JUST SAYIN'—HOW THE FALSE EQUIVALENCE OF SPEECH WITH ACTION UNDERMINES THE FREEDOM OF SPEECH

Tara Smith[*]

ABSTRACT

This Article argues that a firm distinction between speech and action is critical to the preservation of freedom of speech. The line between the two has blurred in recent years in disputes over such things as cake bakers' artistic freedom to refuse certain clients, disruptions of speakers on college campuses, whether campaign finance restrictions limit spending or speaking, and social media companies' status as platforms or publishers. For the legal system to resolve such conflicts correctly and to uphold the proper boundaries of individuals' freedom, a firm grasp of the respective referents of "speech" and "action" is imperative.

The Article is in two main parts. First, it presents the basic rationale for a legal system's treating speech and action differently. It explains that the distinctive concern of the First Amendment is the protection of intellectual activity and demonstrates how the relationship of intellectual activities to the rights of others justifies their special legal status. Second, the Article considers the case for viewing speech and action as more readily intermingled, addressing arguments that, in turn, invoke harm, power, and symbolic speech. On analysis, none of these arguments, I show, vindicates the equation of speech with action.

Finally and more briefly, the Article also considers some of the underlying sources of the conflation of speech with action, sketches the proper resolutions of a few of the recent controversies generated by

* Professor of Philosophy, BB&T Chair for the Study of Objectivism, and Anthem Foundation Fellow for the Study of Objectivism at the University of Texas at Austin. Discussions with numerous people have helped my thinking about these issues. Thanks to participants in the Columbia Legal Theory Workshop session held in March 2018, especially Philip Hamburger, Kent Greenawalt, and Seyla Benhabib; audiences at Cornell Law School and Georgia State Law School; and Sherry Colb, Arif Panju, Al Martinich, Andrew Ingram, Simone Gubler, Onkar Ghate, Steve Simpson, Mitch Feinberg, Larry Salzman, Tim Sandefur, and Greg Salmieri. I'm also grateful for research assistance from Sam Krauss and Hannah Trees.

that conflation, and explains the damage that results from continuing confusion over the speech-action divide. Essentially, when we mis-classify, we mis-protect—we protect actions that should not be protected and we restrict speech that should not be restricted.

TABLE OF CONTENTS

INTRODUCTION

In order to protect freedom of speech, we need to know what speech is. What the word "speech" refers to, however, has become increasingly contentious. My subject is the widespread confusion of speech with action.[1] Consider, for example, the

1. This Article will use the word "action" interchangeably with "conduct."

readiness with which people consider NFL players kneeling at the playing of the National Anthem an exercise of freedom of speech, or classifications of a protest march or a sit-in, of occupying an office or burning a flag, as cases of free speech.

Recent First Amendment cases have only heightened the confusion. In December 2017, the Supreme Court heard arguments in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a case in which a professional baker maintained that his baking was a form of speaking and, as such, entitled to enjoy the full protections regularly extended to freedom of expression (such that the government could not compel him to bake for a gay couple's wedding reception).[2] In the 2017 Eleventh Circuit case affectionately known as "Docs v. Glocks," physicians successfully argued that a state law prohibiting them from advising their patients about the health hazards posed by guns in the home interfered with their freedom of speech.[3] In labor law, the payment of agency fees to unions is sometimes framed in terms of free speech.[4] Here, the question is "whether public-sector unions may charge a fee to non-members for the cost of negotiating their contracts."[5] Workers who object to paying these fees argue that their freedom of speech would be violated if they were compelled to pay for "spokesmen" they do not

2. 138 S. Ct. 1719, 1728 (2018).

3. Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1311–12 (11th Cir. 2017) (holding that certain provisions of Florida's Firearms Owners Protection Act interfered with physicians' First Amendment rights).

4. *See, e.g.*, Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2484–86 (2018) (holding that public sector unions cannot constitutionally extract collective bargaining agency fees from employees without consent); Adam Liptak, *A Supreme Court Showdown Could Shrink Unions' Power*, N.Y. TIMES (Feb. 22, 2018), https://www.nytimes.com/2018/02/22/us/politics/supreme-court-unions.html (discussing the First Amendment issues at play in the *Janus* case); *Public Unions vs. the First Amendment*, WALL STREET J. (Feb. 22, 2018, 7:00 PM), https://www.wsj.com/articles/public-unions-vs-the-first-amendment-1519344027 (same); David B. Rivkin Jr. & Andrew M. Grossman, *Mark Janus Was with Hillary, Whether or Not He Wanted to Be*, WALL STREET J. (Feb. 22, 2018, 6:25 PM), https://www.wsj.com/articles/mark-janus-was-with-hillary-whether-or-not-he-wanted-to-be-1519341922 (same).

5. *Anthony Kennedy's Camelot: The Supreme Court's New Term*, ECONOMIST (Sept. 30, 2017), https://www.economist.com/united-states/2017/09/30/the-supreme-courts-new-term.

choose to represent them, as this would amount to compelled speech.[6]

My immediate concern is not to suggest the proper resolution of any of these particular disputes. My interest in the basic speech-action distinction predates the attention-grabbing controversies of the past few years. At the outset, I wish simply to indicate the variety of areas in which the lines between speech and conduct have become blurry. And to round out the quick survey, notice that the confusion runs in both directions. While the examples mentioned so far interpret what seem to be actions as speech, so speech is often construed as something fiercer, more potent than mere speech. Consider arguments over hate speech and the tactics employed at public forums.[7] The idea of a "micro-aggression" reflects the belief that the utterance of certain ideas constitutes aggression[8]—aggression of a sort that justifies violent response and/or legal restriction.[9] Support of legal restrictions on hate speech often rests on the claim that certain language amounts to an assault.[10] Commentators have

6. *See Janus*, 138 S. Ct. at 2462. For a discussion of *Janus* and the compelled speech doctrine more generally, see Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 355–59 (2018).

7. *See, e.g.*, Richard Cohen, *Protestors at Middlebury College Demonstrate 'Cultural Appropriation'—of Fascism*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/opinions/protesters-at-middlebury-college-demonstrate-cultural-appropriation--of-fascism/2017/05/29/af2a3548-4241-11e7-9869-bac8b446820a_story.html?utm_term=.aa48784bb56 (discussing a reception held at Middlebury College for Charles Murray that left a Middlebury professor with a concussion); Phil Helsel, *Protests, Violence Prompt UC Berkeley to Cancel Milo Yiannopoulos Event*, NBC NEWS (Feb. 2, 2017, 7:27 AM), https://www.nbcnews.com/news/us-news/protests-violence-prompts-uc-berkeley-cancel-milo-yiannopoulos-event-n715711 (discussing the violence that erupted over a scheduled speech by Milo Yiannopoulos at the University of California, Berkeley).

8. *See* Christina Friedlaender, *On Microaggressions: Cumulative Harm and Individual Responsibility*, 33 HYPATIA 5, 6–7 (2018) (describing microaggression as a form of oppression, which is particularly harmful because the aggressor is often not aware that he or she is doing it).

9. *See* JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 55 (1999) ("[T]he most powerful justification for a general ban on hate speech is that racist expression causes racial discrimination, including violence.").

10. *See, e.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 89, 89–110 (1993); RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 1–19 (2018) [hereinafter

observed "a rising idea that . . . speech itself can *be* a form of violence."[11] A *Chronicle of Higher Education* article reports that "[t]he demarcation between words and actions has blurred, as psychologists and activists argue that language itself can be a form of violence."[12] In the words of Nobel Prize-winning novelist Toni Morrison, "Oppressive language does more than represent violence; it is violence."[13]

In still other cases, we are simply puzzled about what an activity *is*.[14] When I donate to a political campaign, am I spending or speaking? Is Twitter a platform or a publisher? Given the myriad roles that Facebook plays in the lives of millions, is it an information service, in which case it should enjoy the same legal protection afforded to speech and the press, or is it a telecommunications company, in which case it should not?

MUST WE DEFEND NAZIS?]; RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 12–18 (2004) [hereinafter UNDERSTANDING WORDS THAT WOUND]; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 24–26 (1993); JEREMY WALDRON, THE HARM IN HATE SPEECH 35–39, 57–60, 105–06, 116–18 (2012). For critical analysis of this line of reasoning, see WEINSTEIN, *supra* note 9, at 127–35.

11. Amanda Hess, *America Is Struggling to Sort Out Where 'Violence' Begins and Ends*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/magazine/america-is-struggling-to-sort-out-where-violence-begins-and-ends.html.

12. Jason N. Blum, *Don't Bow to Blowhards*, CHRON. HIGHER EDUC. (Sept. 8, 2017), https://www.chronicle.com/article/Don-t-Bow-to-Blowhards/241048.

13. Nell Gluckman, *Weeks After Charles Murray's Visit, Middlebury Continues to Debate the Contours of Free Speech*, CHRON. HIGHER EDUC. (Mar. 28, 2017), https://www.chronicle.com/article/Weeks-After-Charles-Murray-s/239612 (quoting author and poet Toni Morrison).

14. To note just a few other disputes that raise questions concerning the boundaries of speech and action: some faculty at the University of Texas at Austin object that a law allowing possession of concealed guns on campus is a violation of their free speech rights, arguing essentially that the possible presence of deadly weapons in the classroom chills their ability to teach and oversee classroom discussion. *See* Matthew Choi, *Guns Chill Free Speech, UT-Austin Professors Will Argue at Federal Appeals Court*, TEX. TRIB. (July 11, 2018), https://www.texastribune.org/2018/07/11/ut-austin-professors-argue-campus-carry-chills-free-speech/. In Everton, Oregon, a group of baristas recently argued that a city ordinance banning them from wearing bikinis on the job violates the First Amendment, chilling their ability to convey a message of "female empowerment" and "positive body image." *See* George F. Will, *Bikini-Clad Baristas Serve Up a Lesson in Free Speech*, WASH. POST (Oct. 8, 2017), https://www.washingtonpost.com/opinions/bikini-clad-baristas-serve-up-a-lesson-in-free-speech/2017/10/04/431f1cd8-a85d-11e7-92d1-58c702d2d975_story.html?utm_term=.c4929727be10. And some have long contended that pornography is an oppressive practice, "a form of forced sex," and thus an action, not eligible for the protections that the law extends to expression. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 130, 147–48, 154–56, 176 (1987).

The upshot is, we are increasingly uncertain as to what constitutes speech and what constitutes action. Moreover, the longstanding judicial practice of providing greater protection to First Amendment activities than to most others only exacerbates confusion, as it subtly encourages people to describe all manner of activity as speech and to seek First Amendment shelter for their activities.[15]

However each of these individual disputes should ultimately be resolved, the frequency and intensity of these debates testifies to our tenuous grasp of the basic boundaries between speech and action. My thesis is that a proper understanding of the difference between speech and action is critical to the preservation of freedom of speech. Indeed, the false equivalence of speech with action works to erode the freedom of both. It bespeaks a failure to understand what freedom is and what a right to freedom entails. The long-term effect of this is the diminution of individuals' freedom.

And this is why the distinction matters. It is important to respect the difference between speech and action to ensure that the legal system protects all those activities that should be protected and restricts all those activities that should be restricted. When speaking is misclassified as acting, however—in particular, as acting of the kind that government has legitimate reason to restrict—then that speaking becomes subject to government restriction. We will allow the kinds of restrictions that legitimately apply to certain actions to infiltrate the domain of speech—to restrict speech that should properly be legally free. By the same token, when acting is misclassified as speaking, it will receive legal protection that potentially jeopardizes the rights of others. When an action that threatens others' rights is mistakenly considered speech and, on that basis, given greater deference by the legal system, those whose rights are threatened are left unprotected.

In short, misclassifying entails mistreating. When we do not know which is which and why the legal system should treat

15. *See infra* Part III.

speech and action differently, individuals' freedom pays the price. I hope to show, in other words, that the conflation of speech with conduct is not only mistaken, but destructive.

The plan is as follows. In Part I, I will present the basic case for a legal system's treating speech and action differently. That case is at once legal and philosophical. It draws on the meaning of First Amendment text, so in this respect, it is legal. Yet that meaning can only be properly understood, I believe, in light of the philosophical commitments that inform the U.S. Constitution as a whole.[16] And the First Amendment, I hope to show, reflects not only the philosophical commitments that the Framers happened to hold, but an important philosophical truth. Thus my argument is also philosophical. What is important is that it is not philosophical as *opposed* to legal, however. Rather, a prior, Constitution-independent fact explains why the First Amendment designates the activities that it does as falling beyond the bounds of proper government restriction. Essentially, in other words, the First Amendment got it right, on my view. The First Amendment reflects the philosophical truth.[17]

In Part II, I will trace and assess the principal arguments of those who deny the distinction and contend that speech and action bleed into one another such that firm boundaries cannot be drawn. These arguments invoke (1) the harm allegedly inflicted by certain speech, (2) the asymmetrical power held by different speakers, and (3) the social value of symbolic speech.

Next, in Part III, I will consider the roots of the confusion. If I am right that it is dangerous to equate the two categories, it can be helpful to understand the more basic beliefs that inform the confusions. Thus I will briefly tease out two significant contributors, one philosophical and one more practical, that help to explain the error.

---

16. *See generally* TARA SMITH, JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM (2015) [hereinafter SMITH, JUDICIAL REVIEW] (discussing the proper method of discerning the objective meaning of the Constitution).

17. In a similar vein, Frederick Schauer describes his inquiry in *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427 (2015), as "pre-constitutional and pre-doctrinal." *Id.* at 430.

While the significance of the speech-action division transcends any of the particular controversies that have arisen in recent years and while my interest is at the more theoretical plane, having mentioned a number of controversies in opening, it would be natural for a reader to wonder how my account of the distinction would apply in these cases. Therefore, in Part IV, I will revisit a handful of the examples to indicate the implications of my arguments. Although I believe that the fundamental difference between speech and action is strong, its application to specific cases can sometimes be complicated, and a full analysis of these cases would require a separate paper. Nonetheless, a brief application of my theory may be instructive for understanding its exact meaning.

Finally, in Part V, I will assess the damage wrought by the confusion of speech with action. Surveying its ramifications should only underscore how vital it is to correct it.

Before I begin, let me clarify a few parameters of this discussion. Foremost, I am using "freedom of speech" as a distinctly legal concept with a very particular meaning: it refers to the absence of government restriction.[18] While people frequently use the phrase "freedom of speech" loosely to refer to a much wider array of conditions and contexts (including restrictions imposed by employers, universities, private companies such as Facebook, and large institutions such as the NCAA),[19] the distinction that I am defending is specifically confined to the context of a legal system.[20] Correspondingly, I am also not venturing claims concerning the metaphysical

18. *See* David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 995 (1982) (acknowledging that "[t]he primary concern in most litigation arising under [the First Amendment] has been to protect individuals from government interference with their ability to communicate or associate," while also noting use of the Amendment "to protect[] . . . a corollary right not to speak or associate at all").

19. *See* Tara Smith, *The Free Speech Vernacular: Conceptual Confusions in the Way We Speak About Speech*, 22 TEX. REV. L. & POL. 57, 77–78 (2017) [hereinafter Smith, *Free Speech Vernacular*] (discussing the ways in which open, free-flowing discussion in certain private settings can also be valuable).

20. *See infra* Part II; *see also* Smith, *Free Speech Vernacular*, *supra* note 19, at 67–80 (discussing how people misleadingly use the terms "freedom of speech" and "censorship" to refer to "private, non-governmental contexts" and why those terms exclusively pertain to government restrictions).

status of "action" and "speech." My concern is solely in clarifying why the *law* should distinguish these phenomena.

Second, one can recognize the validity and the importance of the speech-action distinction while also holding that the two should be treated in the same way in a particular case for reasons that are distinctive to that case. That is, a person who appreciates the general significance of the distinction might nonetheless be correct in thinking that something that is normally speech *is* actually action (for legal purposes) in an unusual situation. For example, a person who knowingly issues a fabricated bomb threat to a crowded school is certainly speaking; yet for legal purposes, he is engaged in the action of recklessly endangering the safety of others. Similarly, a person who deliberately misrepresents the number of miles driven by his car to a would-be buyer may be speaking, but he is speaking as a means of engaging in fraud.[21] The point is, the fact that what is normally speech can, in particular contexts, constitute action does not undo the basic difference between the two.

And this leads to a more general clarification of the scope of my claims and the proper use of the two categories. The classification of an activity as "speech" or "action" is presumptive; it sets defaults for proper legal treatment of the activity in question, but it is not necessarily decisive. That is, such classification does not in all cases definitively resolve how the legal system ought to proceed. While it may suffice in most cases, if and when additional factors arise that might alter the proper legal treatment of the activity in question, those must be responsibly investigated. As the examples indicate, occasionally, specific elements of a particular situation may render something that is usually speech, an action (or vice versa). Accordingly, we cannot simply declare an incident either

21. Similar explanations underwrite the law's refusal to protect speech that is instrumental to criminal conspiracy, witness tampering, suborning perjury, and the like. *See* Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 697 (2012) ("[N]o serious scholar has suggested that speech involved in the creation or implementation of a scheme to defraud consumers or to engage in an antitrust violation is deserving of even the slightest constitutional protection. The same is true for perjury, blackmail, espionage, and a host of other activities, which seem to involve the use of language and communication.").

speech or action and move on, washing our hands of the additional questions that a particular case might raise. Designation as speech or action is not the final word as to appropriate legal treatment.

Lest one suspect that this renders the speech-action classification pointless, note that the intelligent application of a general principle always requires thoughtful consideration of the particular case to which it is applied. Principles alone (reflected in the form of laws, rules, or the like) can only guide a person so far in determining concrete action. The fact that intelligent and context-sensitive thought is required to properly apply a principle hardly means that the principle itself is hollow or useless. And here, it does not mean that we do not need to pin down the governing legal categories. Ultimately, if we are to preserve a distinctive meaning for the First Amendment, we need to know what "speech" refers to.[22]

I. THE CASE FOR DISTINGUISHING SPEECH AND ACTION

A full understanding of why a legal system should distinguish speech from action depends on a proper understanding of the role of government and the nature and value of freedom. Both, alas, are huge subjects in their own right. Here, I will simply declare my presuppositions on these matters, given that they inform the reasoning to follow.

I will proceed on the premise that the central purpose of government is the protection of individual liberty or individual rights. This is essentially how the Framers of the U.S. Constitution saw it.[23] In the words of the Declaration of Independence,

22. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 3, 40–71 (1989) (asking "what is the 'speech' that is to be free and protected?" and then engaging in an analysis of what counts as "speech"); *see also* Schauer, *supra* note 17, at 429–30 ("[W]hen we inquire into whether there can be a sound free speech principle at all, we must subject to critical analysis just what it means to draw a distinction between speech and action . . . .").

23. *See generally* THE FEDERALIST NO. 10 (James Madison) (arguing that a republican form of government would limit the threat political factions pose to individual rights); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 54–60 (2004) (explaining the Framers' discussions about protecting natural rights and liberties); RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE

it is "to secure these rights, [that] Governments are instituted among Men."[24] Individual rights are individuals' moral claims to freedom of action—to freedom from others' obstruction of their ability to rule their own lives.[25] "Freedom," in turn, of the type that is relevant to a legal system, consists of the absence of others' initiation of physical force.[26] Such force (or credible threat thereof) is the only means by which a person could violate another person's rightful freedom.[27] While many of others' actions can affect a person in undesired ways (e.g., when Green accepts the job that I would have been offered, had he declined, or when my salary is cut as my employer battles a tighter market), the distinct condition of freedom consists of not

---

PEOPLE 167–68 (2016) (discussing the structure of the Constitution in protecting "the individual sovereignty of the people"); SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 6 (1995) (asserting that the "original intent" of the framers was "to secure natural rights"); ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE 73–74 (2005) (discussing Locke's conviction that the function of government is to protect life, liberty, and property and how his ideology influenced the Founding Fathers); TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 13–14 (2014) (discussing how the Constitution's "language consistently reflects the primacy of liberty" and how it "promises to 'secure' liberty"). As Evan Bernick observes, despite their differences on other matters, "[the Framers] shared the same fundamental understanding of the proper function of government. For the Framers, as for Locke, government was a means of protecting the natural rights of the individual 'to dispose, and order as he lists, his person, actions, possessions, and his whole property . . . .'" *Reason's Republic*, 10 N.Y.U. J.L. & LIBERTY 522, 561 (2016) (quoting JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT § 57 (1689)).

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* KRAMNICK & MOORE, *supra* note 23, at 42 (quoting Constitutional Convention delegate Oliver Ellsworth as asserting that "[t]he business of civil government is to protect the citizen in his rights").

25. I am using "freedom" and "liberty" interchangeably and I will frequently use "rights" as a shorthand for individuals' rights to freedom of action. I have further elaborated on the precise meaning of these concepts in previous works. *See* SMITH, JUDICIAL REVIEW, *supra* note 16, at 99–110; TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM, *passim* (1995) [hereinafter SMITH, MORAL RIGHTS].

26. SMITH, JUDICIAL REVIEW, *supra* note 16, at 97–107; SMITH, MORAL RIGHTS, *supra* note 25, at 141–61.

27. SMITH, MORAL RIGHTS, *supra* note 25, at 141–61; *see also* SMITH, JUDICIAL REVIEW, *supra* note 16, at 97–107; Tara Smith, *"Humanity's Darkest Evil": The Lethal Destructiveness of Non-Objective Law*, *in* ESSAYS ON AYN RAND'S *ATLAS SHRUGGED* 335, 338–40 (Robert Mayhew ed., 2009) [hereinafter Smith, *Humanity's Darkest Evil*]; Tara Smith, *What Good Is Religious Freedom? Locke, Rand, and the Non-Religious Case for Respecting It*, 69 ARK. L. REV. 943, 967–71 (2017) [hereinafter Smith, *What Good Is Religious Freedom?*].

being forced by others to do as *they* wish.[28] Paradigmatic cases of violating a person's freedom would be enslaving him or confining him to a cell, beating him, or, while brandishing a knife, issuing the threat, "Give me your wallet or I'll slit your throat." When a person is free, by contrast, his ability to direct his own actions is intact. And this is what we are entitled to from others: non-interference with our authority to steer our own course.[29]

Obviously, each of these claims is controversial. In other works, I have provided extensive elaboration in defense of them.[30] Yet I believe that these are crucial foundations for a sound understanding of how the government should treat individuals' speech and individuals' action. A misshapen view of freedom will naturally distort one's notions of what is needed from the government in order to protect freedom responsibly and of whether the law should treat speech and action differently. Thus I announce my premises simply to help a reader grasp the larger framework of my reasoning and to locate the sources of our possible differences.

As we turn to the speech-action difference itself, we confront an immediate stumbling block: speaking *is* acting.[31] The two are not mutually exclusive; when a person is speaking, he is doing something. So how can I insist on a significant difference between them?

The reason for the distinction arises from the particular purpose of law. The distinction between speech and action may dissolve in various other contexts. It would be ridiculous for a casting director in theater, for instance, to assess auditionees' acting as *opposed* to their speaking, given that a performer's

28. SMITH , MORAL RIGHTS, *supra* note 25, at 125–29.

29. This entails that it is the initiation of force, as opposed to its defensive use, that would violate an individual's freedom. *See* Smith, *Humanity's Darkest Evil*, *supra* note 27, at 337–40.

30. *See generally* SMITH, MORAL RIGHTS, *supra* note 25, at 123–84 (discussing the necessity of an absence of interference, particularly physically, to individual freedom). On the reason why freedom is especially precious, see SMITH, JUDICIAL REVIEW, *supra* note 16, at 97–105; Smith, *Humanity's Darkest Evil*, *supra* note 27, at 337–40.

31. *See* Schauer, *supra* note 17, at 427 n.2 (noting that "*all* speech is a form of action").

manner of speaking is an important component of his acting.[32] My claim is not that the difference is an immutable fact of nature or some sort of ontological given. Rather, my contention is that *for the purposes* of a proper legal system, the difference between speech and action is critical. It is critical in light of the function of the legal system, which is the protection of individual freedom.[33]

A. *It's the Thought that Counts*

To see this, we should start by looking closely at the text of the First Amendment. It reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[34]

The kinds of actions protected by the Amendment—religious worship, speech, the press, assembly, and petition—share one thing in common: they are all intellectual activities.[35] In each of these cases, while the relevant activities (praying, publishing, speaking, etc.) involve certain physical organs (they are not disembodied), the activities are essentially activities of the person's mind rather than his body. Even assembly, which clearly involves a congregating of bodies, was recognized not in order to protect people's ability to exercise their muscles or to engage in physical activities, such as to run a race, play horseshoes, or build a barn. The Founders did not seek to

32. Similarly, a person's sincerity can depend (in part) on his actions being in harmony with his words, rather than sharply different from them. The person who tells you one thing but does another is widely derided as a phony. "He's *acting* like your best friend when he's with you, but you should have heard what he said about you at that party."

33. For a discussion on how the government's primary function is central to understanding how a legal system should do its work, see SMITH, JUDICIAL REVIEW, *supra* note 16, at 45–66.

34. U.S. CONST. amend. I.

35. James Madison urged explicit reference to freedom of conscience in the First Amendment, which would have made this more apparent. *See* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 18–19 (2015).

protect "assembly for its physical sake."[36] Rather, assembly was seen as vital to allow people to convey convictions—to "voice grievances" and pursue political goals.[37] Indeed, as David Cole points out, given the limited means of communication available in that era, it would have been difficult for people to organize politically without physically assembling.[38] And in this vein, Justice Charles Evans Hughes wrote for a unanimous court in *De Jonge v. Oregon* in 1937 that "[t]he right of peaceable assembly is a right cognate to those of free speech."[39]

Intellectual activities are significantly different from other activities. A person who follows the instruction, "Think about raising your right arm" does something quite different from what he would do if instructed, "Raise your right arm." When a person ponders, doubts, questions, answers, ruminates, explains, generates examples, mounts arguments, or draws inferences, his action is essentially mental. When a person hammers a nail, by contrast, or shoots pool or shoots ducks, cooks dinner,

---

36. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, *in* FREEDOM OF ASSEMBLY AND PETITION: THE FIRST AMENDMENT, ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 207, 210 (Margaret M. Russell ed., 2010).

37. Jason Mazzone, *Freedom's Associations*, *in* FREEDOM OF ASSEMBLY AND PETITION: THE FIRST AMENDMENT, ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 200, 201 (Margaret M. Russell ed., 2010). Also note the language of the North Carolina and New Hampshire state constitutions, linking assembly to petition and the expression of beliefs. N.C. CONST. of 1776, art. XVIII; N.H. CONST. art. XXXII; *see also* M. Glenn Abernathy, *The Intent of the Framers*, *in* FREEDOM OF ASSEMBLY AND PETITION: THE FIRST AMENDMENT, ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 189, 192–93 (Margaret M. Russell ed., 2010) (discussing the presence of a right of assembly in some state constitutions, and its absence in others).

38. *See* Cole, *supra* note 36, at 210. Cole further writes, "If one asks why the framers protected the right of assembly, the reasons would have little to do with the physical act of gathering together in a single place, and everything to do with the significance of coordinated action to a republican political process." *Id.* In the same vein, Linda J. Lumsden describes "the power of taking their message to the streets" for the early women suffragists. RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 22 (1997). Lumsden adds that "[t]he suffrage movement exemplified how the right of assembly can effect change," *Women and Freedom of Expression Before the Twentieth Century*, *in* FREEDOM OF ASSEMBLY AND PETITION: THE FIRST AMENDMENT, ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 195, 195–96 (Margaret M. Russell ed., 2010), and that "[n]o disempowered group can organize without assembling," *id.* at 198–99.

39. 299 U.S. 353, 364 (1937).

paints a cabinet, tosses a frisbee, knits a sweater, walks, bends, stretches, or dances, his action is essentially physical. It disrupts the external environment.[40]

To appreciate why this difference should matter to a legal system, consider a quick thought experiment. Suppose that a person enjoys complete legal freedom of speech; he is left free to say and write what he likes. Also suppose, however, that state-neuroscientists manipulate his thoughts. Their sophisticated devices completely determine his thinking processes as well as the specific conclusions that he reaches. The outward expression of those thoughts is unobstructed; the person is completely free to speak, publish, pray, etc. Yet the thoughts themselves are dictated by the government. Would this be a satisfactory state of affairs? Under those circumstances, what good would his freedom of speech do him?

This scenario reveals that it is not speech per se that warrants legal concern. It is the forming of beliefs that are worth expressing. Indeed, it is also the forming of beliefs that are not worth expressing. More exactly, what the First Amendment distinctively safeguards is the freedom to think.[41]

For the First Amendment, thought is what matters, not words being uttered. By specifying the five kinds of activities that it does, each of which turns on the agents' thinking (in choosing the basis of a petition, the purpose of assembling, the gods to worship, and so on), it clearly implies that words in themselves are insignificant. Rather, it is the thinking that is valuable. The First Amendment is calling special attention to intellectual activity as warranting firm protection from the legal system.[42]

---

40. Even if a person's intellectual activities affect his immediate physical surroundings by altering electromagnetic waves or the like, they do so to a radically lesser extent than what we normally think of bodily actions, such that a difference in kind remains.

41. I probe this more deeply in previous works. *See* Tara Smith, *Religious Liberty or Religious License? Legal Schizophrenia and the Case Against Exemptions*, 32 VA. J.L. & POL. 43, 66–70 (2016) [hereinafter Smith, *Religious Liberty or Religious License?*]; Smith, *What Good Is Religious Freedom?*, *supra* note 27, at 972–80.

42. This is not to say that intellectual activities enjoy an elevated status. Nothing in the U.S. Constitution supports the notion that some exercises of a person's freedom enjoy stronger claims to government protection than others. *See* Smith, *Religious Liberty or Religious License?*,

Truly, then, the "speech-action" distinction is a coarse shorthand for the difference between intellectual activity and non-intellectual activity. While both are volitional actions[43] (events that occur because of the will of the agent), intellectual activity is unusual in that it cannot of itself determine actions beyond one's own. By thinking, writing, saying, or engaging in any type of intellectual activity, one person cannot bring about the actions of another. In this sense, intellectual activity is self-contained.[44] Consequently, while I will continue to use the shorthand and speak of the difference between "speech" and "action," a few things must be understood.

First, because speaking is a type of acting, the raw classification of something that a person does as either "speech" or "action" is, strictly, too crude. Throughout the paper, correspondingly, when I refer to "action," I am referring more narrowly to non-speaking action, to action that is not intellectual. In other words, I am using "action" as a shorthand for "non-intellectual action" (walking, sewing, carrying groceries, etc.). Second, the salient difference is truly between intellectual activity and non-intellectual activity, or between physical, environment-altering action on the one hand and mental, me-altering action, on the other.[45] And third, I reiterate that my concern is with the difference between speech and action solely as it is relevant in the legal context, for the question of deter-

supra note 41, *passim*. The First Amendment simply calls attention to prominent forms of intellectual action (that rulers had frequently denied in the past) as genuine and as equally fully within a person's rightful freedom as other rights named or implied elsewhere in the Constitution. Ultimately, I would argue that intellectual freedom and physical freedom are symbiotic, and a person could not truly enjoy either without the other, but that is an issue for another occasion. On the relationship between the two, see Onkar Ghate, *A Free Mind and a Free Market Are Corollaries*, *in* A COMPANION TO AYN RAND 222–42 (Allan Gotthelf & Gregory Salmieri eds., 2016) (explaining how the mind is typically seen as the locus of intellectual freedom and the market is seen as offering the fruit of physical freedom, but arguing that the two types of freedom cannot be neatly separated).

43. I am leaving aside automatic, physiologically regulated processes such as a heart's beating or reflex reactions.

44. *Cf.* Schauer, *supra* note 17, at 437 (referring to "expression, compared to conduct, [as] normally more self-regarding and therefore less harmful," albeit noting this is an oversimplification).

45. This distinction could be drawn more finely, but should be adequate for our purposes.

mining proper law. Indeed, I believe that what *is* relevant to a legal system informs the difference between intellectual activity and non-intellectual activity that the First Amendment seeks to capture.

Suppose, then, that my reading of the First Amendment as basically concerned with freedom of thought is sound.[46] The next question is, why should it do that? Why would it make sense for a legal system to promise such robust security to intellectual activities?

History provides one type of answer. The Founders were all too familiar with government repression of dissident thought. Through the experience of some of their ancestors under religious and political persecution abroad as well as in relations between the colonies and their British rulers, the value of intellectual freedom was made palpable. Philosophically, however, the reason that it is proper for a legal system to treat intellectual activity and non-intellectual activity differently stems from their differing capacities to infringe on the rights of others.

B. *Why Intellectual Activity Is Different*

Intellectual activity is incapable of obstructing others' freedom of action. Correspondingly, if an activity is purely intellectual, the legal system must maintain a hands-off posture.

The Founders were keenly aware of the power of the mind. As Enlightenment figures, many of them studied history, the sciences, and philosophy in depth and they appreciated the practical implications of abstract ideas.[47] Indeed, some of them were also themselves inventors, engineers, or architects, such as

46. For a somewhat similar, but by no means identical, analysis of freedom of speech (rather than the First Amendment as such), see SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 3 (2014) (offering a "'thinker-based theory' of freedom of speech" which "locat[es] the foundation for freedom of speech in the needs of the individual thinker").

47. *See* JAMES J. WALSH, EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC: SCHOLASTICISM IN THE COLONIAL COLLEGES 33–63 (1935) (detailing the extensive educational backgrounds of the Founding Fathers).

Ben Franklin and Thomas Jefferson.[48] And the Constitution itself was heavily influenced by John Adams' careful empirical examination of historical legal systems.[49]

Nonetheless, it is not the sheer value of the intellect that warrants its legal status. What is singularly salient for a legal system is the effect of a person's activities on others. The reason that a legal system should respect freedom of intellectual activity flows from its basic function: the protection of rights.[50] To fulfill that function, the government's sole and abiding concern must be to discover whether a person's actions threaten the freedom of others. The First Amendment reflects the conclusion (correctly, in my view) that a person's intellectual activity does not. This is the critical fact that warrants the legal differentiation of speech and of action.

My intellectual activity cannot twist your arm. Nor, by itself, can it change your mind. It cannot alter your beliefs. Persuasive as I hope that my writing is, even at its best, my thinking cannot single-handedly change a reader's beliefs.[51] When one person is thinking—wondering, questioning, inferring, challenging, speculating, concluding, and so on—or even when that person is communicating his thoughts to others, his activity does not seize control over another person's thinking process.[52] However convincing a person's speaking or writing might be, it does not commandeer another person's course of reflecting, inferring,

48. *See* Alex Knapp, *The Five Best Inventions of the Founding Fathers*, FORBES (July 3, 2011, 12:21 PM), https://www.forbes.com/sites/alexknapp/2011/07/03/the-five-best-inventions-of-the-founding-fathers/#1bff193a544f.

49. C. BRADLEY THOMPSON, JOHN ADAMS AND THE SPIRIT OF LIBERTY 39–43 (1998).

50. *See supra* note 23 and accompanying text.

51. In a similar vein, Frederick Schauer observes that "[a]dvocacy, for example, cannot produce action without conscious intervention by the recipient of the communication." Schauer, *supra* note 17, at 440; *see also* NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 124 (2018) (explaining that a person's reactions to the speech of others are mediated by a number of factors).

52. *See* Clay Calvert, *Hate Speech and Its Harms*, 47 J. COMM. 4, 9 (1997). According to Calvert, many communications scholars today "reject the magic bullet theory of direct, powerful, and uniform changes in attitudes and behaviors caused by messages. Instead, communication is viewed as a complex process and set of relationships, with contingent conditions and mediating variables influencing the chain of causation." *Id.*

doubting, disputing, drawing conclusions, or making decisions. And for this reason, it does not fall within the legitimate concern of government.[53]

It is only physical force that can blunt another person's ability to choose his course. And this is the basis for the legal differentiation between intellectual activity and non-intellectual activity. The fact that intellectual activity as such cannot displace others' autonomy renders it off-limits to government. Government's mission is the security of individual rights; since intellectual activities cannot impinge on others' rights, they are not the government's business. This is the basic idea captured in Jefferson's celebrated observation, "[I]t does me no injury for my [neighbor] to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[54]

Throughout, the reader might have noticed, I frequently refer to speaking "per se" or to thinking or intellectual activity "as such" or "in itself." I do this in recognition that speaking or thinking can, under certain circumstances, violate others' freedom of action (for example, when the speaking is part of a criminal conspiracy or treasonous disclosure of information to a state enemy).[55] If a person speaks in a way that obstructs the rights of others (e.g., at a volume that prevents the person on

53. Notice that a person's *physical* actions can affect our environment and, whether directly or indirectly, affect the actions available to the people around him, independently of any cooperation on their part. I can chop down a tree, build a footbridge, erect a wall, or bomb a subway and in each case, curtail or expand other people's options regardless of their thoughts, wishes, or actions. Intellectually, however, my range of impact is inordinately more limited. My thoughts and words certainly might influence others' actions—and they might not. That depends on how others assess my words and what they choose to do about them. When I take physical actions, however, whether by building or bulldozing, occupying land, seizing property, or hurling a grenade, my actions will affect others' options. No cooperation from them is needed. For a discussion of the impotence of physical force to alter people's beliefs, see my discussion of Locke, Milton, and others in Smith, *What Good Is Religious Freedom?*, *supra* note 27, at 947–55.

54. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (Penguin Books 1999) (1785). In the same vein, Jefferson's contemporary Joseph Priestley asked, "How . . . is any person injured by my holding religious opinions which he disapproves of?" KRAMNICK & MOORE, *supra* note 23, at 82.

55. *See supra* note 21 and accompanying text (pointing to various limitations on the scope of the First Amendment); KATHLEEN ANN RUANE, CONG. RESEARCH SERV., FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1–3 (2014).

stage from being heard), the government may legitimately restrict it. So while intellectual activity could, under certain conditions or in conjunction with certain other actions, acquire the ability to constrict others' rightful freedom, *in itself*, it does not have that capacity. And it is this relationship to others' freedom that is salient for the legal system. It is not the speechyness of an action that makes the difference. The important question is not whether the action employs the vocal chords or uses the tongue. Rather, it is the action's capacity to obstruct others' freedom of action.[56]

C. *Border-Crossings*

Admittedly, recent controversies suggest that border-crossings between the respective territories of speech and action are commonplace—so much so, some might think, that the borders are porous. Cake baking,[57] political spending,[58] occupying,[59] and kneeling[60] seemingly defy tidy classification as strictly one, or the other. Thus, one might suppose, no firm distinction between speech and action can be drawn.

The fact that the proper categorization of an activity is not always transparent does not mean that it cannot be discovered, however. What is true is that we usually speak to have effect,

---

56. We do not respect freedom of kissing, after all, such that a person is free to impose unwanted kisses on others. *See, e.g.*, Alanna Vagianos, *Reminder: 'Groping' and 'Unwanted Kissing' Is Definitely Sexual Assault*, HUFFPOST (Oct 13, 2016, 6:18 PM), https://www.huffingtonpost.ca/entry/reminder-groping-and-unwanted-kissing-is-definitely-sexual-assault_us_57ff9f7be4b0e8c198a6642f.

57. *See generally* Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (confronting, and ultimately punting, the question of whether requiring a baker to bake a cake that he claimed was against his religious beliefs violated the baker's First Amendment rights).

58. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (finding political expenditure limits imposed by the Federal Election Campaign Act of 1971 unconstitutional).

59. On the recent rise of occupations on college campuses, see Emma Kerr, *Student Occupation, Coming to a Campus Near You*, CHRON. HIGHER EDUC. (Apr. 16, 2018), https://www.chronicle.com/article/Student-Occupation-Coming-to/243138.

60. *See* Nicole Lewis, *The NFL and the First Amendment: A Guide to the Debate*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/10/05/the-nfl-and-the-first-amendment-a-guide-to-the-debate/?utm_term=.37d47adc41d4.

and conduct can send a message. Typically, a person speaks because he wants another person to know something or understand something or to encourage that person to do something. *I want you to know what I'd like for my birthday*; *I want you to understand why I'm angry*; *I want to explain why they should fire the coach* / *why you should see that movie* / *why you should vote against the Republican*. We speak (frequently) in order to influence others' opinions and actions.[61] By the same token, conduct can convey beliefs and attitudes. Consider "body language" or something as simple as a dirty look, or, in certain circumstances, walking away without responding, wearing flip flops to a funeral, or texting during a sermon. Whether deliberately or inadvertently, actions often say something.

The objection's factual observation is thus undeniable. It does not follow, however, that the legal system should treat speech and action as interchangeable. The problem, if it were to do so, is that neither the intentions behind an activity nor the effects of an activity determine the basic character of that activity. More precisely, they do not determine whether that action impinges on the freedom of others. And that is the sole concern of a proper legal system. That "I *meant* it as speech" (the sit-in), "I *meant* it to show affection" (the unwanted fondling), "I *wanted* to teach my son a lesson" (the brutal belting), however sincere, would not erase the actual effects of one's action on others' rights. As Nadine Strossen once observed, the fact that "a racially motivated lynching expresses the murderer's hatred or contempt for his victim" should not bestow First Amendment protections on it.[62] Conveyance of a message does not convert

61. A person can also speak without any desire to convey a particular message. Consider the familiar "Testing 1-2-3," uttered to check the quality of microphone amplification, or an actor reading lines from a script so that a casting director can hear the quality of his voice. "Small talk" about such things as the weather has been dubbed phatic communication, intended for social bonding more than for the exchange of ideas. *See* Richard Hughes Gibson, *Just Staying in Touch?*, HEDGEHOG REV., Mar. 2018, at 10 (discussing the fate of phatic communication in today's world of social media).

62. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 542. In a similar vein, Strossen writes, "Saying that black children are unfit to attend school

an action into speech.[63] Rights-violating actions should be legally restricted, even if they also "say" something.[64]

Similarly, even in cases where a person's speech is influential on others' actions (*her lecture was instrumental in his conversion to Judaism; that conversation about the way he treated subordinates was really a wakeup call for him*), words are words—reflections of intellectual activity. Any actions subsequently taken result from a listener's free decisions.[65]

The upshot is, speech and action can both switch-hit to play the role normally played by the other. Yet the basic reason for a legal system to treat speech and action differently stands intact: only action (non-intellectual action) has the capacity to violate others' rightful freedom. Regardless of the intentions that might motivate an action and regardless of the actions taken by those who hear a person's speech, that action either does or does not infringe on other individuals' freedom.[66]

D. *Implications of the Distinction's Denial*

While the core case for the speech-action distinction should by now be clear, it can also be instructive to confront the

---

with whites is materially distinguishable from legally prohibiting them from doing so, despite the fact that the legal prohibition may convey the former message." *Id.*

63. *See id.*

64. The U.S Supreme Court sometimes distinguishes "core" speech from speech incidental to a transaction (such as a commercial transaction) in recognition that speech can be involved in an action without converting that action into speech rather than action. *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (noting the distinction and the lower standard of constitutional scrutiny for "commercial" speech).

65. Here, I am leaving aside those special cases in which the speech is instrumental to a violation of rights, such as plotting a crime, fraud, or libel. *See supra* note 21 and accompanying text; *see also* Sarah Chayes, *Inciting Violence May Not Be Protected Speech*, N.Y. TIMES, https://www.nytimes.com/roomfordebate/2013/03/05/in-free-speech-a-line-between-offputting-and-illegal/inciting-violence-is-not-protected-speech (last updated Mar. 6, 2013, 7:47 PM).

66. This does not deny the relevance of intentions to certain other questions that fall within a legal system's proper ambit. After we have established that one individual's action violated another's rights, for example, we reasonably inquire into his state of mind to determine culpability and appropriate penalties. Did the agent understand what he was doing? Was his action accidental? Deliberate? Premeditated? And so on. While certain aspects of the person's intentions are relevant to the manner in which the legal system should treat him, my point is that whether in fact he violated others' rights does not turn on his intentions.

implications of equating speech and action. Suppose we held that many actions *should* be considered speech, for legal purposes, such that they should be protected by the First Amendment and other individuals should correspondingly be prevented from interfering with those actions. Under this scenario, what would be the operative definition of "speech"? Presumably, when the authors of the First Amendment wrote freedom "of speech," they meant *something*.[67] What is the concept that they were referring to? On the premise that action and speech are really the same, what does "speech" mean? And what does it not mean—what would it exclude? How would the activities referred to in the First Amendment be distinguished from any other type of activity? Should the Framers have simply written, "Congress shall make no law . . . abridging the freedom of action"? Or perhaps, "abridging freedom"?

The implied interpretation seems to defeat the point of the First Amendment and sabotage the rights it aims to uphold. The problem is not merely a textual one of interpreting this particular document. The legal equation of speech with action flirts with conceptual incoherence. Unless the idea of free speech clearly excludes certain things, the concept would be vacuous, collapsing under such boundless breadth.[68]

To see this, consider the ramifications for rights, in practice. If any of a person's speaking that played some explanatory role in a listener's subsequent acting in a certain way was, on that basis, to be considered action (as in claims that offensive speech that prompts certain reactions is an assault or that hate speech has effects on listeners that render it an aggression), then the speaker's freedom would be lost. One person's freedom to speak would now hinge on the actions of his audience. For if a listener subsequently acts in frowned-upon ways, the speaker's speech will be deemed action and subject to greater legal

67. *See* Schauer, *supra* note 17, at 436 ("[T]he First Amendment could make sense only if there were *some* distinction between speech and action.").

68. *Cf.* ROBERT DARNTON, CENSORS AT WORK: HOW STATES SHAPED LITERATURE 235 (2014) ("If the concept of censorship is extended to everything, it means nothing."). It is important to have boundaries on both ends regarding censorship because it would be similarly dangerous to censor everything. Smith, *Free Speech Vernacular*, *supra* note 19, at 74–80.

restriction. A speaker becomes legally liable for his own actions as well as for others'. Far from "free speech" signifying liberation, this would chain us all to one another; one person's title to freedom will expand or contract, depending on the actions of others. Under these premises, no speaker could be respected as free. Rather, how much "freedom" he will enjoy—more accurately, how much permission he will be granted—depends on how those who hear him act. His freedom depends not on his own actions (specifically, on his refraining from interfering with others' rights), but on the actions of others.

In short, if speaking can become acting due to others' response to it, then a person's "freedom" is hostage to a heckler's veto, and the purported right to free speech is reduced to a permission, on a leash held by others who can jerk it around.

Further, notice how the equation of speech with action subjectivizes the legal system. Under this scheme, what the law *is*—what is and is not legally permissible—would be determined by the subjects on a case-by-case basis. If a particular instance of speech will legally constitute *either* speech or action depending on the responses of listeners and if the same action is to be legally permitted, or not permitted, depending on whether it is considered speech, and if the determination of whether an action *is* speech depends on the agent's intentions in taking it (*We intended our occupation to send a message*), then the meaning of the law is dictated by the beliefs and actions of its subjects. When what constitutes speech turns on the intentions of the agent and what constitutes action turns on the actions of individuals other than the agent (other than the speaker, in this case), then what the law *is* is in continual flux. A particular law no longer designates fixed kinds of action and thus no longer issues a definite, knowable rule. If the Constitution promises freedom of speech but "speech" denotes different things in different circumstances, we no longer have an enduring rule that is the law. Correspondingly, the legal system could not uphold "the" law in a consistent, even-handed manner. If two or more subjects claim incompatible statuses for their actions ("Mine is speech"; "No, no, mine is speech"), the

government would lack an objective standard by which to resolve the dispute.

Consider the clash between the baker and the gay couple in the *Masterpiece Cakeshop* case.[69] Both parties seemingly seek to do something in order to say something.[70] The baker refuses to satisfy the customer's request as a means of expressing his religious convictions, just as the couple wishes to enjoy a cake as an expression of their commitment at the wedding celebration.[71] What should decide which of them gets its way?

The case is a complicated one, even apart from the conflation of speech with action, but we need not address those complicating elements here.[72] What is significant for us is that if both actions are considered forms of speech (baking this cake and buying this cake), then the government will need to employ some extraneous standard in order to decide which "speech" will gain legal protection—and one party's "speech" will be denied. Yet if "speech" and "action" bleed into one another and are not recognized as different in kind, such conflicts will be ubiquitous, and their resolution by a consistent, principled standard, impossible.

People will always press conflicting claims, of course; these are the bread-and-butter of a judicial system's work. The unique problem raised by a legal system that allows people's intentions to determine what it is that they are actually doing (that is, the legal category to which their actions belong) is that such a system will have no basis for resolving their disputes. It will have no basis for finding that the baker's action warrants legal protection and the gay couple's does not—or for finding the reverse. Ditto, for clashes between the occupier and the

69. 138 S. Ct. 1719, 1723 (2018).

70. The situation could accurately be described in several different ways, but this is among the possible characterizations.

71. *See id.*

72. I have discussed the free exercise of religion and its relationship with the First and Fourteenth Amendments in previous works. *See, e.g.*, SMITH, JUDICIAL REVIEW, *supra* note 16, at 255–58; Smith, *Religious Liberty or Religious License?*, *supra* note 41, at 48–49.

property owner, or the groper and the groped, and so on. Objective law cannot be built from such conceptual confusion.

To reiterate my central contention: the First Amendment assures distinct protection to exercises of intellectual freedom.[73] The basis for its recognition of the speech-action distinction rests in the fundamental difference between persuasion and force, between intellectual means of affecting other people's actions and physical means. As John Locke observed, "[I]t is one thing to pers[u]ade, another to command; one thing to press with Arguments, another with Penalties."[74] Or in the words of Ayn Rand, "A gun is not an argument."[75] One can always walk away from others' speech. "Not so when the[ir] argument is made with a gun."[76] Physical force compels a person either to do as another dictates, or to lose something that is his (such as his wallet or his life).[77] Words do not.

At bottom, what is salient to a legal system about either speech or action—about something that is said, written, or expressed, or about something that is done by physical means—is its effect on others' rightful freedom. Properly, the activities of government must be limited to the ends of government—to the purpose for which it is authorized to wield the coercive power that it holds. If the legal system's reason for being is the protection of individual rights, then rights must serve as its lodestar in determining whether an activity should come under government restriction. Because, normally, speech cannot infringe on individuals' freedom whereas actions (non-speech

73. *See supra* note 41 and accompanying text.

74. JOHN LOCKE, A LETTER CONCERNING TOLERATION 27 (James H. Tully ed., Hackett 1983) (1689).

75. AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 8 (Penguin Books 1986) (1967).

76. Steve Simpson, *Charlie Hebdo Two Years Later: Will America Continue to Protect Free Speech?*, HILL (Jan. 7, 2017), https://thehill.com/blogs/pundits-blog/civil-rights/313161-carlie-hebdo-two-years-later-will-america-continue-to-protect.

77. *See* SMITH, JUDICIAL REVIEW, *supra* note 16, at 99–105; SMITH, MORAL RIGHTS, *supra* note 25, at 143–47.

actions) more readily can,[78] government should respect the difference between speech and action.

II. THE CASE FOR EQUATING SPEECH AND ACTION

What is the thinking of those who deny the distinction? On what grounds might one view the division between speech and action as artificial?

As far as I can tell, the deniers' reasoning consists not so much in a set of arguments at the level of general principle, as in the particular concerns pressed in different of the specific disputes that arise (about a speaker on campus or campaign finance, for example). Theirs is a more case-based set of arguments. From these, however, I think we can glean a few broad, recurring themes that animate the denial of the distinction. I will consider three: arguments alleging the harm of certain speech, arguments asserting the asymmetrical power of different speakers (which is tightly entwined with the harm reasoning), and arguments based on the potency of symbolic speech.

A. *Harm*

According to the Harm Argument, some speech harms people, either specific individuals or society as a whole.[79] Pornographic speech or offensive speech, for instance, allegedly damages such public goods as inclusion, dignity, or an individual's sense of security or standing in the community.[80] Accord-

78. This is not to say that while the government must keep its hands off intellectual activity, it may be "hands-all-over" everything other than that. Rather, it is to insist that the presumption of the innocence of speech (innocence of abridging the rights of others, that is) should be greater than the presumption granted to actions. Because non-speech actions are, as a class, more "infringement-ready" than speech, the legal system should (and does in fact) view them as more likely to sometimes warrant restriction. *See* Schauer, *supra* note 17, at 427 (distinguishing the protections between non-speech actions and speech).

79. *See* UNDERSTANDING WORDS THAT WOUND, *supra* note 10, at 11–18.

80. WALDRON, *supra* note 10, at 3–5, 34–39, 57–60, 116–118; *see also* Delgado, *supra* note 10, at 89–96 (discussing the harms caused by stigmatizing and racist speech); MACKINNON, *supra* note 14, at 130 ("[A]s a form of 'speech,' pornography amounts to terrorism and promotes not freedom but silence."); Matsuda, *supra* note 10, at 24–26 ("Victims of vicious hate propaganda

ing to Jonathan Haidt, "A common feature of recent campus shout-downs is the argument that the speaker 'dehumanizes' members of marginalized groups . . . ."[81] Moreover, people increasingly argue that language is sometimes violent.[82] Laurie Essig contends "that words . . . can be a form of symbolic violence."[83] Others maintain that hate speech is a form of "discursive violence," rather than expression.[84] Toni Morrison, we saw, has averred that certain speech does not merely "represent violence; it is violence."[85] On this line of thinking, saying such things as "Your god is a fraud," or "You're a bloody faggot—and you'll fry in hell because of it!" crosses the border from innocent speech to injurious action. These statements allegedly harm in a legally actionable way. Timothy Garton Ash, for example, while mounting what he regards as a vigorous defense of freedom of speech, is among those who would legally prohibit "verbal aggression" because of the psychological harm it inflicts.[86] Accordingly, he advocates creating a "tort action for racial insults."[87]

Arguments for restrictions of hate speech[88] typically characterize hate speech as an attempt to delegitimize certain people

---

experience physiological symptoms and emotional distress ranging from fear in the gut to . . . hypertension, psychosis, and suicide.").

81. Jonathan Haidt, *Intimidation Is the New Normal on Campus*, CHRON. HIGHER EDUC. (Apr. 26, 2017), https://www.chronicle.com/article/Intimidation-Is-the-New-Normal/239890.

82. *See* Blum, *supra* note 12.

83. Laurie Essig, *Talking Past Each Other on Free Speech*, CHRON. HIGHER EDUC. (Mar. 15, 2017), https://www.chronicle.com/article/Talking-Past-Each-Other-on/239493.

84. Lawrence Douglas, *Fish, Matsuda, MacKinnon, and the Theory of Discursive Violence*, 29 L. & SOC'Y REV. 169, 169 (1995) (reviewing the works of Catharine MacKinnon and others).

85. Gluckman, *supra* note 13.

86. TIMOTHY GARTON ASH, FREE SPEECH—TEN PRINCIPLES FOR A CONNECTED WORLD 215 (2016).

87. MUST WE DEFEND NAZIS?, *supra* note 10, at 8–14. For related discussions of psychological or emotional harm, see Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html, and Douglas Jacobs, *We're Sick of Racism, Literally*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/opinion/sunday/sick-of-racism-literally.html.

88. The term "hate speech" is itself equivocal, used to signify different things, often without the term's users' recognition of this. As Nadine Strossen has argued, "This term has no single legal definition, and in our popular discourse it has been used loosely to demonize a wide array of disfavored views." STROSSEN, *supra* note 51, at xxiii. Rather than put the term in scare quotes

in the eyes of others. The attitudes that it fosters can spur harmful actions. The Canadian Supreme Court has held that such speech "lays the groundwork for later, broad attacks on vulnerable groups that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide."[89] Jeremy Waldron, in his defense of hate speech restrictions, makes clear that the target of such restrictions should not be the hate, but the harm that allegedly results from its expression.[90] On Waldron's view, hate speech targets the dignity of certain members of society by threatening their assurance of respect.[91] This undermines the "public good of inclusiveness."[92] Echoing Catharine MacKinnon, Waldron maintains that "[s]peech *acts*," implying that a sharp distinction between speech and action is untenable.[93]

That is the take-away from these authors. Speech can pack a punch (so to speak). Speech can inflict harm because it is not merely speech. Words sometimes carry the same effects as action. Saying things *does* things. Therefore, we lose any ground for distinguishing speech from action in a firm, categorical way.

---

throughout the paper to indicate its wobbly meaning, I will simply register here that serious questions attach to its meaning as well as to its application in many cases.

89. Saskatchewan (Human Rights Commission) v. Whatcott, [2013] 1 S.C.R. 467, 470 (Can.); *see also* R. v. Keegstra, [1990] 3 S.C.R. 697, 746 (Can.) (expressing the concern that public expressions of hatred may cause people in the targeted groups to "take drastic measures in reaction").

90. WALDRON, *supra* note 10, at 38–39.

91. *Id.* at 85–88.

92. *Id.* at 4–6. In a similar vein, Ulrich Baer writes that "[w]hen [certain speakers'] views invalidate the humanity of some people, they restrict speech as a public good." *What 'Snowflakes' Get Right About Free Speech*, N.Y. TIMES (Apr. 24, 2017), https://www.nytimes.com/2017/04/24/opinion/what-liberal-snowflakes-get-right-about-free-speech.html; *see also* SIGAL BEN-PORATH, FREE SPEECH ON CAMPUS 29–46 (2017) (defending "inclusive freedom").

93. WALDRON, *supra* note 10, at 38 (emphasis added) (quoting CATHARINE A. MACKINNON, ONLY WORDS 30 (1993)). The immediate context of Waldron's remark is the meaning of the term "hate speech," but he also makes plain that "calling something speech is perfectly compatible with also calling it an action that may be harmful in itself or that may have harmful consequences." *Id.*

B. *Power*

Closely related to the Harm Argument is what I will call the Power Argument. Its basic contention is that the effects of an individual's speech are a function of his position in society—economic, political, cultural, and the like.[94] Who it is that speaks and how that person's speech is received depend heavily on the relative social standing of speaker and audience.[95] On this view, we must always be attuned to a speaker's "social location" and where speakers "are positioned in existing structures of power."[96] Some people's words are amplified and others' muffled by virtue of where they stand in a social hierarchy.[97] Correspondingly, some people's speech carries greater impact than others'. This propels it into the realm of action.

K-Sue Park, for example, criticizes the American Civil Liberties Union for employing "colorblind logic" in its defense of those who express noxious ideas.[98] "For marginalized communities," she contends, "the power of expression is impoverished for reasons that have little to do with the First Amendment."[99] Numerous factors "chill their voices but amplify others."[100] Ulrich Baer, drawing on Jean-Francois Lyotard's work on asymmetry in public discourse, maintains that "[s]ome topics, such as claims that some human beings are by definition

94. *See* UNDERSTANDING WORDS THAT WOUND, *supra* note 10, at 176–78, 183–84; K-Sue Park, *The A.C.L.U. Needs to Rethink Free Speech*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/opinion/aclu-first-amendment-trump-charlottesville.html; Baer, *supra* note 92. For critical discussion, see STEPHEN R.C. HICKS, EXPLAINING POSTMODERNISM: SKEPTICISM AND SOCIALISM FROM ROUSSEAU TO FOUCAULT 224–46 (2011); Ted Gup, *Free Speech, but Not for All?*, CHRON. HIGHER EDUC. (Apr. 27, 2017), https://www.chronicle.com/article/Free-Speech-but-Not-for-All-/239909; Andrew Sullivan, *Is Intersectionality a Religion?*, N.Y. MAG.: INTELLIGENCER (Mar. 10, 2017), http://nymag.com/intelligencer/2017/03/is-intersectionality-a-religion.html.

95. *See* Baer, *supra* note 92; Sullivan, *supra* note 94.

96. Brittney Cooper, *How Free Speech Works for White Academics*, CHRON. HIGHER EDUC. (Nov. 16, 2017), https://www.chronicle.com/article/How-Free-Speech-Works-for/241781.

97. *See* KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 134 (2018) (quoting a student at Pomona College as claiming that free speech "has recently become a tool appropriated by hegemonic institutions").

98. Park, *supra* note 94.

99. *Id.*

100. *Id.* ("[T]he power of speech remains proportional to the wealth in this country . . . .").

inferior to others, or illegal or unworthy of legal standing, are not open to debate because such people cannot debate them on the same terms."[101] We have already observed how some forms of the Harm Argument claim that words can be violent. The Power Argument adds that "violence is embedded in . . . our social structures."[102]

The Power Argument's central pitch is to equality. When power is not held equally by all, speech is not as free and equal as those who insist on the speech-action distinction imply.[103] Speech is a weapon that can be just as destructive as action. The superior power of certain speakers disguises their actions as speech when, in fact, that "speech" inflicts real damage (reinforcing stereotypes, for instance, and perpetuating their corrosive effects).[104] The speech of the elite inhibits the voices of others.[105] Treating speech as merely intellectual and all speech as thus fully entitled to strong legal protection simply on the grounds that it *is* speech works to silence some people and exacerbate inequities.[106] It permits the stronger to dominate the weaker.[107]

Given these power dynamics, many contend that advising people to stick to speech or to confine themselves to words, in

101. Baer, *supra* note 92. In part on this basis, Delgado and Stefancic contend that a "marketplace of ideas works best in connection . . . with narrow, clearly defined problems," such as whether one parking space is better than another. UNDERSTANDING WORDS THAT WOUND, *supra* note 10, at 219. "But with ills like racism or sexism that are deeply embedded in culture and language, speech is much less helpful." *Id.*

102. Hess, *supra* note 11.

103. Appeals to equality often animate calls for campaign finance restrictions to even the playing field. *See, e.g.*, FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 79–83 (2017); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 970 (2001) (arguing that the speech-action distinction "occupies a central role in First Amendment law").

104. *See* MACKINNON, *supra* note 93, at 99.

105. *See supra* notes 10, 97, 99, 107 and accompanying text.

106. Philosopher Herbert Marcuse, for instance, famously rejected "pure tolerance" arguments, maintaining that tolerance is reasonable only when all the people involved are equally capable of rationally evaluating the arguments that they hear. *See* WHITTINGTON, *supra* note 97, at 23–24.

107. For further critical discussion of this idea, see HICKS, *supra* note 94, at 237–38.

debate, will not do.[108] When some speech "reinforces social imbalances," it is fair to silence it.[109] Restrictions on the speech of the more powerful would not be censorship, but liberation.[110] Further, at least according to some, victims of such imbalances are justified in fighting speech (so-called) with physical force on the grounds that they are simply resisting injustice.[111] Those in subordinate positions require more tools to counteract different speakers' standing. The disparate impact of words justifies corrective *action*, in response. To insist on a strict separation of speech and action would only foster inequity.[112]

In sum, according to the Power Argument, it is naïve to think that we can neatly segregate speech from action. Given the uneven distribution of power in society, all speaking is not equal and does not form a distinct, uniform kind. The position from which a person speaks can dramatically affect the impact of what he says. Some people's words carry far more influence due not to the logic of their words, but to the speaker's social standing. Consequently, much "speech" truly constitutes action.

---

108. *See, e.g.*, Nisa Dang, *Check Your Privilege When Speaking of Protests*, DAILY CALIFORNIAN (Feb. 7, 2017), http://www.dailycal.org/2017/02/07/check-privilege-speaking-protests/ ("[A]sking people to maintain peaceful dialogue with those who legitimately do not think their lives matter is a violent act.").

109. *See* William A. Galston, *The Assault on Free Speech*, WALL STREET J. (Aug, 22, 2017, 6:27 PM), https://www.wsj.com/articles/the-assault-on-free-speech-1503440870 (discussing this view, but not endorsing it).

110. HICKS, *supra* note 94, at 237. Marcuse, for instance, held that progressives should practice intolerance toward political conservatives. *See* WHITTINGTON, *supra* note 97, at 24.

111. *See, e.g.*, Howard Gillman & Erwin Chemerinsky, *Does Disruption Violate Free Speech?*, CHRON. HIGHER EDUC. (Oct. 17, 2017), https://www.chronicle.com/article/Does-Disruption-Violate-Free/241470 (quoting a student at the University of California Irvine as saying that "acts of protest must be judged by their ability to empower marginalized voices to speak out" rather than on their classification as actions that violate the rights of others).

112. The Power Argument clearly shares elements with the Harm Argument. It provides one explanation of what enables certain speech to do damage. Nonetheless, I distinguish the two because power differences are not the only means by which speech can allegedly harm. Moreover, the speech of the less empowered can sometimes be quite potent.

C. *Symbolic Speech*

Finally, I can imagine a quite different and much simpler line of reasoning for collapsing the speech-action distinction. Symbolic speech has long been a potent instrument of expression. Yet its messages are frequently conveyed by means of actions, such as a march, a hunger strike, laying down in city streets, burning a draft card, or carrying a mattress across a college campus.[113] Actions can send powerful messages and have sometimes catalyzed profound societal advances (in regard to civil rights for blacks or women or gays, for example). It would be wrong to neuter symbolic speech and preempt its possible benefits by restricting it under the notion that it is truly action.[114]

Many people believe that when certain actions are "clearly intended to communicate a message, the fact that they don't involve words does not prevent them [from] being examples of speech."[115] Indeed, the U.S. Supreme Court has agreed. In *Spence v. Washington*, a 1974 case concerning a college student who had hung an American flag with a peace symbol attached to it upside down in order to protest certain government policies, the Court held that the act was "sufficiently imbued with elements of communication"[116] to qualify for First Amendment protection.[117] The appellant's action, it reasoned,

113. In 2014, Columbia University student Emma Sulkowicz continually carried around campus a fifty-pound mattress to protest the university's handling of sexual assault cases. T. Rees Shapiro, *Columbia University Settles Title IX Lawsuit with Former Student Involving 'Mattress Girl' Case*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/07/13/columbia-university-settles-title-ix-lawsuit-with-former-student-involving-mattress-girl-case/?utm_term=.eca0ac225bdd.

114. We should distinguish symbolic speech from symbols. A symbol expresses an idea, a value, or the like. Consider flags, insignias, badges, a Christian cross, or specific images such as the serpent of libertarians or the fish of creationism. "Symbolic speech," by contrast, denotes the idea that a person's *doing* something (beyond simply displaying such symbols) constitutes a type of speech. Also note that some people regard the sheer display of certain symbols (such as the Confederate flag or the Cleveland Indians mascot) as expressing hatred and, on that ground, call for its legal restriction. *See* Matsuda, *supra* note 10, at 41.

115. NIGEL WARBURTON, FREE SPEECH: A VERY SHORT INTRODUCTION 5 (2009).

116. 418 U.S. 405, 409 (1974).

117. *Id.* at 415.

"was a pointed expression of anguish."[118] Given that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it," the Court concluded that this conduct merited the legal status of speech.[119]

As an argument against the speech-action distinction, then, the reasoning is that we should recognize the expressive potential of certain actions and, on that basis, legally protect them as symbolic speech. Certain actions' practical ramifications, along with the fact that the legal system has often recognized their expressive capacity, testify to the fluid passage between speech and action.[120]

D. *Assessment*

What should we make of these arguments? How strong a case do they offer for relaxing the legal distinction between speech and action?[121]

---

118. *Id.* at 410.

119. *Id.* at 410–11, 415. In the 1992 case *R.A.V. v. City of St. Paul*, which centered around a cross-burning on the lawn of a black family, the Court struck down St. Paul's Bias-Motivated Crime Ordinance prohibiting the display of certain types of symbols (among other things) as incompatible with the First Amendment. 505 U.S. 377, 391 (1992). Interestingly, the Court's reasoning focused on the content- and viewpoint-based character of the expression prohibited by the ordinance; the First Amendment's application to "expressive conduct" was taken for granted. *See id.* at 391–94.

120. For discussion of other phenomena whose status as speech is controversial (such as instrumental music and nonsense), see MARK V. TUSHNET ET AL., FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT 18–24, 124–48 (2017).

121. Because advocates of the harm, power, and symbolic speech arguments sometimes use them to make further arguments about the propriety of certain types of legal restrictions on speech, it is natural that in analyzing those arguments, it may sometimes seem as if I am addressing that different question. To the extent that I do, I do so only to understand the implications of the claims for the difference between speech and action. Only when we properly understand what speech and action are can we proceed to further arguments of whether certain speech crosses the threshold into appropriately legally restricted action (such as threats, harassment, and so on).

1. *Response to the Harm Argument*

First, let us consider the Harm Argument. The effects that the harm line of reasoning invokes are undoubtedly sometimes real. A person's sense of inclusion or social standing could well suffer from others' expression of harsh, derisive attitudes. The things people say can affect the social climate, at minimum, and can often influence some listeners' later choices and actions. Even if speech might be said to "act" in this metaphorical way, however, the question is whether it acts in the particular way that the legal system should be concerned with—namely, does it encroach upon others' freedom of action? Remember that that is the object of rights protection and that rights protection is the mission of the law.[122] Correspondingly, only such encroachment would justify the legal system's classifying such speech as action (and, on that basis, as an appropriate target of coercive restriction).

The answer to the question, it should be obvious, is no. As we saw earlier, speech does not seize control over another person's ability to steer his course; it cannot disable another's command over his own thinking, choosing, and acting.[123] Freedom can only be thwarted by others' initiation of physical force.[124] A person's autonomy is not compromised by the words or intellectual activities of the people around him. However unpleasant or uncomfortable others' words may make him (and however reasonable his discomfort might be, in some circumstances), to not be able to do something *without feeling badly* is not to not be able to do it.[125]

---

122. *See supra* note 23 and accompanying text.

123. *See supra* notes 49–51 and accompanying text.

124. Again, this encompasses credible threats of force.

125. As ever, in certain conditions, words can rise to the level of action that infringes on the rights of others (as in harassment) and on those grounds, properly be counted as rights-assaulting action. *See supra* note 21 and accompanying text. Recall that in those cases when the government should not protect certain speech (fraudulent speech, libelous speech, or speech that endangers national security, for instance), the speech in question is instrumental in a rights violation. *See* Smith, *Free Speech Vernacular*, *supra* note 19, at 65. Also, in highly unusual cases, victims of traumatic experiences such as combat, physical violence, or sexual assault might be affected ("triggered") by others' speech in ways that others are not. *See* SUBSTANCE ABUSE AND

The implication of the Harm Argument is that a person is entitled to have others think of him in certain ways, or at least, to speak as if they think of him in certain ways.[126] The deprivation of that non-critical reception amounts to a deprivation of his freedom. If people around me disparage me, the thinking is, they take something that is mine, and this is justification for the legal system to treat speech as action.

This is problematic on several fronts.[127] For starters, it inflates the notion of freedom of action to encompass a good deal more than it truly does—specifically, to include the satisfaction of a person's psychological comfort zone.[128] But quite apart from that, even if a reader believed that my conception of freedom was overly narrow, a fatal problem besets this idea. Consider: by what means could the requisite favorable reception be achieved? To require *that* would necessitate the violation of others' freedom. It would license the imposition of a range of restrictions on everyone.[129] The idea that freedom of speech turns (at least in part) on others' warm reception of one's speech or of one's person reflects the utilitarian concern that what matters is the consequences; that is where we should look to determine whether speech is "free." "Freedom" is to be measured by a particular type of outcome, rather than by the absence of force.

MENTAL HEALTH SERVS. ADM'R, TREATMENT IMPROVEMENT PROTOCOL 113 (57th ed. 2014) (discussing how "[t]rauma reactions can be triggered by sudden loud sounds . . . tension between people, certain smells, or casual touches," suggesting those with trauma react differently than those without). While general laws must be designed for normal circumstances, their application to actual cases must be sensitive to salient differences from the norm. Therefore, it may be that the legal system should not treat a traumatized person's reaction to speech in exactly the same way that it should respond to the actions of others who have no comparable basis for such a response. Without entering a large and complex debate, my immediate point is simply to acknowledge the potential relevance of this type of context.

126. WALDRON, *supra* note 10, at 85–88.

127. Some of what follows will also apply to my critique of the Power Argument. *See infra* Section II.D.2.

128. On the frequent equivocal use of the term "freedom" to designate several distinct phenomena, see Smith, *Free Speech Vernacular*, *supra* note 19, at 67–74, where I distinguish seven.

129. *See* Caroline West, *The Free Speech Argument Against Pornography*, 33 CANADIAN J. PHIL. 391, 392–93, 407 (2003) (citing the reasoning of Ronald Dworkin and Leslie Green).

The problem, however, with relying on an outcome-dependent legal standard is that it is not universalizable; it could not be upheld in an even-handed, consistent manner. The satisfaction of one person's psychological comfort zone will frequently entail the frustration of others' (the comfort zones favored by those who chafe under restrictions on their expressing their beliefs).[130] Differing preferences about where to set the cultural thermostat (for acceptable discussion concerning immigrants, Muslims, or women who have abortions, for instance) make this a hopelessly subjectivist measure for the uniform enforcement of law. And how could a legal system set it, without engaging in long-abjured viewpoint discrimination?[131]

It is also important to appreciate that the equation of speech with action works both ways. Once one asserts an equivalence, the two sides of the equation must carry the same value. If one side is erroneously inflated, so the other side must be erroneously deflated. In this case, physical abuse of another person becomes no more and no worse than verbal scorn.[132] If (according to the Harm Argument and contrary to time-worn wisdom) words *can* hurt me,[133] then sticks and stones that break a person's bones are no worse than words. When verbs, adjectives, or sentences injure, then, on the other side of that "equal" sign, beating, knifing, or shooting merely say; they merely convey a message. When speech and action are considered the same in kind, the legal system can have no basis for

130. *See* Snyder v. Phelps, 562 U.S. 443, 459 (2011) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

131. Still further, this raises the specter of holding an individual responsible for a society's wider climate of opinion, which is naturally beyond any individual's control. *See, e.g.*, Strossen, *supra* note 62, at 515 n.154 (quoting Franklyn Heiman as stating that the tort of intentional infliction of emotional distress "involves 'boundless subjectivity'" and can wrongfully "subject[] people to punishment because they violate 'changing sensitivities' of [a] particular community at [a] particular time").

132. *See* JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 131 (2013) (responding to the argument that certain speech is "assaultive," and cautioning against "erasure of the distinction . . . between discussion and bloodshed").

133. *See supra* notes 86–89 and accompanying text.

treating them differently. It may still rely on other grounds for treating different "actions" differently from one another, of course, but intellectual activity must be regarded as no different from non-intellectual activity, and if some people who perceive certain speech as harmful accept Essig's claim that "polite debate about disagreeable ideas is a luxury [we] can no longer afford"[134] and adopt physical means of "debate" (roughing up speakers, for instance, as has frequently occurred in recent years[135]), the legal system will have a hard time justifying intervention. (At least, if it strives to protect speech.[136]) The result is that speech that should not be restricted will be (in the name of harm prevention) and actions that should not be permitted (because they violate rights) will be.

The problem grows still worse. As a standard of legal guidance, the equation of speech with action collapses into incoherence. If words wound and deeds merely say, then deeds should not be restricted any more than words should be, as we have just seen. Yet by the same token, words should not be *permitted* any more than the most egregious, rights-abusing deeds should be. For any particular action—be it intellectual or non-intellectual, be it an instance of speaking or of physically attack-

134. Essig, *supra* note 83.

135. A professor at Middlebury College suffered whiplash and a concussion in the melee surrounding Charles Murray's cancelled lecture in March of 2017. Allison Stanger, *Understanding the Angry Mob at Middlebury that Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html. In February of 2017, protesters at Berkeley "smashed windows, threw rocks at the police and stormed a building" because they were angry about a lecture organized on campus. Thomas Fuller, *A Free Speech Battle at the Birthplace of a Movement at Berkeley*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/us/university-california-berkeley-free-speech-milo-yiannopoulos.html. In March of 2018 at King's College in London, masked activists "barged into [a] university building, smashed windows, hurled smoke bombs and set off a fire alarm" in order to disrupt a panel discussion. Camilla Turner & Helena Horton, *Violence Breaks Out as Protesters Storm King's College London Event Featuring Controversial YouTuber*, TELEGRAPH (Mar. 6, 2018, 9:43 AM), https://www.telegraph.co.uk/news/2018/03/06/violence-breaks-self-proclaimed-antifascists-shut-alt-right/.

136. As Amanda Hess observes, a result "of expanding the category of violence to include words and beliefs" is that "[i]t begins to feel reasonable, or even like a form of self-defense, to respond to words and beliefs with physical action." Hess, *supra* note 11.

ing[137]—the legal system would have as much reason to allow it as to restrict it. For whatever deeds might be harmful might be simultaneously expressive. And in the effort to honor free speech, they would have to be allowed. This exposes the distinction's denial as utterly impracticable.

The upshot is this. Advocates of the Harm Argument invoke effects of certain speech that are undoubtedly sometimes real. Some speech *is* morally repugnant and hurtful to its targets.[138] (It can also be painful, in different ways, to other people.) Much more can be said about its depravity and in certain contexts, much more should be said. For understanding the speech-action relationship, however, what is important is that these effects are not of the type that violate individual rights. Speech does not "act" *in the law-relevant way*, namely, by infringing on others' freedom. Thus, the legal system's reason to distinguish speech and action remains.

2. *Response to the Power Argument*

Next, let us consider the power analysis as reason to deny the distinction between speech and action. The Power Argument, recall, maintains that inequalities in social position leave some speakers less free than others. Thanks to certain individuals' greater social capital, speech loses the benign quality by which we might have distinguished it from action. Because some speaking is more influential than other speaking, it is truly a kind of action.[139]

The problem for this argument, however, is that power is beside the point. Even if we agree that people occupy different positions of likely influence, that tells us nothing about respect for individuals' freedom. And freedom is the concern that gives

137. Of that which we would normally and least controversially consider speaking and acting, that is.

138. *See* STROSSEN, *supra* note 51, at 1–4 (discussing the difference between what speech some people believe should be censored because it is disturbing and what is actually censored under the First Amendment).

139. *See supra* notes 101–10 and accompanying text.

the legal system reason to distinguish intellectual activity from non-intellectual activity. One speaker's social status—be it high or low—does not prevent any other individual from running his own life. It does not dismantle others' ability to think for themselves and make up their own minds about the merits of what a speaker says.[140]

While the irrelevance of power is the fundamental problem, we can break this down into three more specific, related errors to appreciate this problem more clearly. First, the argument muddles quite different types of "power"—economic, intellectual, and physical (at the least). By "economic power," I mean the potential of money or material goods to affect a person's thinking and choices, by "intellectual power," the potential of ideas to affect a person's thinking and choices, and by "physical power" (in the legal context), the potential of human beings' physical manipulation to affect another person's thinking and choices.[141] One could obviously delineate further types of power (such as political, logical, or psychological),[142] and different iterations of the power analysis will import different types into their reasoning (some stressing the greater economic power of wealthier speakers, for instance). All, however, miss the basic difference between mental power and muscle power. They overlook the fact that only the latter is capable of obstructing individuals' freedom. They do so because they fail to grasp the fundamental difference in kind between the free and the forced,

140. *See* SMITH, MORAL RIGHTS, *supra* note 25, at 134, 143–48 (noting that impinging on someone's freedom means interrupting her ability to run her own life and make her own decisions, which words alone cannot do).

141. In non-legal contexts, "physical power" would encompass a wider domain, including the actions of animals, natural forces, and manmade objects. What is relevant to law, however, is human beings' physical actions.

142. One type of psychological empowerment can arise from exercising one's freedom to speak up for one's beliefs. Consider the words of Arizona State University student Rossie Turman, acting as chairman of the University's African-American Coalition: "When you get a chance to [say something that] swing[s] at racism, and you do, you feel more confident about doing it the next time. It was a personal feeling of empowerment, that I don't have to take that kind of stupidity." STROSSEN, *supra* note 51, at 168.

the chosen and the coerced, the voluntary and the *imposed by others*.[143]

Words are not agents. The expression of a person's ideas cannot, in itself, hijack another person's choices. The fact that human beings possess differing degrees of various powers does not alter human nature by extinguishing anyone's volitional capacity.[144]

Second, the Power Argument employs an erroneous standard for determining whether a person's rights have been respected and his speech is free. The impact of a person's speech on others is not the test of its freedom. Concern with achieving a particular effect on listeners (that they consider one's views seriously, for instance, or that they agree with them) is not the justification of free speech; it is not the reason for which we respect a person's freedom of speech in the first place. Correspondingly, it is not the standard by which to measure whether particular speech truly is free. And (what is most germane here), it is not a basis for concluding that speech that is influential is really action, in disguise.[145]

143. *See* LOCKE, *supra* note 74, at 21–22.

144. Some of the confusion over "power" also emerges when one simply looks more closely at the claims of the Power Argument's advocates. When Park calls it obvious that "the power of speech remains proportional to wealth in this country," for instance, what exactly is she claiming? *See* Park, *supra* note 94. What would it mean for the *power* of speech to be proportional to wealth? Which type of power correlates with wealth? History shows a long string of wealthy and better-funded political candidates failing in their campaigns to win political office. *See* Andrew Prokop, *Really Rich People Aren't Actually that Good at Buying Their Way into Political Office*, VOX, https://www.vox.com/2015/12/3/9837596/self-funding-candidates (last updated June 5, 2016, 11:01 AM). Further, on this view, what could account for the influence of a Martin Luther King, Jr., who spoke from a comparatively marginalized social position? Seemingly, King's intellectual power explains his disproportionate influence—testimony to the potential of multiple types of power.

145. The one aspect of speech's impact that does matter is its effect on others' freedom of action. Words used to plot a robbery or perpetrate a fraud, we have noted, may be restricted because they violate individual rights. *See supra* note 21 and accompanying text. In these cases, the relative social position of the perpetrator is of no significance, however.

Judgment is not oppression. An individual's expression of a strong political opinion or of a severely negative view of others does not touch its target's freedom of action.[146]

Notice how the contention that a person's rights can be constricted by the speaking of the more "powerful" tacitly assumes that a person is entitled to things that others' power might affect. For the Power Argument's salient claim is not that some are using their power to initiate physical force against others. The contention, rather, is that the possession of certain kinds of power converts the power holders' speech into action that must be corrected by force (either in the form of legal restriction or, as some advocate, the use of violence, to resist).[147] This runs well beyond holding that a person is entitled to others' non-interference. And by extending the territory to which a person's rights entitle him, it correspondingly expands the ways in which others might violate his rights.

This, of course, would hamstring the freedom of *those* people. The expanded "freedom" of some individuals results in reduced freedom for others. (This echoes a problem encountered by the Harm Argument.[148]) At the same time, however, maintenance of the "equal power" conditions required to ensure those other individuals' freedom would shrink the freedom of everyone who is obligated to respect their rights. What becomes quickly apparent is that the Power Argument's operative gauge of freedom could not be upheld on a consistent basis. Because the respect for such bloated "freedom" of one person could come only at the expense of another person's

146. On the alleged equation of certain speech with violence, it is worth noting the legal meaning of "violence." According to the FBI, "violent crime is composed of four offenses: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. Violent crimes are defined . . . as those offenses which involve force or threat of force." FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2010, at 1 (2011), https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violentcrimemain.pdf. In a related vein, the former slave Frederick Douglass harshly criticized the equation of various other forms of suffering and deprivation with slavery. *See* NICHOLAS BUCCOLA, THE POLITICAL THOUGHT OF FREDERICK DOUGLASS: IN PURSUIT OF AMERICAN LIBERTY 16–19 (2012).

147. *See supra* notes 114, 117, 143.

148. *See supra* Section II.D.1.

freedom, its protection would require arbitrary exception-making.[149]

To put the point slightly differently, the more that a person's freedom is freedom *to* and the more that a person's freedom is correlatively thought to require of others, the less free those others will be. Further, the less free that he himself can be, given that he (along with everyone else) will be required to fulfill the expanded needs of others' fattened freedom. On this over-fed notion of freedom of speech, a government could not protect the *equal* freedom of all individuals (which is ironic, since concern for equality typically animates the Power Argument). Rather, the government must pick winners and losers and, in the course of protecting the rights of James, abridge the rights of Mary. This feeds into the third fatal deficiency.

The Power Argument's standard of "freedom" torpedoes the objective enforcement of law. The idea that the freedom of one's speech—more precisely, the idea that whether one's speech constitutes speech (as opposed to action)—hinges on the social position of the speaker jettisons the belief that all individuals are naturally morally equal and, on that basis, equal in their rights. Instead, the rights that a person possesses—the classification of his action as action or as speech and correlatively, the freedom that he is entitled to—depend on the relative power of his group.[150] Rights are not objective principles that warrant steadfast respect, on this view, but fluid, ever-shifting demands whose practical clout and moral authority ebb and flow with

149. *See* HICKS, *supra* note 94, at 238 (analyzing the postmodernist argument that speech is a form of power that silences oppressed groups and tolerance is therefore a form of censorship, and then characterizing the argument, "So in order to equalize the power imbalance, explicit and forthright double-standards are absolutely and unapologetically called for by the postmodern Left."). Compare this with the view of Marcuse, who argued that "true tolerance 'must always be partisan—intolerant toward the protagonists of the repressive status quo.'" WHITTINGTON, *supra* note 97, at 24 (quoting Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81, 85 (1969)).

150. I leave aside further major questions concerning which group identities should count, the fact that an individual is simultaneously a member of many groups, and the way in which the differing degrees of different kinds of power of these groups complicates our ascertaining what an individual's power is.

the tides of various groups' perceived influence. A person will possess more rights, or fewer, depending on his identity as a member of a favored group.[151]

In sum, the Power Argument's focus on power is a red herring. The analysis equivocates between different senses of power, imports an inappropriate measure of individuals' freedom (namely, a particular impact of speech), and necessitates double standards in the application of law. Crucially, it fails to show that a person's social position exerts the type of power that obstructs any other person's rights.

3. *Response to the Symbolic Speech Argument*

Finally, what should we make of the appeal to symbolic speech as providing reason to deny a firm distinction between speech and action? The idea, again, is that insistence on this distinction would leave symbolic speech vulnerable to legal restriction and thus neuter a valuable tool of social reform.[152]

It is undeniable that the use of symbolic speech can be an effective means of calling attention to injustices and lead to worthy reform.[153] The problem with the claim that this vitiates the speech-action distinction, however, is that instances of symbolic speech are not actually instances of speech. The person who kneels or refuses to eat or hoists a mattress or sets a match to something is not speaking. He is not engaged in intellectual activity (thinking, writing, hypothesizing, inferring, and so on). He is engaged in physical activity that directly alters the external environment.

---

151. While the Court has long abjured viewpoint discrimination, *see* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."), this would require speaker discrimination, which is arguably worse. For it would amount to: "Tell me who is talking, and I'll tell you whether he should be permitted to talk." For background on the speaker discrimination doctrine more generally, see Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 802–07 (2015).

152. *See supra* Section II.C.

153. This is not to imply that those who engage in symbolic speech unfailingly have justice on their side. Sincerity and righteousness do not assure *being* right.

"Symbolic speech" is a misnomer. The term is figurative, rather than literal. We readily understand what is meant by it, as it is a clear, concise means of conveying the reasons for which certain actions are taken. As I explained in Part II, however, the reasons for which a person takes an action do not dictate the kind of action that he takes. When I kneel during the National Anthem to express my objection to police treatment of blacks, the kneeling is still kneeling—a physical position of a body. Correspondingly, an agent's intentions do not determine the proper legal classification of his action.[154] An action should acquire no greater legal protection because of what it is intended to accomplish.[155] As an action, it should be evaluated by the government in the same way that all actions are to be evaluated by the government, namely, for its effect on the rights of others. And an agent's intentions do not determine the action's impact on those rights.[156]

My position here might seem at odds with a claim that I made earlier. In explaining the object of First Amendment protection as intellectual freedom, I argued that assembly could be understood as intellectual, its physical dimension notwithstanding.[157] Yet if assembly could qualify as intellectual, wouldn't these instances of symbolic speech be equally intellectual? How can I reconcile the denial that symbolic speech is speech with the view that assembly can be?

Three points should dispel any air of tension. First, bear in mind that I have not denied the phenomenon of "symbolic speech." People engaged in such activities are doing physical

154. Note that the traditional test for symbolic speech depends on both the actor's subjective intent and the objective likelihood that his or her message will be understood. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

155. *See* Strossen, *supra* note 62, at 542 ("If incidental messages could transform conduct into speech, then the distinction between speech and conduct would disappear completely, because *all* conduct conveys a message.").

156. For related discussion of the "seemingly impossible task of declaring a sufficient test for symbolic speech protection," see Caitlin Housley, Note, *A Uniform Test Isn't Here Right Now, But Please Leave a Message: How Altering the* Spence *Symbolic Speech Test Can Better Meet the Needs of an Expressive Society*, 103 KY. L.J. 657, 657 (2015). Housley proceeds, nonetheless, to offer suggestions to fortify and salvage the differing standards that the Court employed in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* and *Spence v. Washington*. *Id.* at 669–70.

157. *See supra* Part I.

things in order to express a viewpoint, and sometimes succeed in expressing those viewpoints quite vividly. Our question, however, is whether a legal system should view these activities as speech or as action, as intellectual or physical. And on this, the fact that an agent intends a certain idea to be conveyed by his physical activity does not, by itself, render it speech for the plain reason that its physical character makes it more capable of affecting the rights of others. Since an action's impact on others' freedom is the basis for the legal system's distinguishing intellectual activity and physical activity in the first place, that is the basis for denying that the intended symbolism of a particular physical action sets it apart from other physical actions. The intention behind an action does not alter that action's capacity to affect others' freedom; therefore, it does not alter its proper legal classification. (Note also that the assembly that is properly respected by the First Amendment is not symbolic. Rather, it is simply a means of enabling the gathering of individual rightsholders to express their views. No symbolism need be involved.)

Second, in explaining assembly as congruent with the concern for intellectual freedom that unites the First Amendment's protection of speech, religion, press, and petition, I did not claim that assembly was speech. Rather, I claimed that assembly could be intellectual. The point of the Framers in including assembly was to recognize that when people assemble *to make a point*—to express a view—the government must allow it.[158] The Amendment as a whole clearly indicates that individuals' thinking and acting accordingly (by speaking or publishing or praying or petitioning or gathering with others) should be free.[159] At the same time, however, all of these manifestations of intellectual activity—all of these physical actions—are to be protected only as long as they respect the rights of others.

158. *See* Mazzone, *supra* note 37, at 29 (describing history of First Amendment's right of assembly as indicating intent to protect popular sovereignty and specific forms of political petition and expression).

159. *See id.* (noting the Supreme Court's holdings protecting a variety of activities of assembly and petition, including "marches, sit-in protests, rallies . . . , group boycotts, labor pickets, [and] the filing of lawsuits" (footnotes omitted)).

Accordingly, assembly at the cost of others' rights is not to be legally protected any more than speaking at the cost of others' rights (such as through libelous speech or fraudulent speech) or practicing religion at the expense of others' rights (such as by beating infidels) is to be protected. And this is what I have emphasized throughout. The problem with so-called "symbolic speech" is that it typically is not speech and it frequently does threaten the rights of others.

Finally, observe that my position on both symbolic speech and assembly draws on another point that I made early on, namely, the fact that the legal categories "speech" and "action" are presumptive rather than dispositive. Categorization as speech or action is not the last word on appropriate legal treatment. Consequently, to say that an action that is commonly considered "symbolic speech" does not legitimately qualify as speech (for legal purposes) does not alone entail that it should be restricted. It simply means that it should not be segregated from other actions in the same way that fundamentally intellectual activities should be. Indeed, a person's actions should be legally protected (regardless of whether they are symbolic) as long as they make use of the agent's own property and do not abridge the rights of others.[160] In this vein, it is worth noting that the First Amendment refers to the right "*peaceably* to assemble,"[161] an indication that physical forms of intellectual activity are protected only as long as they themselves are rights-respecting. Notice further, however, that when that condition is satisfied, it is not its "speechy" quality that qualifies the action for legal protection. Rather, it is the fact that the action does not interfere with others' freedom. As long as a person is not interfering with others' property, it does not matter to the legal system how he chooses to exercise his rights.[162]

160. *See* Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, *in* FREEDOM OF ASSEMBLY AND PETITION: THE FIRST AMENDMENT, ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 104, 107–08 (Margaret M. Russell ed., 2010).

161. U.S. CONST. amend. I (emphasis added).

162. *See* Smith, *supra* note 160, at 108.

In sum, my rejection of symbolic speech as speech is perfectly consonant with all I have said about assembly and the First Amendment. And my core denial that intent alone is sufficient to render an action legitimately beyond the reach of the law stands intact.

Let me next consider another possible defense for the symbolic speech line of reasoning. Sometimes, symbolic speech is defended under the banner of a right to protest.[163] Surely, the thinking runs, one could not deny that people have a right to protest things they regard as injustices. Symbolic speech is a natural means of doing so.[164]

While there is definite truth in this, we must be precise in assessing the right being asserted. There is no such thing as a "right to protest" as such, or at the expense of the rights of others. What is true is that each individual possesses the right to use his resources to do whatever he likes (within the bounds of respecting others' rights), and this includes speaking out and acting in protest of the actions or policies of others. This is not a special right in any way, however. It is not the case that when what a person wishes to say is in protest of something, he gains additional legal protections beyond those that attend other uses of his freedom or his speaking to convey other types of messages. The legal system would have no basis for awarding such a bonus, given that such intentions are irrelevant to its scope of concern.[165]

---

163. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969) (holding unconstitutional a school district's act of punishing students for wearing black armbands in protest of the Vietnam war).

164. Symbolic speech can also be employed for purposes other than protest, of course, such as religious, laudatory, celebratory, or historical commemoration. Indeed, contributions to political campaigns are often made not only to lend material support but to express spiritual support and symbolize solidarity (particularly when the donor recognizes that the small size of his contribution is unlikely to carry much material impact). Interestingly, the idea that symbolic speech qualifies as speech because of its intended expression implies that restrictions of such spending would be unjustified incursions on speech. I discuss the proper categorization of campaign contributions below. *See infra* Part IV.

165. The question of a right to protest is sometimes complicated by a protest's taking place on public property. The government may not restrict people's peaceful action on public property for reasons beyond the usual time, place, and manner restrictions that are applied to

The point is, while protest is one legitimate exercise of a person's freedom of action, it does not change action into speech. Neither the adjective "symbolic" nor the noun "protest" work as an all-purpose converter of physical activity into intellectual activity.[166]

More generally, the idea that "symbolic speech" demonstrates that speech and action are not significantly different from one another would commit one to the same subjectivism that afflicts the Harm and Power Arguments. If the legal permissibility of an action turns on the mental set of the person taking the action (because he *means* his marching, burning, beating, or groping to say such and such, it is classified as speech), then the people around him cannot know what the laws are and whether they are legally entitled to respond to his action in certain ways. If an employer, for example, contemplates firing a worker who engages in "symbolic speech" on the job by defying the dress code, would firing him violate the employee's First Amendment rights of free expression? Or would it be a permissible expression of the employer's views? If an action's permissibility depends on agents' intentions, then the law is continually "in the making" and the rules to which one will be legally accountable are not knowable in advance. The very same deed carrying the very same effects on others would be legally permissible, or not, depending on the agent's state of mind. This is not objective law.

More fundamentally, again, the referent of "symbolic speech" is not speech. Indeed, this is why we use the adjective. Without

---

all speech on public property, *see* John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1180–82 (2015), thus an action's being a protest is immaterial. Insofar as we can meaningfully speak of a specific "right to protest," however, it is akin to the way in which we might say that a person has the right to eat oatmeal, the right to wear black sneakers, the right to go to church on Sunday morning, or the right to play soccer on Sunday morning. These are simply a few of the countless specific ways in which a person might exercise his freedom.

166. It is generally advisable to be cautious when confronted with novel, compound, or hyphenated forms of pivotal political concepts, such as "symbolic speech," "symbolic violence," "discursive violence," "epistemic violence," "corporeal protest," or "inclusive freedom." While some of these may identify genuine phenomena and valid conceptual categories, often, such terms serve to obscure important differences and thereby license logical non sequiturs. In a similar vein, we should guard against allowing that which may be figuratively or metaphorically true to be treated as if it were literally true.

the word "symbolic," few would mistake kneeling, marching, burning, beating, and the rest for speaking. Groping is not a fundamentally intellectual activity. The fact that physical actions can, under certain circumstances, serve to convey convictions does not mean that they should be considered speech by the legal system. Insofar as they are physical, they stand in a relevantly different relationship to other people's freedom of action. And this, again, is the proper concern of the law.

Before we leave the subject, notice that in denying that symbolic speech constitutes speech, one does not defang an effective tool of social reform (or even necessarily oppose the use of it). People remain free to engage in "symbolic speech." What they cannot do, however, is demand First Amendment shelter for their action under the pretense that it is speech.

* * *

As I noted at the start of this section, the denial of the speech-action distinction arises more directly in positions urged on particular disputes over the freedom of speech than in a systematic presentation of principled arguments. Nonetheless, a few general lines of thinking seem to support the denial. While the Harm Argument, the Power Argument, and the appeal to symbolic speech each raise some isolated true observations, none of them, on inspection, validates the conclusion that the legal distinction should be overthrown.

III. ROOTS OF THE CONFUSION

Having explained the logic behind the law's distinguishing speech from action as well as detailing the failings of the distinction's denial, we can turn to a different sort of question. What is driving the confusion of speech with action? What further ideas might be fueling it?

The mingling of speech with action will be much more natural if one has a hazy grasp of why speech should be free in the first place. I have argued that the legal difference between speech and action is significant because of the differing capa-

cities of each to affect other individuals' freedom.[167] Yet unless one recognizes the protection of individuals' freedom as the primary function of government, that difference will fail to register. Clearly, deeper differences inform differences over the speech-action relationship. While we can hardly examine all of these here, it is always helpful, in order to combat an error, to understand its sources. For it is those that must be uprooted, to alter people's thinking in a lasting way. Because the deeper premises of the speech-action confusion could easily be the subject of a separate paper, however, here, I will confine myself to brief comment on just two of the contributing factors: a philosophical premise of determinism and a pragmatic response to the judiciary's method of tiered scrutiny.

A. *Determinism*

Determinism is the belief that "every event is necessitated by antecedent events" and the physical laws of nature.[168] Human actions, accordingly, are not the result of individuals' choices, but the products of factors beyond a person's control—typically, these are claimed to be biological or environmental factors, genetic or social.[169] Strictly, therefore, under determinism, human actions are not truly "actions" in the familiar sense that would imply personal agency, but merely further events—things that happen, as opposed to things that one *does*. Determinism denies that a person is free to choose among alternatives.

What is instructive for understanding the roots of the speech-action confusion is the fact that, although a commitment to

167. *See supra* Part I.

168. Carl Hoefer, *Causal Determinism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 21, 2016), https://plato.stanford.edu/entries/determinism-causal/; *see also* HARRY BINSWANGER, HOW WE KNOW: EPISTEMOLOGY ON AN OBJECTIVIST FOUNDATION 323 (2014) (observing that "determinism is the theory holding that antecedent factors beyond man's control necessitate everything he is and does").

169. *See* Ulrike Rangel & Johannes Keller, *Essentialism Goes Social: Belief in Social Determinism as a Component of Psychological Essentialism*, 100 J. PERSONALITY & SOC. PSYCHOL. 1056, 1057–59 (2011) (exploring components of and theories underlying genetic and social determinisms).

determinism is not always conscious, much of the reasoning on behalf of the equation of speech with action implies it. Charges that "Your speech oppresses me," for instance, attribute to speech a power that it does not possess—unless one assumes that speech has the capacity to dictate its listeners' beliefs. The idea that a person's freedom could be compromised simply by exposure to the airing of others' words implies that that person lacks the capacity to evaluate the ideas that he hears and to act on his own judgment.[170] The determinist premise is also evident in the familiar refrain in some strands of the Power Argument, "Of course you think that, you're white / you're male / you're a person of privilege." Translation: your race, gender, or class dictates your convictions. Bear in mind, too, Essig's claim that "our ways of seeing the world are shaped by our circumstances: race, gender, sexual orientation, class, and so on."[171] The "shaping," she implies, is quite strong.[172]

Even in the Harm Argument, the contention that words can wound in the same way as blades and bullets portrays human beings as helpless patients, at the mercy of forces beyond our control. This reasoning effectively physicalizes the intellectual. It attributes a greater power to words than they actually possess. This outlook treats thoughts not as tools of cognition, as means of acquiring knowledge and understanding phenomena, but instead as movers of stuff, more akin to fireplace pokers: *if he hears x, he will think x.* Ideas are not truly ideas, on this view;

170. *But see* STROSSEN, *supra* note 51, at 22 ("Unlike other forms of conduct . . . speech can influence listeners only through their intermediating perceptions, reactions, and actions, and only as one of countless other factors that also have potential influence. . . . Sticks and stones directly cause harm, through their own force, but . . . whether particular words actually do cause harm depends on how individual listeners perceive and respond to them . . . ."). Even Richard Delgado, one of the pioneering advocates of restrictions on hate speech, "concede[s] that 'the emotional damage caused' by such insults 'is variable and depends on many factors, only one of which is the outrageousness of the insult.'" *Id.* at 123–24 (quoting Delgado, *supra* note 10, at 94).

171. Essig, *supra* note 83.

172. *See id.*

they are no different in kind from noises or sounds.[173] And it is those, allegedly, that have the ability to move minds.

If words wound, then our minds are meat. For without volition, we *would* be more vulnerable to a greater variety of external "assaults," be they verbal or physical. Determinism fosters the notion that, since a person's course is equally susceptible to "restriction" by other people's words and by other people's deeds, we need not concern ourselves with whether another person said something or did something.[174] The difference between speech and action simply does not matter.

Again, I do not believe that everyone who confuses speech with action consciously affirms these deterministic underpinnings. It is important to recognize that determinism is the logical implication, however, in part because it stands directly at odds with the position of those who deny the distinction. That is, if human beings' beliefs are determined by forces beyond our control, then the entire normative realm is moot. One could not consistently maintain that the legal system ought to recognize the power of words or the harm of words or that it ought to treat speech and action as interchangeable (or as distinct, for that matter) if one believes that we cannot choose, by our own judgment and of our own volition, what to believe and what to do about it. You cannot have your determinism and prescriptions, too. For determinism provides no escape from its grip; a consistent determinist has no basis for such self-exclusion.

Obviously, this ventures onto still deeper and contentious questions. For our purposes, the upshot is this: if you do not think that actions are volitional, you will attribute great power to all of the external elements in a person's environment. Other people's speech will seem just as threatening as other people's physical actions (those that *are* capable of thwarting a person's

173. *See* Walter Bruno, *Campus Discourse and the Silence Track*, 29 ACAD. QUESTIONS 410, 411 (2016) ("In today's world, to speak is not to construct or mediate an idea; it is merely to mark something that preexists, according to place, history, and identity. Things don't get randomly ideated by speech. In fact, there's no such thing as an 'idea'; the term is a classical fallacy.").

174. *See* RAUCH, *supra* note 132, at 130–31.

freedom). You will conflate the two and assume that the law should treat them as interchangeable.[175]

B. *First Amendment as Sanctuary*

We should also recognize a completely different sort of contributor to the conflation of speech with action, which I referred to in my opening. This is rooted not in a philosophical premise, so much as in a particular government practice. Over roughly the last century, the U.S. Supreme Court has been especially protective of the rights mentioned in the First Amendment,[176] while it has been much less protective of most others. Building on a handful of rulings in the first half of the twentieth century, the Court has adhered to the policy of tiered scrutiny in assessing constitutionality, subjecting different kinds of government activity to differing degrees of skeptical analysis.[177] First Amendment freedoms are among the few for which the Court maintains rigorous criteria to justify government restriction.[178]

---

175. For related discussion of the idea that determinism is implicit in certain arguments over freedom of speech, see HICKS, *supra* note 94, at 230–31, 234–35, 238–39.

176. *See generally* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (holding that public sector unions cannot constitutionally extract collective bargaining agency fees from employees without consent); Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018) (holding that a political apparel ban violated the First Amendment).

177. *See* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 947–57 (2004) (discussing the origins of the Court's modern tiered scrutiny framework). The three tiers are strict scrutiny, intermediate scrutiny, and rational basis review. Notable early cases that employed the differing standards include Nebbia v. New York, 291 U.S. 502, 525 (1934) (offering, in the context of the Fifth and Fourteenth Amendments, an early articulation of modern rational basis review, noting that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained"), and Wickard v. Filburn, 317 U.S. 111, 129 (1942) (noting, in the context of the Commerce Clause, that "[t]he conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process").

178. The basic idea of tiered scrutiny was most famously laid out in footnote 4 of *United States v. Carolene Products Co.*, in which the Court wrote that "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." 304 U.S.

One effect of this has been that individuals increasingly misdescribe their actions as speech in order to win judicial favor. The extension of government restrictions to encompass so much of what people do coupled with courts' use of tiered scrutiny and comparative respect for First Amendment activities encourages people to claim that some of their actions are speech, in order to gain legal shelter for those actions. Cake bakers who wish not to serve certain customers, for example, or workers who wish not to abide by their employers' dress codes frame their claims as the exercise of free speech, thinking that this provides their best chance of having the courts rule to protect them.[179] And those who are sympathetic to the idea that the action in question should be legally free can easily fall into assuming (erroneously) that it is speech.[180]

I do not mean that this misdescribing is typically deliberately deceptive, intended to misrepresent. While it is no doubt often a strategy advised by attorneys, many people are simply sloppy in their thinking about the differences. They hear others assimilating the two concepts, they see courts frequently endorsing these confusions (at least by implication), and they absorb the idea themselves, gradually coming to believe that many actions are speech and that the borders between the two are fluid. The cumulative effect is the entrenchment of misguided assumptions and the erosion of the speech-action distinction.

144, 152 n.4 (1938). It thus developed that courts granted the lenient rational basis review to most government actions, while reserving strict scrutiny for First Amendment activities and very select others. Schauer, *supra* note 17, at 430–32. Numerous scholars, myself included, have criticized this division and the rational basis standard, in particular. *See* Tara Smith, *A Conceivable Constitution: How the Rational Basis Test Throws Darts and Misses the Mark*, 59 S. TEX. L. REV. 77, 91–105 (2017); SMITH, JUDICIAL REVIEW, *supra* note 16, at 227–33; CLARK NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 1, 49–63 (2013); Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 859–60 (2012).

179. *See* Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct 1719, 1724 (2018) (analyzing a baker's argument that requiring him to bake a cake that he claimed was against his religious beliefs violated his First Amendment rights). *See generally* Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502 (5th Cir. 2009) (analyzing a high school student's argument that the school's dress code violated his First Amendment rights).

180. *See infra* Part IV.

The problem, however, is that legal strategy does not determine an action's identity. A strategy for gaining legal protection, however understandable its adoption, does not determine whether an activity is fundamentally intellectual or non-intellectual. It does not determine whether the activity is capable of violating the freedom of others. Even if the disputed actions in many of these cases should, indeed, be legally free, that does not render them instances of speech.

IV. APPLICATION TO EXAMPLES

So how would I classify some of the hard cases that I noted at the outset? Should the legal system regard them as instances of speech or as instances of action?

My primary aim in this paper, as I indicated earlier, is to call attention to the fundamental principle being buried in many of these debates. Only after we grasp the essential difference between speech and action can we properly untangle these more localized controversies. Nonetheless, my position may itself be clearer if we consider its application to some concrete disputes. I will, therefore, comment briefly on three, simply to indicate the general contours of what my analysis would entail.

Before I do so, though, a couple of preliminaries are needed. First, a caution against allowing one's leanings on the larger question of whether the activity in question should be legally free to distort one's thinking about speech-action designations. That is, the subtle influence of the "First Amendment as refuge" phenomenon may sometimes encourage us to "see" an action as speech because we believe that that action should be legally protected.[181] We must resist such motivated reasoning.

Second, remember that the classification of an activity as speech or as action does not by itself determine how the legal system should treat that activity. The speech-action division is useful because it calls attention to the natural and customarily harmless character of speech (harmless in relation to indivi-

181. *See* Schauer, *supra* note 17, at 435 n.43 (warning of the danger of "labeling (or perceiving) an act as [speech or action] depending on the outcome preferences of the labeler").

duals' rights, that is). Yet we have acknowledged all along that in certain circumstances, speaking words can be used to prey on others' rights. (This again is the basis for the law's refusal to shield libelous speech or fraudulent speech, among other types.[182]) It is equally important to remember that although action (non-intellectual action) is, *as a kind*, more capable of infringing on others' rights (and as such, is the kind of activity to which the legal system should stand more ready to respond), it is hardly the case that any or all action is properly subject to government restrictions. Correspondingly, it is not as if, once we classify an activity as either speech or action, the legal inquiry has been completed. The particular context must still be examined in order to determine whether any of its elements warrant different treatment for the relevant speech or action from the usual.

A. *Baking a Cake*

The baker who defends his refusal of certain commissions as an exercise of free speech is mistaken, in my view. Baking is not speaking. Its constituent activities—breaking eggs, greasing pans, sifting, blending, kneading, heating—are not fundamentally intellectual activities. People might bake for all sorts of reasons, including expressive ones (to offer support to a bereaved widower or to a homesick college freshman, for instance). Such aims do not alter the basic nature of what one is doing, however. More specifically, they do not alter it in the respect that is salient for a legal system, namely, its capacity to infringe on the freedom of others.

To hold that baking is not speaking does not settle the question of its proper legal status. The government does not have the authority to regulate all non-intellectual activity. The overwhelming majority of individuals' actions (non-speech actions) do not endanger others and are perfectly within the agent's rights. One distinct possibility is that while the cake baking is not speech, the baker *should* be free to refuse labor for

182. *See supra* note 21 and accompanying text.

certain people—not because legal mandates to the contrary would compel speech, but because they would compel action and, in so doing, violate one or more of his other rights (to property, contract, or association, for instance). This obviously raises substantial questions concerning the reigning interpretation of the Fourteenth Amendment's Equal Protection Clause.[183] The immediate point is this: much more must be considered to determine who should have his way in disputes between religious bakers and gay couples.[184] In order to conduct that discussion on solid terrain, however, we must accurately understand whether speech is one of the factors in play. And because baking is not fundamentally intellectual activity, it does not qualify.

B. *Physicians' Counsel About Guns*

Next, let us turn to a few more complicated cases. Consider the "Docs v. Glocks" case concerning physicians' freedom to speak to their patients about guns in the home as a health risk (because of issues of gun safety, access, childproofing, and the like).[185] In February 2017, the Eleventh Circuit ruled that certain provisions of Florida's Firearms Owners' Privacy Act, which prohibited doctors' discussing gun safety with patients, unconstitutionally violated doctors' freedom of speech.[186] While I welcome the protection of the physicians' freedom, the question for us is: is it really speech that is at issue?

In this case, speech clearly is involved: the doctor is talking. Yet he is doing so in a special capacity as an expert, hired for service in that role. Part of that service consists of dispensing his knowledge and counsel. When speaking about gun safety, the physician's observations are not presented to the patient as idle chat between the "real" parts of the medical consultation, as immaterial to the patient as the physician's opinions about

183. *See* SMITH, JUDICIAL REVIEW, *supra* note 16, at 255–58.

184. I discuss the clash between claims of religious liberty and equal protection that arise in similar cases in Smith, *Religious Liberty or Religious License?*, *supra* note 41, *passim*.

185. Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1301 (11th Cir. 2017).

186. *Id.* at 1300–01, 1319.

the local baseball team or the Academy Awards might be. Rather, he is speaking in order to provide the contracted service. Good medical treatment requires that a physician explain, share knowledge and experience, present options, and advise. He is being paid to express his judgment. Such speaking is one component of providing health care.

The particular subject matter of guns raises potentially distracting questions about whether gun ownership actually constitutes a medical concern. What is designated a "public health" issue is often politicized. We need not enter that debate here, however, for even if one denies that gun safety constitutes a health issue, the principle at issue (concerning a physician's choice of topics and viewpoints) remains. If a patient does not like the subjects that his doctor raises, he is free to object and to seek a different doctor (just as he is if he finds a doctor's questions too intrusive or too personal, or a doctor's tone or comments too censorious about certain lifestyle choices or sexual practices, for instance).[187]

The main point is that by speaking, a physician is delivering a contracted-for service. His knowledge and advice are a major part of what the client seeks from a doctor. Accordingly, his speaking in the provision of care is not "self-contained" intellectual activity in the way that formulating or sharing opinions about baseball or a movie would be. (He is not "just sayin'.") In speaking, the doctor is trying to do his job. For the state to restrict how he does that by dictating what he may and may not discuss would be a direct interference with his work. As such, it would be unjustified.

In my view, then, the doctor's speech should be legally protected, but not under the First Amendment. Rather, it should be protected on the grounds of freedom of trade, commerce, and contract, and the broader ground of freedom of action, in recognition that an individual's life is his to do with

187. Questions of a physician's competence or professionalism raise additional serious issues, but those are not the concern here. *See, e.g.*, Jon C. Tilburt et al., *The Case of Dr. Oz: Ethics, Evidence, and Does Professional Self-Regulation Work?*, 19 AMA J. ETHICS 199, 200–02 (2017) (identifying ethical issues implicated by physician speech).

as he chooses (as ever, as long as he is not infringing on the rights of others). In this case, an action (the delivery of health care) is mischaracterized as speech.

Obviously, readers will have differing views concerning the propriety of various government restrictions on the practice of medicine. Those disagreements call for a different, and deeper, debate. The point here is that, whether physicians ultimately should be more regulated or less, what is in question is not their speech, but their actions.

C. *Campaign Finance Restrictions*

Finally, let us consider the question created by campaign finance restrictions. Are expenditures for political purposes (to elect a candidate or support a particular position on a ballot referendum, for example) instances of spending (a type of acting) or speaking?[188]

Ordinarily, spending is not speaking. Most of the time, people spend money to buy things that have nothing to do with expressing ideas (spending money to buy gas, groceries, or shoes, for instance, or to pay tuition, rent a video, get a ticket to a concert, and so on).[189] When a person spends money in order to support or disseminate a political message, however, that spending is a means of giving voice to his beliefs.[190]

Suppose a government announced the policy: *You are free to communicate your ideas. You may not do this at others' expense; you may not infringe on any of their rights, but as long as you are using your own resources, you are free to communicate.* Suppose that the policy further declared: *While you are free to communicate, you may not employ the tools necessary to do that. A business, for instance, is free to advertise its products, but not to spend money to do so.* The

188. In this discussion, I am not distinguishing between contributing money to a political campaign and spending by a campaign.

189. Obviously, people sometimes spend to engage in conspicuous consumption, to impress others, or the like.

190. *See* Eugene Volokh, *Why* Buckley v. Valeo *Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1095 (2003) (arguing that a "limit on independent [campaign] expenditures" works to "infringe[] core First Amendment rights").

government explains that it is not restricting advertising; it is only restricting spending on advertising.

Such a policy, I submit, would render the promise of free speech a fraud. When the government prohibits a person's natural means of engaging in an activity, it prohibits that activity. As Bradley Smith has observed, "[T]o limit what someone can spend to exercise a right—whether to speak, worship or obtain an abortion—is to limit the right itself."[191] When the government restricts a person's means of speaking, it restricts his speaking. For this reason, I believe that political spending is a form of speech.[192]

Some will no doubt resist this classification, contending that such restrictions on spending do not restrict a person's speech. Rather, they merely prohibit his speaking in that one way, through the use of that money. The person remains free to speak on behalf of his ideas without spending money.

But this will not do. First, it is comparable to the government telling a woman, "You're perfectly free to obtain an abortion. You may not pay anyone for that service, however." Second, the fact that a restriction does not silence all of a person's speaking does not mean that it does not silence. Dictators who rule the most repressive, censoring regimes leave their citizens "free" to talk about the weather or an innocuous tennis match. Their subjects do not become mutes; they are permitted some speaking. The violation of their freedom consists in the fact that they are prohibited from discussing topics X and Y, criticizing Z, or expressing views A through P.

Third and most fundamentally lurks a basic question: Under such restrictions on spending to speak on political issues, *how* is

191. Bradley A. Smith, *A 'Teachable Moment' on Free Speech*, WALL STREET J. (Nov. 1, 2017, 7:10 PM), https://www.wsj.com/articles/a-teachable-moment-on-free-speech-1509577816; *cf.* ABRAMS, *supra* note 103, at 86 ("The question is not whether money is speech, but whether the First Amendment *protects our* [sic] *right to speak using your money*." (quoting Volokh, *supra* note 190, at 1101)).

192. To refrain from restricting a person's means of speaking does not require the government to supply means of speaking (such as money) to pay for the materials or platforms that a would-be speaker might like. It simply requires that it not interfere with a person's using his own resources to contract with others to serve his desire to communicate ideas.

a person to communicate? Speaking is naturally and necessarily done by some means. To limit a person's use of those means is to limit the activity to which those means are essential.[193]

My contention that a political campaign expenditure is speech may give rise to a different misgiving. Here, in the political spending case, I seem to be allowing that a person's reasons for taking an action matter to whether that action is to be classified as action or as speech. Yet earlier, in considering symbolic speech, I argued that taking an action to make a point (by kneeling or occupying an office, for instance) does not alter its status as an action. How can I reconcile these?

While the objection does not reveal any contradiction in my reasoning, it does prompt greater precision on my part, which should clarify the issue. First, recall again that I have not challenged the concept of symbolic speech. As I have acknowledged all along, the phenomenon is genuine. People do sometimes act in ways designed to communicate specific convictions, and their intent is certainly germane to whether a particular action is an instance of this. My objection, rather, was to the legal classification of those acts that are symbolic speech as speech and, as such, worthy of First Amendment protection. That a given action may, in a particular context, be thought of as speech symbolically does not render it speech, literally. It does not render it speech by the standards appropriately employed by the legal system. And this is my more basic point, which has been consistent throughout the paper and across my analysis of various examples. A person's will—his desire to express something through a particular action—does not unilaterally convert that action into speech, for legal purposes.

Obviously, in my explanation of political spending as speech, the agent's intent does play a role. It is his spending the money for the purpose of accomplishing a communicative end that

193. Smith, *supra* note 191; *see also* Steve Simpson, Citizens United *and the Battle for Free Speech in America*, OBJECTIVE STANDARD (Feb. 20, 2010), https://www.theobjectivestandard.com/issues/2010-spring/citizens-united/ (arguing in favor of the *Citizens United* decision, as it recognized that "speaking out in today's world often requires large expenditures of money" and limiting those means limits the exercise of free speech).

leads me to conclude that a restriction on such spending would be a restriction of his speaking. But it "leads" me only in the sense of setting the context that prompts the inquiry. The agent's intent alone does not justify the "speech" classification; the analysis does not turn entirely on his desires. An agent's purpose does not, by itself, determine whether his action is speech or not.

To support the conclusion that political expenditures can constitute speech, I have appealed to a basic fact, namely, the necessity of spending in a modern economy to the exercise of free speech.[194] It is not a quirk of an odd individual that he can only communicate through specific means that often require the use of money; that is not a fact created by a particular agent's idiosyncratic whim. It is in the nature of human beings that our actions (including our intellectual and expressive actions) are taken by and through some more particular means and that some of these require trade with others. While spending money is not the only way to exercise the right to speak, it is necessary to enable many exercises of it.[195] (Indeed, I write these words by typing on a computer that I had to acquire by trade. The ink and paper and internet service by which I convey my thoughts to others also cost money. Such is life. And that is the point. This is the basis for understanding campaign spending as speech.)

Think, too, of the analogy with restrictions on spending money to obtain an abortion. Would anyone deny that to restrict the requisite spending is to restrict the activity? In the

194. Joe Albanese, *Spending Money in Politics Is Part of Our Cherished Freedom of Speech*, HILL (Aug. 25, 2017, 2:00 PM), https://thehill.com/blogs/pundits-blog/campaign/347829-sorry-democrats-money-counts-as-protected-political-speech; *see also* WILLIAM BENNETT TURNER, FIGURES OF SPEECH: FIRST AMENDMENT HEROES AND VILLAINS 9 (2011) (discussing the necessity of spending money for political speech); Robert J. Samuelson, *In Politics, Money Is Speech*, WASH. POST (Apr. 6, 2014), https://www.washingtonpost.com/opinions/robert-j-samuelson-in-politics-money-is-speech/2014/04/04/075df4ec-bc18-11e3-9a05-c739f29ccb08_story.html?utm_term=.a85704c70230 ("Political speech . . . requires money to hire campaign staff, build a Web site, buy political spots and the like.").

195. Albanese, *supra* note 194 ("Reaching any significant number of people requires spending some money. Try posting on the internet without buying a computer, or making fliers without paying for paper and ink.").

case of political spending, the relevant activity is expressive. That is what makes it an issue of speech.

Accordingly, my position stands intact. A person's intent, alone, cannot convert his speech into action or his action into speech. At the same time, to restrict a person's spending on political speech is to restrict his freedom to speak. This is due not to a given agent's peculiar intention, but to the intent-independent fact that speech for human beings is possible only through specific means.[196] To prohibit some of those means (when they do not infringe on the rights of others) is to restrict speech.

On broader reflection, we should be able to appreciate that the question I originally posed—*Is political expenditure speech or is it action?*—is, at least in this context, misleading, given its implication that political expenditures must be one or the other. The question is over-determined. Political spending should be legally protected regardless of whether it is considered speech or action. Restrictions on such spending would violate both a person's property rights and his speech rights. Bear in mind that the reason for drawing the legal distinction between speech and action is their differing capabilities for infringing on the rights of others. Here, the phenomenon in question—spending money to support a political policy—does not endanger any rights. As such, it should be free.[197]

---

196. Recall also that the instances of symbolic speech whose legal classification as speech I challenged (such as a sit-in occupying a person's office) infringe on the rights of others. *See supra* Sections I.C, II.D.3. Political spending, which can only take place as a voluntary two-party transaction, does not do that.

197. Some might believe that my analysis of these examples indicates that my real concern is with the difference between actions that do and do not infringe on others' rights, such that the fuss about speech and action is a diversion. While my ultimate concern obviously is with identifying the kinds of activities that infringe on others' rights, the proper classification of speech and action is vital to doing this. For the fact is that as our legal system currently operates, the category matters; having one's action classified as speech wins it greater legal protection. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406–07 (1989). The reason why it should matter, I have argued, is revealed when we analyze the First Amendment: intellectual activity as such cannot infringe on others' rights. My effort has been to call attention to the underlying reason why we should treat speech differently so that we can use that knowledge to classify actions correctly and then treat them accordingly.

V. THE DAMAGE WROUGHT BY CONFUSING SPEECH AND ACTION

Why does any of this matter? What hinges on the proper classification of speech and action?

In a word, freedom. The uncorrected misclassification of speech and action distorts our understanding of the legitimate boundaries of individuals' freedom and of the proper relationship between individuals' rights. The noxious effects are both immediate and long-term.

To understand how freedom suffers, first consider speech that is mislabeled as action. If language can be violent and words can wound, then sheer self-defense would justify the physical prevention of individuals' uttering those words (as some openly advocate).[198] By this means, freedom is shrunk. Whatever the particular words in question, when the government treats words as if they are deeds, they will be considered more threatening and for that reason, less worthy of legal protection. Accordingly, more of a person's speaking will be forbidden. We will all be confined to narrower corridors of expression.

In fact, as we have seen, words are not predators, menacing in the way that a gun or a club is.[199] Yet when the legal system mistakes words for deeds, it imposes tighter restrictions to guard against this phantom menace. Consequently, this type of misclassifying censors. For when speech is misidentified as action and on that basis, legally restricted, innocent people's speech is illegitimately silenced.

In short, I agree that the deeper issue is the effect of a person's actions on others. Use of the speech and action categories, however, provides us with useful presumptions about how the legal system should treat particular actions. And by emphasizing the correct meanings and referents of "speech" and of "action" as legal concepts, I am urging us to recognize the dangers that lurk in incorrect classification. In other words, it is in this territory of disputes over whether something legally qualifies as speech or as action that much damage to rights takes place.

198. *See* Essig, *supra* note 83 ("Those most disadvantaged by so-called free speech insist that we consider its costs, and they see certain ideas as acts of symbolic violence. They consider blocking it a form of self-defense."); *cf.* Gillman & Chemerinsky, *supra* note 111 (discussing "disruptive protests" that prevented controversial individuals from speaking on college campuses, and explaining that those opponents did not have the right to prevent them from speaking).

199. *See supra* notes 73–76 and accompanying text.

By the same token, if actions (such as baking, burning, occupying an office, or wearing certain clothes on the job) are misclassified as speech and, on that basis, are legally permitted, what occurs is equally damaging to individual freedom. For actions that should be legally restricted (in order to prevent the incursion into others' rights) will be wrongly permitted—which means that the rights of those others will be shortchanged (under the erroneous notion that the baker or occupier, for instance, is "only speaking"). When an action is mislabeled "speech," it should not be protected qua speech. If there were good grounds for the government to restrict that action but it escaped such restriction only by being inappropriately awarded the sheltered status of "speech," then, by protecting something that it should not protect, the government is failing in its obligation to protect the rights of those whose freedom is affected (such as the property owner who cannot use his office or the business owner who cannot choose the terms on which to offer employment).[200] In other words, when the government treats deeds as words, it will grant them greater protection than they warrant and it will, correspondingly, fail to protect the rights that are abridged by those actions that have been misclassified as speech.

Bear in mind that whenever the government protects, it simultaneously restricts. It uses its coercive powers to compel respect for that which it protects. In this way, it restricts some people as a means of protecting others' freedom. In itself, this is unobjectionable. When the government protects wrongly, however, it restricts wrongly. It forces people to do things that they should not be forced to do and it prohibits people from doing things that they should, in fact, be free to do.

At first blush, the misclassification of certain action as speech might seem harmless, since it can seem that all we would be doing is giving people more protection. For those who value freedom, what's not to like? When the government extends

200. This pertains to the workers' dress code case. For related discussion of student dress codes, see Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 505 (5th Cir. 2009).

greater protection to an action than it actually warrants, however (because it has mistakenly classified that action as speech), it puts others' rights in jeopardy by failing to provide the security that they deserve.[201] If, for example, violent protesters disrupting Douglas's speech are treated as simply "more speakers" rather than as acting disruptors, those protesters will be permitted to stifle Douglas's voice. If a bar owner does not want her bartenders wearing t-shirts condemning demon rum, but bartenders who defy her dress code are "merely speaking," then the business owner's right to manage her property is obsolete.

The point is, when the legal system erroneously classifies an action as speech and, for that reason, gives it wide legal latitude, it is inescapably endangering the freedom of others.

What should be becoming increasingly evident is that the breezy equation of speech with action suffocates the freedom of both. Freedom of action is a unified whole. Rights protect an individual's choice to exercise his freedom however he likes, in any of the endless ways that human beings devise, subject only to the condition that he respect others' freedom to do the same.[202] It is not the case that some exercises (such as speaking or praying) warrant more freedom than other exercises (such as spending or contracting) and correlatively, greater legal protection than others. When the government fumbles the classification of intellectual activities and non-intellectual activities,[203] however, the result is that the individual is left *less free*—less free to choose his own course. He is less free to speak as he would and less free to act as he would. Instead, under the open passage between "speech" and "action," anything that he *says* might be construed as action that is subject to government restriction and anything that the people around him *do* might be construed as mere speech and, on that basis, within their

201. *See* Essig, *supra* note 83.
202. *See* Bernick, *supra* note 23, at 561.
203. *See supra* Section I.B.

rights—regardless of the effect on his freedom.[204] From both directions, the individual's freedom is squeezed.

It is also important to recognize the longer-term repercussions of disfiguring the distinction between speech and action. By sweeping under the banner of "free speech" actions that do not actually qualify, we inflate the concept and cheapen the currency. Just as those who inflate a financial currency drive down the value of any single unit (by minting a greater number of coins without a corresponding expansion of wealth, for example), so those who would expand the range of speech to include actions mint a greater number of speech rights and reduce the value of any single claim to free speech.

Still further, the misguided weakening of the speech-action boundaries carries the baleful effect of giving free speech a bad name. Insofar as some restrictions on "free speech" will now seem reasonable (namely, those on actions that have been mislabeled as speech), the category "free speech" will acquire diminished standing in the public eye.[205] Many people would agree that the bar owner should be permitted to constrain her bartenders' attire, for example. But if that constraint is misunderstood as a violation of free speech, people will absorb the idea that while free speech should sometimes be respected, it sometimes should not be. Freedom of speech will no longer be seen as a matter of principle that demands steadfast respect. And by this unassuming route, we normalize censorship.[206]

As Floyd Abrams has observed, "Censorship is contagious."[207] Once we give credence to the premises of censorship (if only implicitly, by supporting the government's engaging in

204. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1742–48 (2018) (Thomas, J., concurring) (arguing that a baker's conduct is expressive speech and requiring him to bake a wedding cake for a gay couple unconstitutionally compels him to speak in support of gay marriage).

205. *See* Smith, *Free Speech Vernacular*, *supra* note 19, at 80–82 (arguing that when we mislabel action as speech we run the risk of "normalizing censorship").

206. *See id.* at 81–82.

207. ABRAMS, *supra* note 103, at 27.

it under tangled labeling), we sanction its future practice.[208] Having blurred the lines between speech and action, we will be far more likely to allow the kinds of restrictions that legitimately apply to certain actions to infiltrate the domain of speech—of speech that properly would be legally free.[209] Indeed, this is not merely a matter of what we are more likely to do. Logically, we will have surrendered the principle by which to oppose it.

Again, the essence of the damage is that when we misclassify, we mis-protect—we shield activities that do not warrant it and we fail to shield activities that do. The casualty is individual freedom.[210]

CONCLUSION

Let me close by reiterating a few of my principal claims. I have argued that the security of free speech and of individual freedom more broadly requires scrupulous respect for the difference between speech and action. My thesis does not concern actions' intrinsic nature or ontological status. Rather, the question is whether, relative to the purpose of a proper legal system, the action in question is fundamentally an intellectual activity or a non-intellectual activity. The First Amendment safeguards intellectual activity on the grounds that it is incapable, in and of itself, of thwarting individuals' freedom. Because the protection of individuals' freedom is the function of government, that must guide the government's determination of whether to restrict individuals' activities. And while a person's thinking can do many things, it cannot deprive another person of his freedom. What goes on in one person's head—the various forms that his thinking might take—cannot wrest control over another person's course of thinking and acting. Even should the thinker put what he is thinking on paper or

208. *See* Smith, *Free Speech Vernacular*, *supra* note 19, at 82 ("[M]isclassification . . . blurs important differences and emboldens the unjustified use of government power.").

209. *See id.* ("The material damage [of misclassification] is the suffocation of intellectual freedom.").

210. *See id.* at 81–82.

speak about his thoughts, others' ability to direct their course stands intact.

Intellectual activities undoubtedly can have effects on others. As a philosopher, I am a great believer in the power of ideas. Indeed, as author of the words that you are reading, I hope to influence *you*. But my words cannot twist your arm. They cannot twist your brain and they cannot single-handedly change your mind. This is why the Constitution marks intellectual activity as different. The denial of the speech-action distinction, however, defeats the purpose of the First Amendment and undermines the rights that the Constitution was designed to uphold.

Even if a reader is not fully convinced by all of my arguments, I do hope to have offered enough to demonstrate that the indiscriminate mingling of speech and action is costly. Under the erroneous idea that an instance of speech is actually an action, the government will consider itself justified in silencing individuals' rightful speech. And under the erroneous idea that an action is actually speech, the government will protect actions that do not warrant it—and by so doing, allow actions that violate others' rights. To confuse speech and action is—in every case—to sanction the violation of someone's rightful freedom.

None of this is to suggest that correction of the conceptual confusion will instantly resolve all questions about the legitimate bounds of speech in disputes over the First Amendment's proper application to particular cases (involving baking, political spending, etc.). The accurate legal classification of certain activities will still require careful analysis of the specific context.[211] While an accurate grasp of the speech-action distinction is not a panacea that can guarantee rights' proper protection, however, our failure to grasp it—the continuing conflation of the two—ensures that some individuals' rights will be violated. It places all rights at risk. If we care about freedom of speech, or freedom of anything, we must have a clear understanding of

211. Questions of proper application are also sometimes complicated by other deficiencies in the legal system, such as misguided but strongly entrenched precedents.

what speech is and what it is not and insist that the legal system honor the difference.