so nicely argued, is precisely what this branch of artifactualist speech theory is all about.²⁶

A final problem raised by the structuralist view is interesting and, by First Amendment standards, age-old. How does aesthetic expression fit into this purposeful structuralist view of the First Amendment? Alexander Meiklejohn was stopped short by this very question: If speech is about politics and government, what place does art have? He first said “None,” then reversed himself after the firestorm hit.²⁷ But the fact is that art’s claim to protection under the structuralist artifactualist theory is quite weak: The structuralist privileges the end result, not its creation—the painting, not its conception. The problem of assigned meaning is also intractable for a structuralist. Art is famously productive of idiosyncratic understandings, or audience meanings. Art may deepen the senses and broaden sensory perception, but we do not really know when this happens, nor do we understand whether, or how, it happens. For art to be privileged the structuralist must know more, for politics, commerce, voting, and judging—the stuff of structuralist purposes—have little to do with aesthetic perception and much more to do with fact, reason, logic, and real experience. In an audience-oriented world where the amount of protection accorded various types or instances of speech is made contingent on the closeness of their relationship to self-government and the preservation of freedom, art will not likely come out on top. Witness obscenity law.

Art is easier to value as speech under the earlier artifactualist view, which rests the First Amendment’s protection on the *audience’s* freedom to be stimulated, unconditioned by the servicing of other struc-

²⁶ See generally Robert C. Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 ETHICS 654 (1993) [hereinafter Post, *Managing Deliberation*]; Robert C. Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993) [hereinafter Post, *Meiklejohn’s Mistake*].

²⁷ Compare ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18-19, 22-27 (1948), with Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257.

tural constitutional ends. This is because aesthetic perception and sensory stimuli are arguably as conducive to the development of one's human potential and mental growth as are facts, logic, and reason. The mind is not simply a computer driven by logic; it is a complex system of senses and structure. Who we are is a combination of all of our senses, all of our experiences, all of our capacity for feeling, insight, reason, and language.²⁸

The audience-centered artifactualist thus can claim a theory premised on an appeal to universal "truth:" that protecting speech in the interest of the individual's growth and development (and incidentally, but incidentally only, the capacity for freedom and free-willed choice) is coherent in the abstract. But the artifactualist cannot explain why expressive stimuli are limited to those of human or corporate origin only and why, if stimulation is the key, "speech" was made the constitutional prerequisite. If speech is a function of "meaning," and if stimulation does not depend on an ascertained or standard "meaning," then stimulation does not seem to have much to do with speech.

Finally, the artifactual speech-as-stimulus idea can make but a meager claim to historical support in the record of the Constitution's ratification and the ratification of the Bill of Rights. What little support there is rests on freedom of conscience traceable originally to the religious freedom roots that are arguably given separate protection in the First Amendment. Conscience, or freedom of belief, is a state of mind separate from and precedent to its manifestation in acts of expression. It is thus a solid basis not for the artifactualist, who focuses on the words or the audience's idiosyncratic use of them, but for the libertarian who centers the First Amendment's protection on the individual liberty of speaking. Notwithstanding these textual and historical difficulties, it must be said that the audience-centered artifactualist view is at least internally consistent.

In marked contrast, the structuralist approach to speech can lay the strongest claim (as between the two) to historical support, for there is much in the debates surrounding the First Amendment about the importance of free speech to self-government and an informed citizenry. In the end, however, the structural artifactualist misuses this history, resting a First Amendment speech theory on the premise that those persons who receive and give meaning to messages are really incapable of executing that duty—and presumably incapable of self government—and then placing the preservation of speech's freedom in the hands of the government whose power was

²⁸ See generally ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* (1999) (arguing that emotion and feeling play a central role in human consciousness); ANTONIO DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1995) (arguing that emotion and bodily feeling are critical to human decision-making).

to be limited in the first place. The Framers did not intend that result, whatever the language of self-government, liberty, and responsibility they employed in making their arguments for free speech.

Dale, on reflection, seems a strange combination of artifact and liberty. The "speech" in *Dale*—the message or meaning—arose from Dale as a symbolic artifact of meaning; this meaning lodged not in Dale's intention but in the audience's construction, which was then assigned by the audience to the otherwise mute Boy Scouts. This is artifactual analysis. Yet having created the speech by artifact, the Supreme Court extinguished it in the name of liberty—the liberty of the Boy Scouts of America to be free from bearing the artifact as its own speech. Some might describe this alliance of artifact and intention as unholy. It is, at the very least, messy.

II. THE LIBERTY THEORY: PREMISES AND PROBLEMS

The other principal contending theory of free speech is the liberty theory, which focuses on the speaker and the act of speaking rather than on the speech itself.²⁹ The theory is premised on the conviction that the act of speaking by an individual, which is itself a manifestation of thought and belief, is an essential attribute of human free will.³⁰ Speaking is both a manifestation of, and also part and parcel of, distinctly human creativity and formation of free-willed belief. It is therefore the creation and the expression of a person's feelings and beliefs—a person's identity, really—that is protected by the First Amendment in the name of human liberty. The resulting expression, or speech, is a personal and social manifestation of this creative process. What happens to it—whether anyone sees or hears it, believes it, or even understands it—is constitutionally incidental, or at least secondary.³¹ As an exercise of the human capacity for consciousness, the creative act is uniquely human and therefore the First Amendment's protection is restricted to human and individually free-willed acts. Protected acts of speaking, as I will call them, cannot originate from non-human sources, and human acts of expression that are externally prescribed (i.e., purchased) or involuntary (coerced) or not intended are disqualified from constitutional protection. It is an individual's own liberty that is safeguarded by the First Amendment.

The liberty theory has two basic variants. The first is the social model of speaking; the second is the pure liberty model. The vari-

²⁹ See *supra* note 10 and accompanying text.

³⁰ See BAKER, *supra* note 10, at 47-51.

³¹ Whether someone hears another's act of speaking is either incidental (i.e., irrelevant) or secondary (i.e., relevant, but not primary), depending on whether the pure liberty model or the social model is, respectively, the one being applied. See *infra* notes 32 (social model), 39 (pure liberty model).

ants reveal a fundamental divide: Does the First Amendment protect the individual's liberty to express his or her communicative intentions to others, thus representing a transactional idea of speaking; or is liberty purely intrinsic to the individual, a manifestation of personal belief valued in itself?

The theory that is dominant, especially in the opinions of the Supreme Court, is the social model, which merges liberty of expression with required communication. An individual's act of speaking, under this view, does not qualify for First Amendment protection unless the message is intended by the speaker to be communicated to others *and is in fact reasonably understood* by those others.³² Speech, an expression of free will, is thus protected as a *social* act. Burning a flag in protest of a war, for example, is protected expression only if people witness the burning and interpret it as containing an anti-war message. If the act is seen as no more than an expressionless attempt to light a charcoal fire, there is no speech for Constitutional purposes; the speech intended by the flag burner remains constitutionally inchoate, much like a tree falling in the woods.³³

The perceived message, moreover, must be the same as the intended one. Inadvertent expression of a message—a beggar understood (though not intending) to express the failure of social programs for the poor, for example—is not protected speech, for without the correspondence of intention and message, there is no self-willed act of expression to safeguard in the name of liberty.³⁴ Likewise, the metaphorical message of gay rights that Dale emits by his very existence, not being intended by him as speech, disqualifies any speech claim Dale might make in response to the Boy Scouts' claim. In this respect, the approach does not fall victim to the vicissi-

³² See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974))); *Cohen v. California*, 403 U.S. 15, 18 (1971) (suggesting that "separately identifiable conduct . . . intended . . . to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message . . . arguably could be regulated without effectively repressing [the speaker's] ability to express himself").

³³ The Supreme Court's decision in *Johnson*, 491 U.S. 397 (1989), departs from this liberty view even while seeming to rest on it, for the speech in *Johnson* was the symbolic message of the flag, as people reasonably interpret it, and the government's attempt to prohibit any other messages was really an effort to freeze in the flag's message, a distinctly artifactual concept. The desecrator's intent, in the end, had nothing to do with the existence of a First Amendment claim, a claim effectively attached to the flag as a speaker. See RANDALL P. BEZANSON, *THE BURNING FLAG: THE MEDIUM AND THE MESSAGE*, in *SPEECH STORIES*, *supra* note 16, at 187, 201 (discussing *Johnson*).

³⁴ Cf. *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) (suggesting that the message of a beggar for First Amendment purposes need not be a "particularized social or political message," but may simply be that of begging).

tudes of limitless potential meaning that plague the artifactual theory. The audience's receipt of the message is still speaker-centered.

The social or speaker-audience variant of the liberty theory comports generally with the way in which human communication is understood to function: a speaker, a message, and a recipient of that message.⁵⁵ The matter, of course, is much more complicated than this, but the nub of the idea is that the liberty of speech is not *exclusively* grounded in freedom of belief and free will, both of which can exist in the abstract without interpersonal expression, but also in the liberty to communicate belief to others, thus beginning a cycle of communication and interaction with the speaker and the ideas expressed. Speaking is an exercise of human liberty, but it is also a social transaction that yields (though not at the expense of liberty) social benefits.

Speech is thus seen as a dynamic and interactive process—a social act—involving negotiated meaning stemming, however, from a correspondence in general meaning between intention and execution. In this sense free speech does perform social and political functions under the Constitution. It must do so in order to be considered protected speech. But in contrast to the artifactualist view, those social functions of speech are dependent on the speech being a product of individual liberty; they are attributes or benefits contingent on the exercise of individual liberty. While the artifactualist sees individual liberty as a valuable byproduct of, but not a precondition to, protected speech, and thus makes the protection accorded speech contingent on judgments about the social or political value of the speech artifact itself, the libertarian sees social values only as incidental, but not necessary, byproducts of protecting liberty, and thus refuses to make liberty contingent on social function or value.⁵⁶

The speaker-audience theory is distinct in that it links the liberty to speak with the social function that speech performs. Speech protected by the Constitution, in other words, is made contingent on *both* liberty *and* social, or interpersonal, function. But the social function is not defined in terms of content; it is grounded exclusively in process. That is, protected speech is not contingent on any particular social value being served by the interaction between speaker and re-

⁵⁵ See, e.g., JOHN AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) (arguing that words can be performative, constituting action that affects the speaker and others); ALFRED JULES AYER, *LANGUAGE, TRUTH, AND LOGIC* (1936) (arguing that a statement can have cognitive meaning only inasmuch as it is either empirically verifiable or true by virtue of linguistic rules); UMBERTO ECO, *THE ROLE OF THE READER* (Ind. Univ. Press 1984) (1979) (containing various essays discussing the reader's interpretive role with regard to open and closed texts); ULRIC NEISSER, *COGNITIVE PSYCHOLOGY* 173-276 (1966) (discussing the passive and active processes involved in auditory synthesis); Christian Metz, *Aural Objects*, 60 *YALE FRENCH STUD.* 24 (1980) (arguing that perception of the aural world is a linguistic *and* socially constructed unity).

⁵⁶ For wonderfully able discussions of the tension between liberty and collective well-being in the setting of free speech theory, see Post, *Meiklejohn's Mistake*, *supra* note 26; Post, *Managing Deliberation*, *supra* note 26.

ceiver. By requiring a link between speaker intention and audience interpretation, the social function is tied directly to, and implicitly limited by, speaker liberty.³⁷

The other variant of the liberty theory focuses only on the liberty of the speaker. I will call it the pure liberty theory. Under this theory, the Constitution protects the act of speaking as a manifestation of individual belief and expressive free will.³⁸ This is realized whether or not anyone else hears the speech and whether or not a receiver understands the speech to have the same meaning as that intended by the speaker.³⁹ The act of speaking, even if no one listens or can hear, is still a constitutionally protected act. Likewise, the intentional act of communicating message X is protected even though the audience hears message Y. In *Dale*, for example, the Boy Scouts argued that its claim of compelled speech—that it was forced to communicate a pro-gay message by retaining Dale as a Scoutmaster—was a function simply of the Boy Scouts' own feelings of compulsion. Whether observers believe the Boy Scouts is speaking should be beside the point, for the liberty is theirs, not the audience's. Similarly, the beggar who intends to communicate the failure of social policies will be protected for speaking that idea even though everyone who sees or hears him understands his message to be, "Mister, give me a dime." The protected act of speaking, however, is limited to the intended message, so the beggar who only seeks a dime but is understood to voice despair over failed social policies will get whatever constitutional advantage or protection is associated with asking for a dime and will not get the benefit of constitutional protection for voicing a larger and more political message of failed social policies.

Neither the speaker-audience nor the pure liberty theory exists in isolated purity in the decided cases. Instances of each can be found scattered throughout First Amendment decisions.⁴⁰ More notably, re-

³⁷ This is the essence of the theory underlying Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting), and the Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁸ BAKER, *supra* note 10, at 47-51.

³⁹ Cf. *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993) (explaining that the act of begging involves expressive conduct for First Amendment purposes regardless of whether the message conveyed is a particularized social/political message or simply one of personal need, but that the message protected will be that intended by the speaker (begging) and not a distinct social message attributed to the beggar's request by an audience (social despair)).

⁴⁰ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (refusing to hold that "the State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury . . . when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (holding that the liability standard for recovery of presumed or punitive damages resulting from defamation of a private individual requires "a showing of knowledge of falsity or reckless disregard for the truth"); *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing an obscenity test from the perspective of "an average person, applying contemporary community standards" (quoting *Roth v. United States* 354 U.S. 476, 489 (1957))); *Cohen v. California*, 403 U.S. 15, 20-

flections of one or the other can be found in the rules courts apply when ascertaining the meaning of an instance of speech for purposes of judging the speaker's liability or determining whether government regulation based on its content is warranted.⁴¹ Despite their differences, however, both variants have in common a core premise that the free-willed act of individual expression is central to liberty and to the First Amendment's free speech guarantee. The concept of liberty will therefore be the main focus of our discussion of the theory and of the ways in which it differs from the artifactual theory in its assumptions, the way it operates, and its implications.

The liberty theory, especially the pure liberty theory, avoids many of the problems of the artifactual theory. The ways in which it does so are worth mentioning at the outset in order to better define the liberty theory, understand its principal advantages, and identify the distinct problems that it presents. The first problem avoided by the liberty theory concerns the scope of the First Amendment's coverage. Under the artifactual view, it was difficult to explain how, even under the audience liberty wing of the theory, "speech" protected by the First Amendment could be limited to expressive stimuli of human origin (much less originating in independent acts by individuals). The liberty theory avoids this problem, for if free-willed belief is uniquely human, there is no reason to extend protection to expressive acts, even intended ones, by non-human actors. The dog's bark, for example, is surely an expressive act, and one intended in some sense, but it is not the product of human consciousness and free-willed belief.

Likewise, the liberty theory restricts protection to an *individual's own* free-willed acts of speaking, thus excluding a wide range of expression with a human origin that, nevertheless, fails to reflect the speaker's *own* views. The corporate message reflecting no one person's beliefs, but rather those of a group or organization; the speech communicated on behalf of another, such as the advertising script or the act of reading it; or the inadvertent message or image conveyed, for example, by the accidental formation of scrabble pieces into a word or image, do not qualify for First Amendment protection as acts

21 (1971) (protecting the individual freedom to express political belief no matter how the expression is understood or received, provided the speech does not fall into an established exception, e.g., fighting words).

⁴¹ See Randall Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 286-315 (1998) [hereinafter Bezanson, *The Quality of First Amendment Speech*] (describing how the Court has followed three approaches in the assignment of meaning to communication: idiosyncratic meaning (meaning is not a question for courts, but rather is best left to individual interpretation); court-applied rules (based on audience interpretation, speaker intent, or literal text); and complex meaning (considering all elements of a communication's meaning (including speaker intent, text, audience, and their dynamic interaction)); see also Randall Bezanson, *The "Meaning" of First Amendment Speech*, 54 ETC: A REVIEW OF GENERAL SEMANTICS 133, 133-44 (1997) [hereinafter Bezanson, *The "Meaning" of First Amendment Speech*].

of speaking by the individual(s) producing them.⁴² The First Amendment only protects the individual's liberty to express his or her own views or intentions.

Second, the liberty theory avoids the often intractable problem of assigning meaning to a speech artifact, at least as a definitional matter.⁴³ The Constitution's protection attaches to the act of speaking. What is said and how it is interpreted are unimportant to the fact of the exercise of liberty. Therefore whether an instance of speech has occurred, and what it consists of, is a function of an individual's intention, not of interpretation of words, symbols, conduct, or stimuli that might be understood by an audience as expressive. It follows, also, that for constitutional purposes the audience's freedom to hear is unimportant, at least in the sense that the audience has no independent constitutional right to hear, and therefore the difficulties in assigning meaning to what has been heard are avoided.⁴⁴ This view would be decisive in *Dale*, for it would require the Scouts to argue that the act of employing (indeed retaining) someone, itself, was intended as speech, which the Scouts denied by the very terms of its "compelled" speech claim. Such an argument, if successful, would effectively transform all acts into speech.

Finally, the audience's "right" to receive speech, often an explicit part of the artifactual theory, is inadmissible under the liberty theory. As such, a right implies the power to compel speech, or at least to regulate it in service of some social or political interest in balance, truth, or fairness. The recognition of a "right to receive" information or ideas is flatly inconsistent with preservation of the individual's liberty to decide whether to speak and what to say. The interpretive problems associated with defining meaning in order to judge balance, fairness, equality, or truth are thus escaped under the liberty view: escaped, that is, at the definitional level, but not fully avoided at later stages if government attempts to justify regulation of the admitted act of expressive liberty on the ground, for example, that it caused harm.⁴⁵

But the avoidance of many of the problems associated with the artifactual theory carries with it the emergence of new and different, and perhaps equally daunting, problems. For present purposes I will

⁴² For a discussion of these and other implications, see Bezanson, *supra* note 11.

⁴³ The problem of meaning cannot, of course, be escaped even under the liberty theory when the claim is that admitted acts of expressive liberty present such dangers (destruction of reputation, disclosure of secrets, incitement to violence) that they can be prohibited notwithstanding the Constitution's protection.

⁴⁴ Randall Bezanson, *The "Meaning" of First Amendment Speech*, *supra* note 41, at 146; Bezanson, *The Quality of First Amendment Speech*, *supra* note 41, at 298-300.

⁴⁵ The clear and present danger test is an illustration of a means of ascertaining meaning (in terms of both intention and audience interpretation) of speech, its effect (causative properties with audiences), and harmful consequences. Obviously, the approach to meaning as a part of such a balancing judgment is complex and cannot be reduced simply to intention. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

mention three, returning to them in greater detail at a later point in the discussion. First, the liberty theory requires that acts of expressive free will be defined and distinguished from other acts producing "speech." Second, those who support the theory must defend its exclusion from constitutional protection of a large range of expressive activity, or "speech," that we now take for granted under the First Amendment. Third, the liberty theorists must explain how guaranteeing individual liberty but not protecting all forms of speech will produce the indisputable structural purposes of the First Amendment—self-government and a free society—as well as, if not more effectively than, the artifactual theory. In the alternative, liberty theorists must explain why the structural purposes are dispensable. For present purposes, however, let us put these specific problems aside and look first to the textual and historical basis for the liberty theorist's interpretation of freedom of speech under the First Amendment; for if the liberty theory is *required* by the text and history of the Constitution, the answer to these questions might be taken as a given, answered as a matter of law by the Constitution's design.

The text of the First Amendment does not speak of the liberty of speech, but rather the freedom of speech.⁴⁶ As a consequence, no express textual claim can be made for the liberty theory, though nothing in the text is inconsistent with it. In this respect the liberty and artifactual theories stand on the same footing: The text of the guarantee can, but need not, be read consistently with either view.

The meaning of the text can, of course, be seen as a reflection of the intentions of those who framed it, those who wrote it, those who debated and voted on it, and the larger body politic that ratified it through their representatives. On these questions there is a fairly extensive record of arguments and statements made contemporaneously with the drafting and ratification of the Constitution and, later, the Bill of Rights.⁴⁷ The long and short of the record, however, is much like the text. Arguments and justifications grounded in individual liberty and freedom were often voiced, as were arguments more closely associated with the artifactualist view that the free exchange of speech—of ideas and information—was necessary to the liberty of the members of the body politic and to the experiment in

⁴⁶ "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

⁴⁷ See, e.g., LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 176-248 (Harper Torchbooks 1963) (1960) (discussing the status of American speech and press from the Revolution to the ratification of the First Amendment); 4 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 122, 609 (Max Farrand ed., rev. ed., 1966) (recording the submission by Charles Pinkney of a proposal that "[t]he liberty of the Press shall be inviolably preserved"); David Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455 (1983) (providing an extensive overview of the legislative history of the Press Clause and of various interpretive approaches to that history).

self-government. Both theories can find support in the record. Indeed, on a quantitative scale, the artifactualists would likely win.⁴⁸

The liberty theory's principal historical support rests on earlier roots: the struggle for freedom of religious belief and conscience in England. America became a land forged on elimination of the bonds between church and state and on preservation of the individual's own free-willed capacity to develop and hold his or her own religious beliefs free of state compulsion.⁴⁹ Of course the First Amendment's religion guarantees can be seen as fully responding to these concerns, thus rendering the same argument under the speech guarantee redundant.

But the liberty theorist would respond to this in two ways. First, the origins of expressive freedom in religious belief reflect importantly on the underlying idea of individual freedom of belief, a core idea that animated the broader array of liberties guaranteed under the Constitution and, specifically, the First Amendment. Second, if the religion guarantees were grounded upon an assumption of individual free will in matters of religious belief, protecting free will in other matters of conscience and belief under the free speech guarantee is not redundant, for there is no reason to suspect the Founders of believing that intellectual free will was limited to religious insight. Indeed, to fail to extend the Constitution's protection to expression and belief on non-religious matters—matters of conscience, morals, political conviction, social organization, interpersonal affairs—would be to leave a large gap in the idea of individual freedom and liberty, a gap made even more difficult to explain in light of the Constitution's principal focus on establishing a structure of limited government subject to popular control through democratic means. Questions of freedom of political belief were thus as paramount in the minds and intentions of the Framers as were questions of religious freedom. Indeed, questions of religious belief were, at the time, questions of politics and philosophy as well.

Notwithstanding the relatively strong argument the liberty theorists can make for their central interpretive claim, two qualifications must be acknowledged. The first is that across the landscape of statements made in connection with the First Amendment, those couched in the liberty theorists' terms were actually fewer in number compared with those grounded in the structural ends of self-government and the importance of information and competing ideas

⁴⁸ There is a voluminous literature on the historical record and the implications of the competing theories. See, e.g., RANDALL BEZANSON, *TAXES ON KNOWLEDGE IN AMERICA* (1994); ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1942); E. HUDON, *FREEDOM OF SPEECH AND PRESS IN AMERICA* (1963); LEVY, *supra* note 47; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; see also *infra* note 53.

⁴⁹ See, e.g., LEONARD LEVY, *THE ESTABLISHMENT CLAUSE* (1986) (tracing early establishments of religion in the colonies, as well as the history and interpretation of the Establishment Clause, and concluding that the Constitution mandates a complete wall between church and state).

for an informed electorate.⁵⁰ The second qualification is that the predominance of structuralist arguments reflects the practical and political character of the issues and the persons speaking on them. The Founders were, by and large, engaged in an enterprise of practical political philosophy.⁵¹ They were not seeking a theoretically and philosophically perfect state, but a practically efficient and manageable one.⁵² They were concerned more, in other words, with the facts of real life, such as the importance of avoiding a monopoly on information, especially if government is the monopolist, and the value of an open field of play for facts, ideas, and opinions that might enable the citizens to control their own government, rather than the opposite. Thus the Founders set out to design practical political instruments. They did not dwell much, if at all, on the nature of free will, human belief formation, or even on the question of whether preserving the individual's liberty to speak would more likely achieve their ends than immunizing speech from government control regardless of its source, but rather conditioned on its truth, balance, and value.⁵³

In short, the fairest conclusion to draw from the text and history of the First Amendment is that both the artifactual and the liberty theories can marshal strong arguments on their behalf. Neither are inconsistent with the Constitution, but neither is one more consistent with the Constitution than the other. As we shall see, this very conclusion may be used in support of a middle ground theory, which recognizes both the artifactual/structural view and the liberty view, keeps each separate from the other, and sees the Constitution as protecting speech derived from each or either view, calibrating the extent of protection differently for each. But our present focus is on the liberty theory. The conclusion that it is consistent with the text and history of the First Amendment, but not more consistent than

⁵⁰ *Supra* note 48.

⁵¹ See ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 3-30 (1975) (arguing that two philosophical traditions—contractarian and Whig—have dominated American constitutional government since its inception).

⁵² As Robert Post has argued, American constitutional law generally, and First Amendment jurisprudence specifically, serves three practical, social goals: "[L]aw creates community when it seeks authoritatively to interpret and enforce shared mores and norms; it is managerial when it organizes social life instrumentally to achieve specific objectives; and it fosters democracy by establishing the social arrangements that carry for us the meaning of collective self-determination." ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 2 (1995). See also SUNSTEIN, *supra* note 9, at xvi-xvii (arguing that the Madisonian conception of free speech "linked the First Amendment to American revision of sovereignty and to a particular conception of democracy").

⁵³ Indeed, both views were expressed—at the same time—in the debates surrounding the First Amendment. See, e.g., *THE COMPLETE BILL OF RIGHTS* 83-92, 96-119 (Neil H. Cogan ed., 1997) (presenting the various versions of the free speech guarantee and writings surrounding ratification as illustrative of the competing ideas of freedom of conscience and responsibility for conduct of public discussion); BEZANSON, *supra* note 48, at 55-87 (examining knowledge taxes from the Colonial period through ratification of the First Amendment and concluding that structural ends of the press guarantee, in contrast to speech freedom, dominated).

the competing artifactual theory, suggests that we must turn our attention to the logical premises upon which it rests and to the problems that it presents. We will explore these matters initially through discussion of four central assumptions, or premises, of the liberty theory.

First, the liberty theory rests on the assumption that free-willed speech is identifiably different from other speech. The theory requires that acts of speaking that reflect the individual's own free-willed intentions be distinguished from a much wider range of acts that fail to do so but whose failure is not apparent on the face of the act.⁵⁴ To make this distinction, rules of decision must be enforced and inquiry into state of mind will be inescapable. This inquiry may be no less daunting than ascertaining meaning ascribed by an audience. If anything, the law's experience with state of mind inquiries in the libel setting⁵⁵ and in the criminal law suggests that serious problems will have to be overcome.

Second, and more basically, the liberty approach must at some level explain what is meant by human free will in the expressive setting, as well as the relation between the freedom to *express* free-willed beliefs and intentions, on the one hand, and the more basic liberty of conscience, belief, and self-definition on the other. Of what does free will consist? Does it have to do with the content of expression—origination with the speaker, for example—or, more likely, with the more limited idea of intention to speak for oneself, or intention to claim the responsibilities of authorship? These are questions that have confounded philosophers and scientists for centuries, and that

⁵⁴ It can also be argued that the liberty theory requires justification for including certain free-willed acts—speech acts—in the name of protecting liberty while excluding other acts by which free will is manifested, such as conduct. See generally JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 249-71 (1989) (arguing that belief-mediated distresses, such as shame and guilt, are different in kind from non-belief-mediated distresses, such as pain, and that only the latter can give rise to a claim by the victim against the inflicter); Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 *ETHICS* 635, 635, 652 (1993) (considering and rejecting the "lesser harm" hypothesis, which states that "the negative consequences of a certain category of acts are sufficiently different in kind or degree to justify treating those consequences differently from the way in which seemingly similar consequences are treated"). Schauer, Thomson, and others have roamed that terrain more ably than I could do, so I will not do it here. Suffice to say that the upshot of the philosophical inquiries into the differences between speech and conduct and the claims that liberty exercised through speech is rightly privileged is that no clear answers can be proved one way or the other. My view does not rest on the philosophical inquiry, however (except, admittedly, implicitly). I believe that acts of free willed expression can be singled out because the Constitution itself rests on that distinction, whether it is philosophically sound or not. The text and the history of the First Amendment are sufficient, for my present purposes, to set a boundary on First Amendment speech in terms of acts of expression.

⁵⁵ See Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 *N.C. L. REV.* 7, 109 (1994) (examining the development of libel law since *New York Times Co. v. Sullivan* and concluding that the courts, in applying subjective intent standards of actual malice, "have become entangled in evaluations of virtually every aspect of the news process, from the first steps in researching a story, through the complex business of writing and editing the final product").

continue to do so. Is it acceptable simply to rest the theory on the assumption of free will, recognizing its uncertain meaning? Is this assumption any less reliable than the artifactualist's assumptions about audience meaning and interpretation? Is the interrelated assumption that intentional expression of ideas is conducive to, indeed perhaps a precondition of, the capacity for free-willed formation of beliefs well founded? Perhaps the close evolutionary relationship between consciousness—the capacity for abstract thinking—and language and art⁵⁶ are sufficient to warrant holding to the assumption until it is disproved. But the same kind of argument could be made in support of the artifactualist's denial of a universal capacity for discernment.

Third, the liberty theory must explain why its failure to extend constitutional protection to many communicative stimuli of non free-willed origin is acceptable. A large portion of what we today experience as speech would be disqualified from protection under the liberty approach: the campaign contribution; the commercial advertisement; many political advertisements; perhaps even many statements made (officially) by public officials and corporate executives or those who represent the views of others, such as lawyers. Art, a creative enterprise, would be firmly protected, but only if and to the extent that it is the product of an individual's own creativity. The once commonplace object—say, for example, a Marlboro Ad featuring the Marlboro Man—that is seen as an artistic icon in the mind of a reader twenty years later would not qualify as creative expression, at least absent some increment of transformation by a later speaker.⁵⁷ Is this an acceptable result and one consistent with the Constitution's design?

This leads to the fourth question. Can a pure liberty-based view of the First Amendment be squared with the fact that speaking is a social act whose benefits to the social and political order arise only if speech is heard and understood, challenging others to think and, perhaps, respond, and yielding deeper understanding from the constantly circular pattern of stimulus and response? If a person is isolated in her liberty to speak and hold beliefs, is that liberty meaningful in the absence of interaction with other beliefs? In a sense the claimed "right not to speak" rests on an isolated, non-interactive view of speech liberty, as does the Boy Scouts' pure liberty claim in *Dale*. The Scouts claimed, in effect, a freedom from being dragged into the public spotlight. The speaker-audience variant, of course, addresses

⁵⁶ See *supra* note 28.

⁵⁷ This is the clear implication of the commercial speech doctrine and theory, which makes the definition of speech a purpose-oriented matter focused on the speech transaction in which the initial parties are involved, even though one might argue that the speech exchanged (e.g., a Marlboro ad) will likely become a cultural symbol of greater and different meaning in the future.

this issue head on, requiring that the protected act of speaking consist not only of an attempt at expression with another, but also of its success. But what of the question, under either liberty view, whether liberty alone is sufficient to assure accomplishment of the Constitution's structural purposes of facilitating self-government and an informed citizenry?

The liberty theorist answers this question in much the same act-of-faith manner as the artifactualist who rests belief in a benign hand of government that will assure truth and balance.⁵⁸ The liberty theorist relies on the free market assumption that one need not privilege interaction or require an audience to generate competing views and ongoing dialogue *as long as everyone enjoys liberty*. The assurance of balance, adequate information, fairness, and even truth can be left in the hands of the individual as long as all individuals enjoy liberty. But can we really afford so blithely to run the risk that wealth disparities may, in fact, seriously affect political dialogue in a post-soapbox, media-driven, and capitalist information marketplace? Or does the liberty theory's exclusion of money and corporate speech from constitutional protection eliminate the risk by an alternative route, disqualifying campaign contributions and corporate messages as speech and thus permitting their regulation?⁵⁹

The "pure" liberty theory treats as *definitionally* irrelevant the social and political purposes of the First Amendment—the fostering of open distribution of information and opinion by which people can engage in democratic self-government. The speaker-audience liberty theory, in contrast, recognizes interaction among persons as definitionally essential for speech, yet it does not permit the individual's liberty to speak to be constrained in order to serve these structural interests. But how, the artifactualists argue, will those interests be safeguarded and how will self-government be preserved? This is the cart and horse problem in reverse. The liberty theory assumes that preserving individual liberty not only will produce enlightenment in self-government and preserve a free political and social order, *but that without liberty these ends cannot be achieved*. Which comes first, freedom or equality? The answer is far from clear. Both are possible, but it is clear that for freedom to come first we must have a full-bodied belief in the individual's capacity for independent will and discernment.

In the end, it seems, the two competing views come down to two central and competing assumptions. For the artifactualist, more information is always better and more equality of information is best.

⁵⁸ See Post, *Managing Deliberation*, *supra* note 26, at 678 (arguing that while "government management is indispensable to achieve our desired purposes and ends," still "we ought not willingly and cheerfully to abandon our last vestigial commitments to the project of collective independence and freedom, even for the most beguiling visions of progressive reform").

⁵⁹ This is the implication of the Court's opinions in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

This is because the individual's capacity for discernment—for the development of independent and free-willed convictions—is seen as limited, or as easily manipulated and subject to coercion and implanted bias. In the alternative, some artifactualists dispute individual discernment and free will altogether, seeing only collective action. The risk that the individual will simply follow the crowd is too great to place all of our faith in liberty.

For the liberty theorist the individual's capacity for discernment is full bodied; free will is a fact. If the individual follows the crowd, or abides by tradition or long-standing convention, it is because he or she freely decides to do so. Habit, culture, convention, and social or economic pressure neither constrain nor excuse individual free will.

Neither of these competing assumptions can be proved or disproved. They fall in the realm of theory—informed theory, to be sure, but theory nonetheless. An informed person might say, reflecting on the competing arguments, "They are both true, but neither is entirely true. I know some damned cranky and independent people, but I also know others who seem to have no self-awareness. So I'll take a little bit of both, hedging my bet." Such a person might be a middle grounder—either on purely pragmatic grounds or as a matter of principle. We will consider each possibility shortly.

For the moment, however, we can say something positive about the liberty theory. While its assumptions are tough and its results often hard to swallow, the First Amendment protection that it yields is logical and coherent. It is good theory, in other words, even if the artifactualist would argue that it is bad politics. Some would say that that is an apt description of the Supreme Court's decision in *Dale*: good theory, bad politics.

III. A MIDDLE GROUND VIEW: SPEECH AND SPEAKING

Nothing in logic or in the Constitution, of course, forces us to choose between the artifactualist, who doubts the individual's capacity for discernment and places confidence instead in the collective will, at least when steered properly, and the libertarian who distrusts the collective, doubts its power, and places all bets on the individual's capacity for free will and discernment. We can instead hedge our bet, accepting both and simply prioritizing them. This is the middle ground: The territory in which, like *Dale*, a little liberty is mixed with a dose of artifact, with a First Amendment resting on both individual liberty and on more instrumental and structural purposes.

The middle ground has all the markings of compromise and perhaps even cowardice. On reflection, however, this need not be the case. The First Amendment can easily—most easily, perhaps—be seen as serving two masters, and doing so in a perfectly principled and coherent way. But even if this were not the case, would compromise be a dirty and disqualifying constitutional label? I think not.

The Constitution was framed as a practical document by men drawing on Locke, Rousseau, Mill, and abhorrence of persecution for matters of religious and political conscience. The Framers also drew on their experience with the long history of attempts by the Crown and Parliament to control the information made available to the common citizens.⁶⁰ As Collet's King of the Tonga Isles put it when first introduced to the art of writing and the idea of his subjects learning to read: "I should be surrounded with plots!"⁶¹ They knew, in other words, the power of information and opinion and their capacity to reign in the abuse of power.

The Framers, in short, drew on diverse and, occasionally, competing ideas about the place of free expression in a democratic state. Their ultimate solution, the "freedom of speech, and of the press," need not be philosophically pure and metaphysically coherent. It was, in a Burkean sense, an idea of progress that they chose, with deliberate ambiguity (as all *collective* drafting efforts are). It was crafted precisely, in other words, to avoid the hard and even dark edges of any of the philosophically coherent theories—neither Locke, Rousseau, Mill, nor others, but rather all of them in due measure. If this is compromise, it is compromise in the name of principle and high politics.

The same process of competing ideas can, of course, also be forged into theoretical and philosophical form. Free expression in a self-governing state can and should reflect two foundational ideas: the individual's liberty to hold and express belief as a manifestation of human free will; and the systematic importance of an open forum for fact and opinion as an instrument of public enlightenment and a means of controlling power that thrives on secrecy. These two basic ideas can coexist, almost always without friction. Indeed, they are both philosophically and practically interdependent. The only thing required for their complete marriage as twin principles is their priority. When they do conflict—when, for instance, it is claimed that my freedom to speak should be curtailed in the interest of giving competing views an opportunity to be heard—we must decide which principle, liberty or collective enlightenment, should control.

Happily, the question of priority is not difficult. The Framers believed fervently and without exception that the great invention of the American government was the centrality of the individual—each individual—to the state, a precondition of government by the will, or with the consent, of the governed. To hold to this premise yet deny primary place to individuality and free will would be to convert the

⁶⁰ See BEZANSON, *supra* note 48, at 6-87 (discussing knowledge taxes in England and colonial America and their influence on the First Amendment); FREDERICK S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776*, at 5-7 (1952) (arguing that the views of Jefferson and Madison on the function of press in society emerged from three hundred years of English history).

⁶¹ COLLET DOBSON COLLET, *HISTORY OF THE TAXES ON KNOWLEDGE* 1 (1933).

constitutional scheme into an elaborate hypocrisy, a Machiavellian scheme to grab and hold power.

But the conclusion favoring free will stands also on pure and necessary logic. If the imperative of openness and of a forum for information and opinion has any meaning, that meaning rests ultimately on the capacity of the individuals in society to receive it and to grapple with it: in short, to discern. The capacity to discern depends, in turn, on the capacity for thought and belief, and on the ability to express that belief and encounter competing ones. Without individual liberty of belief and expression, none of the ends of the Constitution, structural or otherwise, would make sense. Liberty therefore must be first: neither absolute nor exclusive, but rather first.

The contrary view—that collective interests are first and liberty second—must in the end rest on a premise that only some are capable of independent thought and discernment, while most are too dumb, and that the purpose of the First Amendment was therefore to facilitate the education of the many by the intellectually privileged few.⁶² Many intellectuals, and others, have expressed concerns about the mob rule tendencies of the body politic and the capacity of self-interest, such as prejudice or even the sheer power of money, to sway them. Happily, this view need not be disproved to be dismissed. It need only be placed in the context of history. The struggle in England against the stamp, by which information was priced too dear for the common citizens; the aspiration for freedom of religious belief and practice, surely not the exclusive province of the elite; the idea of limited and decentralized government responsible and accountable to the public; each of these were central ingredients in the heritage from which the Constitution emerged. Selective or only partial human capacity for self-determination and self-government would be anathema to them all.

The middle ground view, then, neither accepts nor rejects the basic assumptions of the artifactualist or the libertarian. It hedges its bets, taking something from both, but keeping each in its place. Liberty comes first, for the individual's free will, while contested by many, is constitutive of the Constitution's democratic scheme. But to the extent not inconsistent with genuine claims of individual liberty, structural efforts to assure access to the speech marketplace, fairness and truth in public dialogue, and balance in views presented, are re-

⁶² This view is hauntingly similar to that resisted in a statement by the People's Charter Union in 1849, in the final stages of the struggle against the Stamp in England:

We are told that Englishmen are too ignorant to be entrusted with that franchise which is now nearly universal in Western Europe; we demand, then, that ignorance should no longer be compulsory. . . . By the penny stamp not only are we debarred from the expression of our thoughts and feelings, but it is made impossible for men of education or of capital to employ themselves in instructing us. . . . [I]f you cannot give us this knowledge, at least do not prevent us from seeking it ourselves. . . . Those who should do so would brand themselves indelibly as the willful oppressors of the poor. . . .

Id. at 44-45.

strictions that can be impressed on speech when it is not a manifestation of liberty, but instead an artifact of meaning.

How would the middle ground view be applied in the *Dale* case? What light might its application shed on the *Dale* case?

It might first be said that for an artifactualist, the conclusion that Dale's persona itself emitted a message in the minds of those listening and watching was exactly right. The message, a pro-gay message, ought to count under the First Amendment for it carries a coherent, politically relevant, generally understood point of view. The same can be said for the message carried by the Boy Scouts—a message, before Dale's homosexuality became known, of moral straightness and a message afterwards of acceptance and tolerance. The fact that the latter message was attached to the Scouts by virtue only of Dale's status as Assistant Scoutmaster and the law's command that the status not be severed should make no difference to the fact of "speech" occurring, for the symbolic messages assigned to the Boy Scouts were also, like those carried by Dale, commonly understood and politically, culturally, and socially relevant.

Both messages should be deemed speech for purposes of the First Amendment, but their level of protection is a different matter. Neither message can lay claim to protection as an instance of individual liberty; neither was the product of an intent by Dale or the Scouts to speak. The speech was artifactual, and can claim constitutional protection based largely on its value in the system of expression, not on its importance to individual liberty.

In marked contrast, the Scouts' claimed speech right was purely liberty-based. The Scouts claimed that it was forced to speak when it would have chosen not to and forced to say what it would have preferred not to. This is a distinctly liberty-grounded claim. Indeed, since it rests on a disclaimer of the speech artifact assigned to the Scouts, the claim can rest on no assertion of intentional speech. Moreover, the Scouts' claim of liberty not to speak a message that is neither intended nor wanted implies, by definition, a direct conflict between the artifact of speech at the center of the controversy, on the one hand, and the liberty of speech (or freedom from forced artifactual speech) on the other.

This formulation of the Scouts' speech claim raises two questions, neither of which the Supreme Court addressed or even, perhaps, imagined. First, accepting that a liberty-based speech claim will prevail over an artifactual claim when the two conflict, does it make sense to expand liberty-based claims beyond intentional speech acts to involuntary ones? Should the right not to speak defeat the protection otherwise afforded to the speech itself, as an artifact of communication? Is the right to remain purposefully mute as important to liberty as the right to speak out? Pure libertarians (as I have used the term) would say yes. Those libertarians who nevertheless see free speech as a social transaction yielding not just liberty but also (and

secondarily) interpersonal, cultural, and political benefits would say no.

Second, should the Boy Scouts, an organization comprised of millions of parents and kids from all walks of life, be enabled by the First Amendment to even *make* a claim to the liberty to speak, much less a liberty not to speak? Does "liberty" really have anything to do with the Boy Scouts' refusal to carry the artifactual message of tolerance that Dale unwittingly thrust upon it? As Chief Justice Rehnquist famously (though in dissent) said about another objecting corporate speaker in a case decided some years ago, "Extension of [First Amendment protection to corporations based on] individual freedom of conscience . . . strains the rationale . . . beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' . . . is to confuse metaphor with reality."⁶³

The middle ground rests on both liberty and structure: the liberty of *individuals* to speak their minds in a society in which information and opinion are openly available in order best to assure liberty through self-government and self-determination. Liberty should come first, but only when it is truly at stake. In any case involving a claim of liberty to speak, a decision favoring liberty should be presumed also to serve the structural aims of the First Amendment. Only upon the clearest of evidence should liberty be sacrificed in the name of collective enlightenment, and even then no more than absolutely necessary to avert the harm. On the other hand, in a case in which no claim of liberty can be made because no one's *individual liberty* is at stake—in a case involving a corporate commercial advertisement, for example, and perhaps in one involving a group claim like the Boy Scouts'—the protection accorded the challenged expression should rest not on liberty but instead wholly on the structural and collective ends of the First Amendment and the Constitution: Is the expression relevant to a self-governing and self-determining people, and can its expression be squared with the need for an open forum in which all ideas and information can be obtained by everyone in the body politic? Speech that is the product of liberty should never be made to serve these ends; speech that lays no claim to liberty may always be made to consist with them.

⁶³ Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Calif., 475 U.S. 1, 33 (1990).