## States as Speakers

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I do not teach the First Amendment, and when I started thinking about my paper for this conference, I realized the first thing I needed to do was to figure out just what the "new First Amendment" was. Reassuringly, it turned out as best I can tell to be the same First Amendment that was new a decade or so ago. The new First Amendment, as I will be using the term in this paper, is essentially what Chris Eisgruber refers to in his paper as the "optimal flourishing" conception of free speech. This conception is not the starting point of the model, but rather its conclusion, and it is worth spending a little time discussing how that conclusion is reached.

In terms of legal theory, the new First Amendment is perhaps best described as the product of a Legal Realist perspective, and it has essentially three related themes. The model against which it reacts starts by assuming a baseline of governmental nonintervention. It sees individual speakers as the appropriate objects of First Amendment solicitude, and it seeks to protect them from governmental attempts to interfere with their ability to speak.

The realist critique challenges each element of this model. Its starting point is the assertion that neither speech nor anything else occurs in a pre-legal state of nature. The modern world is subject to pervasive governmental regulation. This regulation sets up

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the conditions under which individuals speak, and those conditions are properly seen as the product of governmental action.<sup>1</sup>

Two related themes follow. Once the background of governmental regulation is brought into focus, the line between state action and inaction becomes considerably harder to maintain as a conceptual matter. In consequence, the idea that individuals are to be protected against governmental interference loses coherence, and the apparent neutrality of the baseline of government "inaction" is called into question.<sup>2</sup>

Having undermined the libertarian conception of free speech as a matter of individuals' rights against government, the realist critique requires a replacement focus. It offers the claim that the First Amendment should be understood as protecting speech, with the protection of individual speakers only a means to that end. First Amendment concerns can exist even when the government does not seem to be regulating speakers directly, and conversely, not all government attempts to redistribute speech rights should be viewed with suspicion. The focus of analysis, in short, should be the quality of the discursive environment rather than the rights of individuals. The bete noire for the realists is thus the Supreme Court's statement in *Buckley v. Valeo* that "the concept that

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<sup>&</sup>lt;sup>1</sup> This aspect of the realist critique obviously has broader applicability. It is, for one thing, a compelling rebuttal to the more simple-minded libertarian arguments in favor of the "free market." If markets, as the realists suggest, are created by governmental regulation, no sharp opposition between laissez-faire and governmental "intervention" exists. The canonical source for this critique of the jurisprudence associated with Lochner v. New York, 198 U.S. 45 (1905), and its extension to free speech issues, among others, is probably Cass Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987). More recent work in a similar vein suggests that the Lochner Court may be best understood not as defending a simple-minded laissezfaire orthodoxy but rather attempting to restrain biased governmental intervention into the private sphere, that is, implementing a sort of antidiscrimination norm via a jurisprudence focused on the limits of the police power rather than a the modern "fundamental rights" approach to due process. See generally, e.g., Barry Cushman, RETHINKING THE NEW DEAL COURT (1998); Howard Gillman, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); G. E. White, THE CONSTITUTION AND THE NEW DEAL (2000); Robert Post, Defending the Lifeworld: Substantive Due Process Jurisprudence in the Taft Era, 78 B.U. L. Rev. 1489 (1998). For a different view, see David Bernstein, Lochner's Legacy's Legacy, 82 Tex. L. Rev. 1 (2003) (criticizing Sunstein's historical analysis). <sup>2</sup> See Sunstein, supra note 1, at 903-04.

government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>3</sup>

This brief statement of the theory obviously does not do it justice; fortunately, the literature contains many excellent expositions.<sup>4</sup> My purpose here is neither to restate nor to evaluate the realist approach, though I admit I find its intellectual power undeniable. Instead, I want to consider the future of this vision—in particular, the prospects that the "new" First Amendment has for shedding its marginalizing qualifier and winning judicial acceptance.

There are two basic means by which doctrinal transformation may occur, and they mirror the two standard approaches in new First Amendment scholarship. First, there is the frontal assault: the attempt to explicitly revise existing doctrine in light of new theoretical insights. The scholarship advocating doctrinal revision in various areas is, of course, voluminous.<sup>5</sup> In the courts, the most notable current battlegrounds for this approach are copyright and campaign finance, and the results have been mixed.<sup>6</sup>

<sup>&</sup>lt;sup>3</sup> 424 U.S. 1, 48-49 (1976). Indeed, Sunstein argues that Lochner's "heirs are not Roe v. Wade and Miranda v. Arizona but instead such decisions as ... Buckley v. Valeo." Sunstein, supra note 1, at 875. See also Rebecca Tushnet, *Copyright as a Model for Free Speech: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. Rev. 1, 44 (2000) (quoting *Buckley*).

<sup>&</sup>lt;sup>4</sup> See, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L. J. 375; Cass Sunstein, *A New Deal for Speech*, 17 Hastings L.J. 137 (1994); Owen Fiss, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. Colo. L. Rev. 935 (1993). This list is far from exhaustive; there are many other worthy articles I have omitted or of which I am simply ignorant.

<sup>&</sup>lt;sup>5</sup> See, e.g., Freeing the First Amendment (David S. Allen & Robert Jensen eds., 1995); Catharine MacKinnon, Only Words (1993); Mari J. Matsuda, et al., Words that Wound (1993); The Price We Pay: The Case Against Racist Speech (Laura J. Lederer & Richard Delgado eds., 1995); Cass Sunstein, Democracy and the Problem of Free Speech (1993); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687 (1997); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989). Again, I make no claim that this listing is exhaustive.

<sup>&</sup>lt;sup>6</sup> See McConnell v. Federal Election Commission, 124 S.Ct. 619 (2003) (upholding Bipartisan Campaign Reform Act); Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding retroactive copyright term extension).

The second method of transformation is incremental creep, which lacks the ambition and drama of the frontal assault but may offer greater chances of success. The academic counterpart to the incremental approach, which is my focus in this paper, attempts to identify what we might call promising entry points—doctrinal areas in which the new First Amendment is already recognized by courts—and to build out laterally from there. Thus Rebecca Tushnet, for example, suggests that copyright withstands First Amendment scrutiny because (though perhaps only to the extent that) its restrictions on the speech of some offer a net benefit to speech as a whole. Understanding that this point has been accepted with respect to copyright, she argues, may make courts more ready to accept it in other contexts. This paper considers another possible entry point: the status of States as First Amendment speakers.

The issue of whether States or their subsidiaries can assert First Amendment rights has never been authoritatively resolved. A number of cases—including some from

As the preceding note suggests, pornography and hate speech have also featured prominently in the literature. They have not, however, proved fertile grounds for doctrinal reformulation in the courts; judges have rejected the argument that prohibitions on subjugative pornography and hate speech can be upheld as "speech friendly" regulation. See, e.g., R.A.V. v. St. Paul, 505 U.S. 377 (1992) (striking down hate-speech law as viewpoint-based); American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down ordinance defining pornography as discrimination against women). I once suggested that the rules controlling the speech rights of government employees might be changed in light of the realist critique. See Kermit Roosevelt III, *The Costs of Agencies:* Waters v. Churchill *and the First Amendment in the Administrative State*, 106 Yale L. J. 1233 (1997). Unsurprisingly, the judiciary has thus far remained

<sup>&</sup>lt;sup>7</sup> *Brown*, after all, was not an unheralded thunderbolt but the culmination of a well thought-out series of incremental advances. See Steven M. Wise, *A New Species of Rights Rattling the Cage*, 89 Cal. L. Rev. 207, 224 (2001) ("Thurgood Marshall's incremental steps on the road to Brown v. Board of Education are now legend"). I do not see a similar pattern of victories for the new First Amendment, which is why a more modest approach strikes me as more sensible.

<sup>&</sup>lt;sup>8</sup> Tushnet, supra note 3. Others have argued that copyright should be subjected to First Amendment scrutiny. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999); Lawrence Lessig, *Copyright's First Amendment*, 48 U.C.L.A. L. Rev. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stanford L. Rev. 1, 17-26 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L. J. 1 (2002). Tushnet's distinctive point is that copyright's constitutional soundness rests essentially on the new First Amendment theories, which should help us overcome the idea that these theories are, as the *Buckley* Court put it, "wholly foreign to the First Amendment." See Tushnet, supra note 3, at 44 (noting tension between *Buckley* and First Amendment argument for copyright).

the Supreme Court—offer dismissive dicta or seem to assume that the answer is no. 
However, there are really two questions here. The first is whether state actors can assert First Amendment rights against their hierarchical superiors—employees against employers, cities against states, and so on. The answer to that question is indeed a fairly clear no. Cities cannot sue their creating states, 
10 and the limited First Amendment rights that government employees retain relate to their status as private citizens; they have essentially no First Amendment rights to speak as employees, i.e., on their employer's behalf. 
But the question of whether States or state actors can assert First Amendment rights against the *federal* government is quite different. The rationale so persuasive in the former case—that the hierarchical superior is essentially regulating its own speech by

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[T]he courts of appeals that have addressed the issue have concluded that government entities do not have First Amendment rights. Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990), cert. denied, 501 U.S. 1222 (1991); NAACP v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990); Student Gov't Ass'n v. Board of Trs. of the Univ. of Mass., 868 F.2d 473, 481 (1st Cir. 1989); Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371, 379 (5th Cir. 1989); Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1038 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). See CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ('The First Amendment protects the press from government interference; it confers no analogous protection on the government.'); id. at 139 n.7 ('The purpose of the First Amendment is to protect private expression.') (quoting Thomas I. Emerson, The System of Freedom of Expression 700 (1970)).

Brief for the United States in United States v. American Library Ass'n, Inc., 2003 WL 145228, \*40-\*41. (My thanks to Marty Lederman for directing the conlawprof listserv to this resource.)

Against this authority stand several recent Supreme Court decisions—*American Library Association* included—that assume (though sometimes only arguendo) that an entity's status as a state actor makes no categorical difference to its First Amendment rights against federal regulation. See, e.g., *American Library Ass'n*, 123 S.Ct. at 2307 (reserving question on grounds that unconstitutional conditions challenge by analogous private party would fail); Arkansas Educational Television Program Commission v. Forbes, 523 U.S. 666 (1998) (recognizing speech interests of state cable channel); Grutter v. Bollinger, 123 S.Ct. 2325, 2339 (2003) (recognizing "a constitutional dimension, grounded in the First Amendment, of educational autonomy" on the part of state-sponsored law school).

<sup>&</sup>lt;sup>9</sup> The current administration seems also to take the same position. The Solicitor General's brief in United States v. American Libraries Association, 123 S.Ct. 2297 (2003), asserted in part

<sup>&</sup>lt;sup>10</sup> See City of Trenton v. New Jersey, 262 U.S. 182, 185-92 (1923); see generally Caswell F. Holloway IV, *City v. City: The Case for Full Municipal Personhood under § 1983*, 2001 U. Chi. L. F. 479, 486-87 (discussing "*Trenton* rule").

<sup>&</sup>lt;sup>11</sup> See Robert C. Post, Constitutional Domains: Democracy, Community, Management 240 (1995).

controlling the speech of its subsidiaries or subordinates—is not applicable in the latter, for as we have frequently been reminded in recent years, "States are not mere political subdivisions of the United States." <sup>12</sup>

Judge Posner recognized just this distinction in *Creek v. Village of Westhaven*, commenting, "But it is one thing to hold that a municipality cannot interpose the Fourteenth Amendment between itself and the state of which it is the creature ... and another to hold that a municipality has no rights against the federal government or another state." It has also been noted in the scholarly literature. Akhil Amar points out that the Sedition Act, the most striking example of a Founding-era violation of the First Amendment (in at least its modern version, if not the new one), met its strongest challenge not in court but in the form of government speech: the Virginia and Kentucky Resolutions. The argument in favor of state speaker First Amendment rights is far from frivolous, then; indeed, against the number of appellate decisions rejecting such rights there stand some recent Supreme Court decisions that appear implicitly to accept them. 15

The question is thus at least reasonably open. It is also reasonably timely; the First Amendment rights of state actors were crucially at issue in the Michigan affirmative

<sup>&</sup>lt;sup>12</sup> New York v. United States, 505 U.S. 144, 188 (1992).

<sup>&</sup>lt;sup>13</sup> 80 F.3d 186, 193-94 (7<sup>th</sup> Cir. 1996).

<sup>&</sup>lt;sup>14</sup> See Akhil Reed Amar, THE BILL OF RIGHTS 23-26 (1998) (describing reaction against Sedition Act). Although Amar's account is deeply rooted in the text, history, and structure of the Constitution, in contrast to the realists' essentially theoretical analysis, his assessment of the conventional view of the First Amendment is in some ways quite similar: "the individual-rights vision of the speech and press clauses powerfully illuminated a vital part of our constitutional tradition, but only by obscuring other parts." Id. at 25. See also Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 Nw. U. L. Rev. 977, 1002-05 (1999) (reviewing Amar, discussing state actor First Amendment rights).

<sup>&</sup>lt;sup>15</sup> In Arkansas Educational Television Program Commission v. Forbes, 523 U.S. 666 (1998), the Court treated the speech interests of a state-run cable channel as essentially equivalent to those of a private broadcaster. See generally Hills, supra note [], at 1003-03 (discussing *Forbes*). In Regents of the University of California v. Bakke, and more recently in Grutter v. Bollinger, 123 S.Ct. 2325, 2339 (2003) the Court relied in substantial part on the schools' First Amendment-rooted interests, without discussing their status as state actors.

action cases,<sup>16</sup> and they may also be at issue in challenges by state-sponsored universities or law schools to the federal Solomon Amendment.<sup>17</sup> It is appropriate to ask, then, what a new First Amendment theorist should think on the subject.

One answer might be that recognition of State actor First Amendment rights would be a good thing from the new First Amendment perspective. Apart from the obvious fact that the generally left-leaning academics who espouse new First Amendment theories tend also to support the State, rather than the federal, side in the affirmative action and Solomon Amendment cases (what Jack Balkin and Sandy Levinson might call the "low politics" analysis<sup>18</sup>), there are also some more theoretically respectable points. More speakers might be thought a good thing from the First Amendment perspective, especially speakers with the power to rival the most powerful private speakers. And especially powerful speakers subject to constitutional constraints. State speech, one might think, is somewhat more likely to be "good" than private speech, because the

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<sup>&</sup>lt;sup>16</sup> Although the Supreme Court made no mention of the state actor issue in *Grutter*, the law school's asserted interest in diversity was founded on a First Amendment right (or perhaps interest) in educational autonomy. See 123 S.Ct. at 2339. A similar argument could have been made on the grounds of expressive association, a la Boy Scouts of America v. Dale, 530 U.S. 640 (2000), which again would have raised the question of state actor First Amendment rights. David Bernstein, who endorsed the Dale argument on behalf of private actors, believed it was for this reason unavailable to state schools. See generally David Bernstein, The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes, 9 Wm. & MARY BILL RTS. L.J. 619 (2001); David Bernstein, Antidiscrimination Laws and the First Amendment, 66 Mo. L. Rev. 83 (2001). The affirmative action cases offer an interesting parallel to new First Amendment theory in another way as well: they present a situation in which race-conscious governmental action could, on one account, be seen as undertaken in the service of promoting equality. One hesitates to call this the new Equal Protection, given that it seems to be consistent with the understanding of the Reconstruction Congress. See Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 430-31 (1997) (listing race-conscious Reconstruction-era federal acts). And new First Amendment theorists might hesitate to associate themselves with it given its decidedly chilly reception by the Supreme Court, which in the Equal Protection context is firmly committed to the analog of the Buckley maxim. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

<sup>&</sup>lt;sup>17</sup> The Solomon Amendment cuts certain funding to educational institutions that interfere with military recruiters' "entry to campuses," "access to students," or "access ... to ... information pertaining to students." 10 U.S.C.A. §983(b). In the interests of full disclosure, I should note that I am co-counsel for the faculty and student plaintiffs in Burbank v. Rumsfeld, a suit filed in the Eastern District of Pennsylvania. I do not intend anything in this paper as a comment on the merits of that or any other Solomon Amendment suit, or on the meaning of the Amendment itself.

<sup>&</sup>lt;sup>18</sup> See J.M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1062-63 (2001) (distinguishing between high and low politics).

Constitution prohibits the government from espousing, for example, messages of racial superiority. (Indeed, from the new First Amendment perspective, one might favor big government in general, because private individuals generally have greater claims of access to government property for speech-related purposes than they do to private property.<sup>19</sup>)

But an analysis along these lines would be the approach that seeks to use the new theory as a guide in resolving particular questions; that is, it would be scholarship of the frontal assault variety. My purpose here, I've said, is to consider the utility of this issue as an entry point, and I conclude that from that perspective, new First Amendment theorists should probably argue that States do *not* have rights as First Amendment speakers.

The reason for this conclusion is relatively simple. If States do not have First Amendment rights, we are confronted with the spectacle of speech without First Amendment speakers. This creates no anomaly; the protection of speech even in the absence of rights-bearing speakers is in fact well-recognized in First Amendment jurisprudence.<sup>20</sup> And that recognition creates an entry point: the claim that the First

<sup>&</sup>lt;sup>19</sup> I am thinking here of public forum doctrine. One of the basic strands of new First Amendment theory, of course, is the claim that since the government bears some responsibility for the existing allocation of property rights, it should not be categorically barred from attempting to redistribute those rights in order to promote speech. Those in search of entry points for this claim might consider New York Times v. Sullivan, 386 U.S. 254 (1964), which could be conceptualized as the First Amendment demanding that some individuals surrender part of their property interest in their reputations in order to facilitate the speech of others.

<sup>&</sup>lt;sup>20</sup> "[W]here a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) (allowing recipients of advertising to challenge restriction); see also, *e.g.*, Bd. of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 867 (1982) ("[T]he Constitution protects the right to receive information and ideas," quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)); Lamont v. Postmaster General, 381 U.S. 301 (1965) (finding a First Amendment right to receive publications from abroad); Martin v. City of Strothers, 319 U.S. 141, 143 (1945) (First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it")(citation omitted). Judge Weinstein, in perhaps the only decision to explicitly recognize State subdivision First Amendment rights, relied indirectly on this line of authority. Holding that a municipality could assert a First Amendment right, he reasoned that a municipality is a municipal corporation, and thus protected to the same extent as other corporations. See County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (S.D.N.Y. 1989) ("A

Amendment protects speech, not speakers, is one of the central tenets of the new First Amendment, and the analysis in such cases, one might think, will naturally take a form more receptive to the new theories.

In fact, each of the main strands of new First Amendment theory can be incorporated into analysis of a speech without speakers case. With no speaker's rights on which to focus, scrutiny can be redirected to the quality and quantity of speech available to listeners. Governmental regulation increasing the available speech might not look so suspect, even if it precludes some speech in the process. Likewise, the absence of a speaker tends to destabilize the conventional action/inaction dichotomy. While it is relatively clear whether the government has acted with respect to a particular speaker, it is harder to decide whether it has acted with respect to speech in general—unless one is willing to undertake the broader analysis of speech conditions advocated by the realists.

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municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.") (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978). But the interesting thing about *Belotti*, of course, is that it does *not* say that corporations have First Amendment rights; rather, it protects their speech without deciding whether they have rights as speakers, in language very suggestive of the new First Amendment theories. See 435 U.S. at 776 ("The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect."). That, as Tushnet observes, would be a regulation similar in structure to the copyright regime—and perhaps also to some suggested regulations of pornography, hate speech, and campaign finance. See Tushnet, supra note 3, at 39-63 (exploring analogies between copyright and other "market failure" justifications for regulating speech). Chris Eisgruber's paper for this conference suggests that perhaps copyright appropriately receives minimal First Amendment scrutiny because it is "not censorious" something he apparently believes cannot be said of the other market failure regulations Tushnet considers. One of the points of the realist challenge to the idea that state inaction provides a neutral baseline is to suggest that identifying censorship may be more difficult than supposed. Another, however, is that we use the term "censorious" to identify undesirable governmental regulations of speech, and perhaps it is worth considering whether the concept of censorship current in First Amendment jurisprudence is over- or underinclusive. To use Eisengruber's terminology, even if one adheres to a "categorical prohibitions" approach to the First Amendment, it might be possible to refine the categories.

Thus state speakers could be engines of free expression in precisely the same way Tushnet characterizes copyright: they could drive the doctrine.<sup>22</sup>

"Could," of course, is not the same as "can," and the picture is not quite so rosy for those who would like to see the new theories win greater acceptance. First Amendment jurisprudence has substantially domesticated the case of speech without speakers by adopting a conventionally libertarian focus on the rights of listeners, which the Court seems to view as reciprocal and coextensive with those of the missing speakers.<sup>23</sup> Multiplying the instances of speech without speakers might not, then, immediately advance the prospects for judicial acceptance of realist approaches to the First Amendment. But it is perhaps easier to suggest that listeners' interests can be assessed by an examination of the broader speech environment than it is to tackle the Buckley maxim head-on and argue that some speakers may be silenced to enhance speech more generally. Cases of speech without speakers present circumstances in which existing doctrine might be more than usually receptive to the new theory, and they deserve consideration for that reason.

See Tushnet, supra note 3, at 3.
 See, e.g., Virginia State Board of Pharmacy, 425 U.S. 748.