

# Defending the Public's Forum: Theory and Doctrine in the Problem of Provocative Speech

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*For more than half a century the heckler's veto has been a source of provocation. On the one hand, there now appears to be widespread consensus among courts and commentators that allowing police to shut down a provocative speaker in a public space over threats from hostile listeners is simply beyond the constitutional pale. Taking that constitutional intuition as their guide, the lower courts have generally approached the problem through a speaker-focused model, in which the government is seen siding with the majority's mob over the minority speaker, in violation of the principle requiring neutrality among speakers and views. But what happens when the usual roles reverse—when the provocative speaker is not representative of a minority opinion but is arguably representative of a larger majority? Relying on the important recent decision from the Sixth Circuit in *Bible Believers v. Wayne County*, this Article argues that this reversal of roles shows us not just the limits of the speaker-focused model in solving the heckler's veto problem, but also how it can and should be broadened to address the increasingly complex protests that have come to dominate our constitutional focus today. We should therefore take *Bible Believers* as the occasion to reconsider the familiar speaker-focused approach to the heckler's veto, by reframing it around the different problem that that case represents: not as the familiar drama of the soapbox orator faced with a hostile audience but as an example of a public forum faced with hostile takeover. In these increasingly common cases, the problem of the heckler's veto should accordingly take on a new conceptual and doctrinal form: as an attack on a public forum that the police must do everything in their power to prevent by defending the forum first.*

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## INTRODUCTION

On a March evening in 1949, a slight-framed student climbed a wooden box on a Syracuse sidewalk, and in a "loud, high pitched voice," began urging the "Negro people" to "rise up in arms and fight for equal rights."<sup>1</sup> Over the next twenty minutes, with his voice reverberating through a speaker hooked to the car idling beside him, Irving Feiner breathed fire against the powers that were—the American Legion and the city's mayor and, at some point, the President of the United States (a

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1. *Feiner v. New York*, 340 U.S. 315, 317 (1951).

“bum,” he supposedly snarled).<sup>2</sup> As one might expect, Feiner was also beginning to “sti[r] up a little excitement.”<sup>3</sup> “[A]ngry mutterings” swept through the racially “mixed audience” assembling before him, some seventy-five or eighty all told. There was pushing and shoving, some restless “milling around.”<sup>4</sup> A few among the listeners began to worry aloud that the two police officers then on the scene, hastily summoned by a telephoned complaint, would be unable to control the growing “excitement.”<sup>5</sup> Then came the threat of violence.<sup>6</sup> Uglier words coursed electrically through the crowd as the officers made their way to Feiner, who was still haranguing, and asked him to step down. Feiner, however, kept talking. Several tense minutes passed. The officers, now vastly outnumbered and fearing a full-on riot, approached Feiner once again, this time explaining that he under arrest for disobeying their order to leave, and again ordered him down.<sup>7</sup> At that, perhaps sensing the inevitable, Feiner relented, letting out one last, unsettling thought for the mob that had just succeeded in silencing him: “the law has arrived, and I suppose they will take over now.”<sup>8</sup>

The facts of Feiner’s case infamously illustrate what Harry Kalven, Jr., once called the “genuine puzzle”<sup>9</sup> of provocative speech—a puzzle now widely identified as the heckler’s veto.<sup>10</sup> A speaker, usually representing a minority view, engages in some form of expressive conduct in a space traditionally open to the public, only to be shut down by police who fear that her listeners, already restive, might threaten wider unrest, possibly violence. And, what makes the veto so grippingly problematic is easy to see in a case like Feiner’s. Simply by growing menacing enough, Feiner’s “hostile audience” effectively conscripted the police to muscle him off a public sidewalk—the sort of place where one might expect such talk to be freest. The law arrives only to end up a

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2. He would later dispute that account, insisting that if he had insulted President Truman he would have chosen a slur a bit saltier than ‘bum.’ Douglas Martin, *Irving Feiner, 84, Central Figure in Constitutional Free speech Case, Is Dead*, N.Y. TIMES, Feb. 2, 2009, at A19.

3. *Feiner*, 340 U.S. at 317.

4. *Id.* at 324 (Black, J., dissenting).

5. *Id.* at 317.

6. According to the officers’ testimony, a man approached them—some twenty minutes into Feiner’s address—saying that, “If you don’t get that son of a bitch off, I will go over and get him off there myself.” *Id.* at 330 (Douglas, J., dissenting). It was only then, the officers said, that they moved against Feiner.

7. Justice Black observed in dissent that Feiner was originally told that he was being arrested for “unlawful assembly;” and only later was the charge officially made out as “disorderly conduct.” *Id.* at 325 (Black, J., dissenting).

8. *Id.* at 318.

9. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140 (1966).

10. Although the substance of the “heckler’s veto” doctrine can be traced to Justice Black’s dissent in *Feiner*, as explained below, the label itself is due to Kalven. *See id.* at 140–45.

weapon in the hands of the majority's mob, bluntly wielded against whatever—or whomever—they would rather not hear. Whatever else the First Amendment may forbid, surely, one might think, it must forbid *that*.<sup>11</sup>

And the courts and commentators have largely agreed. Today, absent a clear and imminent danger of violence or its actual outbreak,<sup>12</sup> it would be simply “out of the question”<sup>13</sup> for the police to silence a speaker simply because of her listeners' displeasure, surrendering their baton to the hecklers' hands. In this broad sense, a heckler's veto is a constitutional non-starter. A principal aim of this Article is to explain why this is so.

As Kalven saw, however, explaining this has always posed something of a puzzle. Despite this consensus in principle, the exact contours of a heckler's veto doctrine have long remained blurry at best.<sup>14</sup> Not only has the Court yet to say what exactly the First Amendment requires of police to keep them from effecting the veto even in the classical case like *Feiner's*; it has yet even to endorse a single theory explaining what about the veto sends it beyond the constitutional pale. The heckler's veto may be clearly out of the question, but the reason why still remains obscure.

This lack of black letter clarity sets the terms of what might be called the *heckler's veto problem*, requiring an answer to not one but two closely connected questions. First, what justifies the consensus today that a heckler's veto is so clearly unacceptable? And, second, what does the First Amendment call on the police to do to respect speakers' right to have their provocative say even when its provocativeness invites violence? When the law arrives on a scene where the proverbial fistfight of ideas threatens to descend to literal fisticuffs, how and on what principle must it act?

The lower courts that have addressed this last question have largely answered it with a common doctrinal refrain: The police must defend the speaker's right to speak.<sup>15</sup> And, though less recognized, they have arrived

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11. For an example of how one might try to focus First Amendment jurisprudence around precisely this concern—the protection of dissent—see STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 101 (1990).

12. *See, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

13. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (describing taxpayer dissenters to government speech as “a First Amendment heckler's veto” that would be “out of the question”); *see also infra* Part I.

14. *See* FREDERICK SCHAUER, *EMERGING THREATS: THE HOSTILE AUDIENCE REVISITED* 2 (2017) (describing the “existing legal doctrine” on this point as “at best, murky.”).

15. *See, e.g.*, *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1289 (9th Cir. 2015) (describing the heckler's veto as a violation of the principle of content neutrality, drawing strict scrutiny); *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 554 (4th Cir. 2010)

at that answer by way of a common conception of the heckler's veto, drawn from the picture classically sketched in *Feiner's* case. This picture is of the *hostile audience*.<sup>16</sup> And the courts have drawn the constitutional wrong out of that picture by tracing it to its focal point: the point at which the government moves against the besieged speaker. In order to head off an escalation in the tensions between soapbox orator and her unfriendly audience, the police end up picking sides by moving invariably against the provocative speaker, slighting their duty to remain neutral between them. Thus the heckler's veto, at least as revealed in this picture, becomes just another content-based regulation of speech, and like all other such regulations, presumptively fails under the First Amendment.<sup>17</sup> And so the most natural way for the police to avoid blundering in this way against neutrality—to avoid making the heckling majority the winner and the besieged speaker the loser—is for them simply to protect the speaker first, to some still unclear extent.<sup>18</sup> Picturing the heckler's veto in this way brings into focus not just an answer to the heckler's veto problem, but an explanation of why the usual doctrinal refrain can feel so natural, even inevitable.

But precisely because this refrain can feel so natural it is also easy to forget that it represents only one way of understanding the heckler's veto. In its more generic sense—the sense in which one party makes the government its instrument for suppressing the views of another—the heckler's veto can reach far beyond the familiar drama of speaker and hostile audience, as the Court itself has seen.<sup>19</sup> And, indeed, the last several years have shown just how unrecognizable the veto can become in the now common case where, as Rachel Harmon has recently put it, “police departments face loosely organized and heterogeneous groups who often seek to bring about social change in ways other than speech.”<sup>20</sup> Today's heckler's veto has less to do with hostile audiences and soapbox orators, and more to do with a wholly new sort of protest where

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(noting that “[c]ourts have recognized a heckler's veto as an impermissible form of content-based speech regulation for over sixty years”); *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (“[D]oes it follow that the police may silence the rabble-raising speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.” (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993))).

16. For a recent discussion of the history of this problem, see generally SCHAUER, *supra* note 14.

17. See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (discussing the distinction between content-neutral and content-based regulations).

18. See generally SCHAUER, *supra* note 14 (describing this as among the “open questions” surrounding the hostile audience problem).

19. See *infra* Part I.

20. Rachel A. Harmon, *Policing, Protesting, and the Insignificance of Hostile Audiences*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/policing-protesting-and-insignificance-hostile-audiences> (last visited Apr. 21, 2018).

protestors come less to have their say than, as the slogan goes, to shut down the places where others would have theirs.<sup>21</sup> And as Harmon rightly sees, these cases have pushed the familiar heckler's veto doctrine to the edge of its usefulness, yielding a difficult "mismatch between the doctrine and the political protests it which it often applies."<sup>22</sup>

One might take this breakdown to signal the limits of what doctrine can realistically do about protests this complex and politically fraught.<sup>23</sup> Kalven's puzzle may not yield to doctrinal solution. But this Article argues that it does, and that a major obstacle to seeing that solution lies in the single-minded way that courts and commentators have understood the heckler's veto. In order to solve the problem of provocative speech, then, this Article contends that we will first need to free the heckler's veto from the picture out of which it first emerged—a picture like the one that opened this Article of the hostile audience. And to do that this Article focuses on a case presenting a timely twist to the familiar *Feiner* script: the recent United States Court of Appeals for the Sixth Circuit en banc decision by the in *Bible Believers v. Wayne County*,<sup>24</sup> in which the Arab community of Dearborn, Michigan, was forced to confront an outlandish group of Christian fundamentalists at what was once their annual Arab International Festival. By reading that case against the line of heckler's veto cases that came before it, this Article argues we can come to see not just the limits to a speaker-focused heckler's veto but also how it will need to be broadened to address the increasingly complex protests that fixate our constitutional attention today.

Accordingly, this Article proceeds as follows: Part I retells of the story of the heckler's veto problem by tracing it back to where it first took root, in *Feiner v. New York*, and explaining how lower courts have tried to solve that problem through the speaker focused model. Intuitively powerful as that model is, however, it has never been fully embraced by the Court, nor need it be. Part II thus goes on to examine how *Bible Believers* challenges that model, by swapping the usual roles of heckled and hecklers, a minority's speaker and the majority's mob, and why we should take it as the occasion to reconsider the model altogether.

Part III then goes on to consider an alternative solution to the heckler's veto problem, through an examination of several seminal

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21. See, e.g., Jonathan Chait, *The 'Shut It Down!' Left and the War on the Liberal Mind*, N.Y. MAG. (Apr. 26, 2017, 8:22 AM), [nymag.com/daily/intelligencer/2017/04/the-shut-it-down-left-and-the-war-on-the-liberal-mind.html](http://nymag.com/daily/intelligencer/2017/04/the-shut-it-down-left-and-the-war-on-the-liberal-mind.html).

22. Harmon, *supra* 20.

23. Harmon appears to go this way, finding that "doctrine will often be less important than political will and participant preferences in determining what our system of free expression looks like on the streets." Harmon, *supra* 20.

24. 805 F.3d 228, 244 (6th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 2013 (2016).

heckler's veto case from the Civil Rights era, beginning with *Edwards v. South Carolina*. By offering a new way of focusing the problem of the heckler's veto—not as the attack of a *hostile audience* but as the *hostile takeover* of a public forum—those cases accordingly suggest a different way of explaining what makes the heckler's veto such a constitutional nonstarter in those cases. The government steps in, not to shut up a speaker, but to shut down the public forum. That way of viewing the heckler's veto, focused resolutely on the forum, also yields a new doctrinal rule: the police must do everything in their power to ensure the openness of our public forums by defending those forums first.

But a forum-focused heckler's veto, on its own, can no more solve the problem of provocative speech than the speaker-focused model that falters so badly in *Bible Believers*. To some this may seem to raise a larger objection to the whole argument of this Article that making the heckler's veto doctrine messier leaves our First Amendment law less principled. Part IV goes on to explain why this objection, rooted in the abiding faith that only theory can unify our constitutional doctrine, simply misses the way doctrine and theory really relate under the First Amendment. By showing how doctrine and principle come to life through the models that we make for them—our free speech fables—Part IV explains why the fundamentalist faith in unifying principles and theories can also end up making our law that much poorer.

#### I. THE HOSTILE AUDIENCE AND THE HECKLER'S VETO

The story of provocative speech customarily opens with a scene much like the one that opened this Article—with a soapbox orator like *Feiner* facing down what, in *Feiner*, came to be called his hostile audience. *Feiner*, of course, was only one among many protagonists in this doctrinal drama. But his case, now considered among the more extreme examples of a heckler's veto, is also one of the most revealing, illustrating not just how the heckler's veto has come to be understood but what that understanding presupposes. To see just what that understanding entails, first one must look to see what these separate points are and how exactly they came together in *Feiner*, which means how they emerge from Justice Black's dissent.

##### A. FEINER AND THE HOSTILE AUDIENCE PROBLEM

*Feiner's* case plots a now familiar course. He was eventually convicted for violating New York's breach of the peace statute, which he challenged all the way to the Supreme Court, arguing that the application of the ordinance in his case had violated his First Amendment right to speak. The Court, however, disagreed. "We are well aware that the

ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker,” Chief Justice Vinson explained, adopting a label for the problem that eventually stuck.<sup>25</sup> That, however, was not really the issue before them. Instead, the Chief Justice concluded, the question was whether the Constitution disabled the police from heading off a near-riot.<sup>26</sup> It would have been one thing, he explained, if the police had been “used as an instrument for the suppression of unpopular views,” as Feiner of course alleged they had.<sup>27</sup> But, at least as the majority read the record, Feiner’s case presented no “such a situation.”<sup>28</sup> It seemed clear enough to the majority that his anger had carried him beyond the “bounds of argument or persuasion” into incitement—from the merely provocative to a direct provocation of violence.<sup>29</sup> And, as Justice Frankfurter added, the Court had already held that restrictions on such speech raised no constitutional concern.<sup>30</sup> Under the circumstances, then, the police could surely not be held “powerless to prevent a breach of the peace,” even if that meant cutting short the curbside oratory of a lone college student.<sup>31</sup> Feiner’s conviction would stand.

Justice Black, however, saw things differently. Writing in pointed dissent, he took the Chief Justice to task for what he regarded as two critical mistakes: one on the facts, and the other on doctrine. On the factual side, Justice Black complained that the Court had leaned too heavily—credulously, really—on the lower courts’ view that the situation on the sidewalk that day had gotten anywhere near dangerous enough to justify Feiner’s arrest.<sup>32</sup> Granted, it appeared that Feiner at some point called on the African Americans in the crowd to “rise up in arms and fight” for their rights, though Justice Black had his doubts that that was quite what Feiner said.<sup>33</sup> And true, whatever Feiner actually said, it did appear to have drawn from somebody a warning that if the police did not

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25. *Feiner v. New York*, 340 U.S. 315, 320 (1951). Chief Justice Vinson was the first on the Court to adopt the ‘hostile audience’ label, but as Frederick Schauer has noted, the label was already in use at the time among academic commentators. See SCHAUER, *supra* note 14, at 2 n.2.

26. *Feiner*, 340 U.S. at 320.

27. *Id.* at 321.

28. *Id.*

29. *Id.*

30. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (describing “fighting words” as among the categories of speech that “have never been thought to raise any Constitutional problem.”). For a discussion of these historical exclusions to the First Amendment’s coverage, see generally Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

31. *Feiner*, 340 U.S. at 321.

32. *Id.* at 322–23 (Black, J. dissenting).

33. In fact, Justice Black accepted this only grudgingly, for the sake of argument: “[r]eliable witnesses,” he claimed, instead confirmed that Feiner had said only that his listeners should “rise up and fight for their rights by going arm in arm to the Hotel Syracuse” to hear John Rogge, a former assistant attorney general who had come to talk on the subject of civil rights. *Id.* at 324 n.5.

shut *Feiner* up, he would. All the same, none of that realistically suggested to Justice Black that the scene had reached “a critical situation,” the point at which simmering outrage had boiled over into “imminent threat of riot or uncontrollable disorder.”<sup>34</sup> After all, “it is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker.”<sup>35</sup> What else would a hostile audience look like? The “ordinary murmurings and objections” of an angry crowd are just that angry. And if murmurings like those could make a speaker too provocative for the public street—creating a “critical situation” justifying his removal—it is unclear when a hostile audience would ever not be able to enlist the police as their instrument. As the Chief Justice put it, this allow the police to silence views they would rather not hear.

In Justice Black’s view, then, the facts clearly belied the Court’s conclusion. But even granting the Court its view that the situation had gone critical, he still found the Court far too willing to tax a speaker like *Feiner* for his provocative speech and too unwilling to tax the police to ensure that he could. For even on the Court’s telling, after the situation had grown “dangerous,” the “policemen did not even pretend to try to protect” *Feiner* before hauling him away.<sup>36</sup> Clearly, Justice Black insisted, the Constitution required more of police than that. As he saw it, a speaker like *Feiner* not only enjoyed immunity from the disturbance his speech was causing; he also deserved a measure of protection—a subsidy—to speak.<sup>37</sup> That subsidy for the speaker, and consequent tax on the public, would have taken the form of a set of instructions to policing officials: before moving against a provocative speaker, as the officers had against *Feiner*, they first “must make all reasonable efforts to protect” him, to the extent of “arresting [anybody] who threaten[s] to interfere.”<sup>38</sup> When verbal push came to literal shove, the First Amendment demanded that officials at least try to push back against the hostility of the crowd, apparently whatever the cost. The law should come to defend the speaker first.

#### B. REREADING *FEINER*

Justice Black may not have had a majority with him in *Feiner*, but he clearly has the judgment of history on his side. As Frederick Schauer has said, today “*Feiner* is commonly taken to represent the extreme case

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34. *Id.* at 325.

35. *Id.* at 326.

36. *Id.*

37. *Id.* at 327 (Black, J., dissenting).

38. *Id.* at 326–27.

of allowing the hostile audience to exercise the so-called heckler's veto," quite as Justice Black warned it did.<sup>39</sup> And although never overruled, in case after case the courts have taken considerable pains to distance *Feiner's* holding from its troubling implications for provocative speech, effectively recasting it from the problematic victory it appeared to represent for the Syracuse mob to a far more forgettable case about "fighting words."<sup>40</sup> Indeed, it seems now that practically every heckler's veto case has become what Justice Stewart once said of *Edwards v. South Carolina*—a "far cry" from *Feiner*.<sup>41</sup>

Although courts may still praise *Feiner* as a "fighting words" case, they have come to bury it in the heckler's veto context.<sup>42</sup> But this early interment has led the Court, and as a result nearly all the lower courts and commentators, to overlook the common conceptual ground between the majority's opinion and Justice Black's dissent. To see clearly what that point of contention was we therefore will have to read Justice Black's largely vindicated dissent in light of the position it has been thought to discredit. And as will become clear by the end of the next Part, getting clear on that disagreement can help explain why the heckler's veto puzzle still resists a tidy solution, practically or, even, in theory.

### 1. The 'Heckler's Veto' Concept

Largely because *Feiner* can seem like such a regrettable aberration today, at least as an entry in the heckler's veto canon, it is easy to miss what the majority there obviously had right. And that, as Chief Justice Vinson explained, was that the Court could clearly not empower a "hostile audience" to silence a speaker simply because of what she says, because of how provocative she or her message has become. Or as the Chief Justice put it, taking a step up the ladder of abstraction, the police could not be made "an instrument for the suppression of unpopular views."<sup>43</sup>

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39. SCHAUER, *supra* note 14, at 7.

40. See *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (concluding case was a "far cry" from *Feiner* since there was no "evidence of 'fighting words.'"); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (quoting *Edwards* to the same effect); *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Feiner* as an example where a speaker "intentionally provok[ed] a given group to hostile reaction."); see also *Glasson v. City of Louisville*, 518 F.2d 899, 905 (6th Cir. 1975) (similarly distinguishing *Feiner*); *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 245 (6th Cir. 2015) (en banc) (concluding that *Feiner* stands solely for the proposition that "incitement does not receive constitutional protection.").

41. *Edwards*, 372 U.S. at 236.

42. See SCHAUER, *supra* note 14, at 7 (describing the Court's decisions as "mark[ing] *Feiner's* burial.").

43. *Feiner*, 340 U.S. at 321.

Neither the thought<sup>44</sup> nor the phrasing<sup>45</sup> was entirely novel. But the connection the Chief Justice made there, between the hostile audience and the idea, was. As he suggested, the reason why the police could not take the “ordinary murmurings and objections”<sup>46</sup> of a crowd as an excuse to haul off an otherwise lawful speaker<sup>47</sup> came down to a more general constitutional principle, one that that action would plainly have violated. That principle holds just what the Chief Justice said it did: that the government cannot allow one party to coopt its coercive power to silence another. And its generality results from its central abstraction—the concept denoting those cases where the government *had* been so coopted, or made the “instrument for the suppression” of other views.<sup>48</sup>

If that concept looks vaguely familiar that is because in a sense it is: functionally it is the same concept, pitched at a higher level of abstraction that we know today by the name Kalven gave it, the heckler’s veto. That it might look only vaguely familiar comes as one of the casualties of *Feiner’s* early burial, a point to be taken up next. For now, however, the relevant point is simply that, despite some appearances to the contrary, the majority in *Feiner* did in fact ratify the same principle, and the same concept, that Justice Black did, dissenting. They both agreed that the heckler’s veto, however understood, is simply out of the question.

## 2. *The Hostile Audience and a Speaker-Focused Heckler’s Veto*

Although this last point may seem obvious enough on closer reading, it has rarely been noticed.<sup>49</sup> No doubt this has something to do with the Court’s later inclination to read *Feiner* out of the heckler’s veto canon entirely—siding with Justice Black by reading the case as just another example of punishable fighting words. But that was only the first of Justice Black’s complaints against the majority, his disagreement on the facts. He also suggested a second, more principled worry about the Court’s conclusion, having to do with a question the Court there effectively sidestepped: why is giving hecklers a veto so clearly out of the

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44. See *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.”).

45. See *Hague v. Comm. Indus. Org.*, 307 U.S. 496, 516 (1939) (noting that the ordinance there allowed an official to “be made the instrument of arbitrary suppression of free expression of views on national affairs.”).

46. *Feiner*, 340 U.S. at 320.

47. In this discussion I am assuming that the putative speakers have not crossed the line separating merely provocative speech and speech intentionally provoking violence—hence the qualification here, “otherwise lawful,” that I will occasionally drop for convenience.

48. *Feiner*, 340 U.S. at 321.

49. *But see* *Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1121 (7th Cir. 2013) (citing this passage from *Feiner* when discussing “an impermissible ‘heckler’s veto.’”).

question, and what should the police do to avoid it? Justice Black, to his lasting credit, actually suggested an answer to that question. And his answer not only bridges his factual and doctrinal objections to the majority's holding, but also explains why the majority's adoption of the wider heckler's veto concept has gone mostly unnoticed.

As already noted, Justice Black clearly thought the majority had leaned too heavily on the lower courts' view of the situation: Feiner may have said something about "arms," but did not call anybody *to* arms; there was some milling about and muttering in the crowd, but nothing approaching a riot, etc. But his more basic worry came in answer to the Chief Justice's apparent agreement as to the hostile audience: that their veto could not stand. The trouble, Justice Black suggested, was that the Chief Justice did not seem to appreciate how hollow, or merely "theoretical,"<sup>50</sup> that concept had ended up in his analysis: if all it took was a little rowdiness to turn the doctrinal tables against the speaker, it could easily look as though the concept did not really capture much of anything at all. That rowdiness just is how a hostile crowd ordinarily expresses its hostility, after all. And any conception<sup>51</sup> of the heckler's veto blind to that fact—one that excludes the silencing of a speaker because of that rowdiness—simply misses what makes the hostile audience the constitutional problem that it had clearly become there. The Court had given no sense of how the heckler's veto actually worked there—what conception or model of that concept it had drawn on—and so why the heckler's veto, and the principle forbidding it, did not ultimately decide the case.

One way to read Justice Black's factual objection, then, is as a conceptual remark. Whatever conception of the heckler's veto the majority had in mind had shown itself, practically, to be empty. And that suggests another way of looking at Justice Black's second doctrinal complaint to the majority's holding: as an effort to fill out a workable conception of the heckler's veto, a practicable model of an otherwise unavailing "theoretical" idea. Thus, in his dissent we find Justice Black not only trying to lay down a clear doctrinal limit to the hostile audience but also, and more importantly, a principled explanation for it—what, that is, explained why the heckler's veto there was so clearly wrong.

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50. *Feiner*, 340 U.S. at 329 (Black, J., dissenting).

51. Here I am invoking something like the distinction between concept and conception that Ronald Dworkin has made use of. See RONALD DWORKIN, *LAW'S EMPIRE* 70–71 (1986). A conception, as I will use the term throughout, is thus a more concrete specification of some concept. To take Dworkin's example, we might agree that the concept 'courtesy' has to do with showing the proper respect to others, even though we may debate whether courtesy then requires us to show respect to some people automatically, based on their social status in all or some contexts, or whether respect need be earned—these being two conceptions of 'courtesy.' *Id.* As explained more fully in Part IV, I will treat the notions of conception and a conceptual model interchangeably.

He sought both from the contextual realities of situations like the one *Feiner* faced—the normative dynamics, as it were, of addressing a hostile audience—as well as the practical upshot that the majority's holding had for them. Justice Black was concerned with those he saw as most vulnerable to hostile audiences generally: those holding minority views. And thus he explained his dissent partly on the ground that the Court had given practically unfettered discretion to police to “silenc[e] in any city” public expressions of unpopular opinions,<sup>52</sup> and especially the speech of those “minority speakers,” like *Feiner*,<sup>53</sup> who dared confront publicly a majority not inclined to be confronted.<sup>54</sup> *Feiner*, after all, was railing against more or less visible public figures, presumably empowered by some relevant majority. He was especially vulnerable, then, to the hostility of public disapproval, not only for standing up for a racial minority, but against the powers-that-were, the “current administration[.]”<sup>55</sup>

That vulnerability also suggested what was so wrong about allowing the hostility of his crowd to silence him, permitting the police to become the instrument of their hostility. That, Justice Black intimated, could be seen in what the majority had effectively handed the government: “a simple and readily available technique” by which a majority could effectively recruit the government to its side, against a minority, or the authorities could essentially side with themselves against dissidents, and silence their critics.<sup>56</sup> The law arrived only to end up picking sides, inevitably the majority's or their presumptive representatives' side. Or, putting the same point in the language of “great principles” that Justice Black teased,<sup>57</sup> what made the veto so wrong there was its violation of the government's duty to remain neutral between speakers and their messages. The government, by backing one side with its coercive power, had effectively joined in its attack on the other. And thus the most obvious way for the government to respect its duty of neutrality under the circumstances was for it to at least try to defend that speaker against that attack, and his attackers, first.

Admittedly some of this analysis lies beneath the surface of Justice Black's dissent—he never says anything directly, for instance, about neutrality—but it is clear enough that one could read it in these terms. And when so read, it becomes equally clear that Justice Black answers

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52. *Feiner*, 340 U.S. at 328 (Black, J., dissenting).

53. In the senses used in Justice Black's dissent, ‘majority’ and ‘minority’ obviously concerned more than just racial minorities, but political minorities as well.

54. *Id.*

55. *Id.*

56. *Id.* at 323.

57. *Id.* at 329.

the majority by simply taking them at their word, though giving that word some much needed content. That content, as just seen, was a workable *model* or *conception* of the heckler's veto: what we might call the *speaker-focused model*. That model traces the same basic conceptual pattern on which Justice Black agreed with the Chief Justice: that the government cannot be made an instrument by one side for suppressing the views of another. And what that means concretely, at least in the context of the hostile audience, is that the government must try to defend the speaker first. Otherwise, the government, there through the police, would be effectively liberated to do what it surely cannot under the First Amendment—make one side the winner, and another the loser. Together, then, this principle and rule complete a model of the heckler's veto—the heckler's veto as an impermissible content-based restriction on a speaker's message. And that model accordingly explains why, as all sides have agreed since *Feiner*, a heckler's veto is simply out of the question.

### C. A CONFLATING CONSENSUS

As powerful and intuitive as his model was, Justice Black still found himself dissenting in *Feiner*. There is little question, however, that that conception of the heckler's veto has taken on a life of its own in the case law. This goes beyond the clear consensus that the heckler's veto, however understood, is simply a constitutional non-starter.<sup>58</sup> More than this, lower courts and commentators have agreed on the outlines of Justice Black's solution to the hostile audience problem, including his focus on neutrality between speakers and the rule to defend the heckled speaker first.<sup>59</sup> Indeed, the Court itself has at least suggested that Justice Black was right to focus on neutrality as a central concern for restrictions of speech in the face of hostile audiences.<sup>60</sup>

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58. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

59. *See, e.g., Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292–93 (9th Cir. 2015) (describing the heckler's veto as a violation of the principle of content neutrality, drawing strict scrutiny); *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 554 (4th Cir. 2010) (noting that “[c]ourts have recognized a heckler's veto as an impermissible form of content-based speech regulation for over sixty years”); *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (“[D]oes it follow that the police may silence the rabble-raising speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.” (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (internal quotation marks omitted))).

60. *See, e.g., Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (concluding that the heckler's veto is a content-based restriction, and so requires strict scrutiny); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531–32 (2014) (noting that a restriction on speech would “not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or [l]isteners' reactions to speech” (internal quotation marks omitted)).

But as Justice Black's model has passed largely unchallenged into black letter law, at least among lower courts,<sup>61</sup> it also appears to have displaced all awareness that it is, in fact, only a model—merely one conception of the heckler's veto. Indeed, lower courts and commentators now widely take the two to be the same: the heckler's veto concept has merged with its model of the hostile audience problem.<sup>62</sup> Some of the blame for this conflation may belong to Kalven, who appears to have thought of the two as the same.<sup>63</sup> Indeed, in an early commentary, Alfred Kamin observed that what Kalven thought of as the 'heckler's veto' apparently amounted to little more than "a crowd-handling problem"—to which he added, presciently, that a concept that aptly named might "quickly become a substitute for thought."<sup>64</sup> As Part II argues, in at least one major case it now has.

Despite this widespread conflation among lower courts, the Supreme Court has never made it itself. On the contrary, the Court has occasionally suggested that it, too, understands the heckler's veto to have more to it than just hostile audiences. In *Reno v. ACLU*, for example, the Court struck down a portion of the Communications Decency Act that would have outlawed the transmission of certain supposedly objectionable content that the sender knew would reach a "specific person" under 18 years old.<sup>65</sup> Although a far cry from the classic hostile audience,<sup>66</sup> the Court overturned that provision with the explanation that it "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on [to some online forum] and inform the would be discourses that his 17-year-old child—a 'specific person . . . under 18 years of age' . . . would be

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61. The nearest the Court appears to have come to embracing the speaker-focused model was in *Brown v. Louisiana*, where, in a footnote, it observed that the "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of constitutionally protected demonstrate itself, that their critics might react with disorder or violence." 383 U.S. 131, 133 n.1 (1966). Notably, however, the *Brown* Court did not go so far as to say, as the speaker-focused model does, that the First Amendment requires the police to protect the speaker first, at whatever cost. The Court instead said only that speakers would not be subject to charge (for example, for breach of the peace) even if they happened to provoke hostility from their listeners.

62. *Rosenbaum v. San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007) (describing the heckler's veto as "an impermissible content-based speech restriction"); *Startzell v. Philadelphia*, 533 F.3d 183, 200 (3d Cir. 2008) (same); see also Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39 (1973) (apparently treating the heckler's veto and hostile audience problem interchangeably).

63. See KALVEN, JR., *supra* note 9 (describing the heckler's veto in terms of the hostile audience).

64. Alfred Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U. L. Rev. 177, 219–20 (1966–67).

65. 521 U.S. 844 (1999).

66. See Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1312 (2007) (noting the same).

present.”<sup>67</sup> Clearly the “broad powers of censorship” that Congress had conferred under the Act—the heckler’s veto there—had nothing directly to do with a threat of violence from an angry crowd: the only ‘crowd’ was virtual, and even in the hypothetical there is no suggestion that violence would follow if users of the forum kept up their lewd posting even after learning that a seventeen-year-old was scrolling along with them. Whatever the Justices understood by the ‘heckler’s veto’ there, it had nevertheless clearly come loose from its usual conceptual mooring in the hostile audience problem. And that at least cracks the door to the possibility that the Court was willing to entertain a different conception of the heckler’s veto, to address these obviously different circumstances.<sup>68</sup>

Over the years this wider use of the ‘heckler’s veto,’ abstracted from the hostile audience context, has made an occasional appearance in the opinions of a number of Justices.<sup>69</sup> How more exactly they may have understood that concept—what particular model or conception they had in mind when they used it as they did—is not always clear. Nevertheless, the important thing is what these uses of the heckler’s veto all have in common, besides the bare name. And that is what Chief Justice Vinson picked out in *Feiner*, the basic pattern of the ‘heckler’s veto’ concept: that the government has in each case become one side’s instrument in suppressing the views of another. As the next Part argues, letting in a little daylight between these two levels of abstraction—between the concept and its conception or model—can help dispel some of the darkness that has now settled over the problem of provocative speech.

## II. ATTACKING THE PUBLIC’S FORUM: OR THE NEW HECKLER’S VETO

It is now clearly settled that allowing the hostile audience a veto over a provocative speaker is out of the question, and in *Feiner*, Justice Black first told us why, through the speaker-focused model he implicitly developed there. But Justice Black also gave us only that: a model of the heckler’s veto that has earned its keep in those cases that have felt most

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67. *Reno v. ACLU*, 521 U.S. 844, 880 (1997); see also *Leanza*, *supra* note 66.

68. That is to say, the Court might still have thought of that case of the heckler’s veto under the same speaker-focused conception: as, that is, just a different example of an impermissible content-based restriction on some speaker’s speech. The only point here, the same that *Leanza* also appears to make, is that the Court’s willingness to apply the concept to a situation so clearly different from the “classic” hostile audience case suggests that they may have been drawing on a different conception (or model) of the concept as well. See *Leanza*, *supra* note 66.

69. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009); see also *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 269 (6th Cir. 2015) (Gibbons, J., dissenting) (citing these cases and noting that “the Court has used ‘heckler’s veto’ as shorthand for the undesirability of opponents being able to cut off some disfavored speech, idea, or policy”).

like *Feiner*—the classic drama of the soapbox orator facing down a murmuring mob. Not all heckler’s veto cases have reenacted the same tidy drama. And where they have not, the concept has begun to tear away, little by little, from the speaker-focused conception now encased in black letter. As this Part explains, a recent decision by the United States Court of Appeals for the Sixth Circuit—*Bible Believers v. Wayne County*—exemplifies this different breed of heckler’s veto cases, and, by upending the familiar script, reveals why the concept and conception not only can but sometimes should come apart.

#### A. FLIPPING THE SCRIPT: *BIBLE BELIEVERS V. WAYNE COUNTY*

For the nearly twenty years leading to this case, the city of Dearborn, Michigan, played host to the Arab International Festival, a celebration that at one time drew visitors from around the world. That it was in Dearborn was also no accident. The city is home to the second-largest Arab American population in the country, after New York City, and it has naturally counted a large number of Muslims among its population, although the city’s majority remains non-Arab and non-Muslim.<sup>70</sup> The yearly summer festival, held on several blocks of Dearborn’s streets, was free of charge to the public and featured the usual staples of the county fair—music, food, carnival rides. But it also attracted a sizable number of religious groups seeking to use—or exploit—such a large gathering to spread their various messages. Normally they did that by reserving one of the many informational booths available to vendors; not all, however, elected to do so. Among the latter were a number of evangelical Christian groups, who, unlike the other religious attendees, chose instead to roam throughout the festival grounds to proselytize as they saw fit.

On June 15, 2012, one such group—the Bible Believers—appeared at the festival as they had the year before, largely, they claimed, to make a point about free speech.<sup>71</sup> And like the year before, they came with signs that were, to say the least, provocative. (“Islam Is A Religion of Blood and Murder,” read one typical sign, and another, “Jesus Is the Way, the Truth, and the Life. All Others Are Thieves and Robbers.”)<sup>72</sup> In addition to these printed provocations, one of the Bible Believers had brought a megaphone, to amplify the walking sermon, while another carried a severed pig’s head, hoisted on a stick—a symbol meant to “ke[ep] [the

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70. Niraj Warikoo, *Arab Americans Become Majority on Dearborn Council*, USA TODAY (Nov. 6, 2013, 9:41 PM), <http://www.usatoday.com/story/news/nation/2013/11/06/arab-americans-become-majority-on-dearborn-mich-council/3460591/>.

71. *Bible Believers*, 805 F.3d at 236.

72. *Id.* at 238.

Muslims] at bay,” one Bible Believer later explained, since “they are kind of petrified of that animal.”<sup>73</sup>

The Bible Believers, pig’s head and signs in tow, began their usual wandering through the festival, preaching as they went. Their sermon, it turned out, outdid their signs. Muslims, they explained to whomever they met, followed “a false prophet,” a “pedophile” and a “pervert,” who “want[ed] to molest a child;” God, they assured them, “will reject you” and “put your religion into hellfire when you die.”<sup>74</sup> The message soon drew a following of adolescent on-lookers, many apparently Muslim, and many, understandably, displeased. Debates soon broke out between the sides. Soon, the angrier among the children began pelting the line of preachers with bottles and other litter. As the crossfire of harsh words gave way to a one-sided barrage of flying garbage, several officers from the Wayne County police stepped in, warning the crowd against any more throwing and ordering the Bible Believers to put away their megaphone.

The Bible Believers objected, but obliged, as did the crowd, at least momentarily. The street-preachers then resumed their march through the festival, with a thickening stream of on-lookers trailing behind them. Soon, however, they came under another bombardment of bottles of debris, including a few larger plastic crates; one Bible Believer was struck in the forehead, which left a bloody gash.<sup>75</sup> An officer finally approached the Bible Believers to warn them that they were “causing [a] disturbance,” by “tell[ing] [the crowd] stuff that enrages them,” and that their presence posed “a direct threat to the safety of everyone” at the festival.<sup>76</sup> An exchange ensued between the Bible Believers’ apparent leader and an officer, resulting in a final warning: leave or face a citation for disorderly conduct.<sup>77</sup> At that, the Bible Believers relented, filing out of the festival under escort of over a dozen officers.<sup>78</sup>

The Bible Believers subsequently sued several of the officers and their employer, Wayne County, and argued principally that those officials had denied them their freedom to speak at the festival by effectively forcing them out once the crowd grew restless.<sup>79</sup> The district court sided with the county, granting them summary judgment on all counts, which a divided panel of the Sixth Circuit affirmed.<sup>80</sup> The full court, in a rare

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73. *Id.*

74. *Id.* at 238–39.

75. *Id.* at 269 (Gibbons, J., dissenting); see also J. Mark Campbell, *American Muslims Stone Christians in Dearborn, MI (Original Edit)*, YOUTUBE (June 26, 2012), <https://www.youtube.com/watch?v=vnJBW49afzg>).

76. *Bible Believers*, 805 F.3d at 240.

77. *Id.*

78. *Id.* at 239.

79. *Id.* at 233.

80. *Id.*

decision,<sup>81</sup> agreed to take the case en banc, and later reversed the panel, granting summary judgment to the Bible Believers instead.

To the en banc majority, the case looked “easy.”<sup>82</sup> The record, which included footage of the incident, made clear that the officers had done little, and arguably nothing, to pacify the Bible Believers’ adolescent detractors, even as their anger boiled over into bottle throwing. Worse, as Judge Clay explained for the court, when the officers came to eject the Bible Believers they did so saying that the crowd’s surliness gave them reason enough to eject the Bible Believers.<sup>83</sup> For the seven judges who joined Judge Clay’s majority opinion in full, the police had plainly flouted the First Amendment’s command of neutrality—an open-and-shut case of the heckler’s veto.<sup>84</sup> The county would have to pay.<sup>85</sup>

For such an easy case, it nevertheless splintered the court quite badly. In all, seven judges dissented, drawing a number of sharply worded exchanges, among them two revealing dissents by Judges Rogers and Gibbons. And together the dissents suggest that, despite appearances, the case was not so easy after all.

#### B. AN ANOMALOUS FORMALISM

The first hint of trouble came in Judge Rogers’s principal dissent, which opened with a startling warning. The majority, he explained, had “effectively advise[d] how to force the police to help disrupt a minority’s speech and assembly rights.”<sup>86</sup> Sketching that advice out as a “roadmap,” he went on:

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81. See Pierre Bergeron, *Dwindling Number of Sixth Circuit En Banc Cases Is Not Escaping Notice*, SIXTH CIR. APPELLATE BLOG (June 29, 2011), <https://www.sixthcircuitappellateblog.com/en-banc-watch/dwindling-number-of-sixth-circuit-en-banc-cases-is-not-escaping-notice/>.

82. *Bible Believers*, 805 F.3d at 261.

83. In the video, the officer can clearly be heard explaining to the Bible Believers why they had to leave: “I mean look at your people here. Look it, look it. This is crazy.” See Campbell, *supra* note 75, at 18:17–18:21.

84. *Bible Believers*, 805 F.3d at 247–255.

85. And pay they did: the final judgment entered against the county came to \$197,500. *Judgment Entered Against Wayne County Sheriffs for Violating Christians’ Free Speech Rights*, AM. FREEDOM LAW CTR. (Sept. 28, 2016), <http://www.americanfreedomlawcenter.org/press-release/judgment-entered-against-wayne-county-sheriffs-for-violating-christians-free-speech-rights/>.

86. *Id.* at 274 (Rogers, J., dissenting).

Yes, you can get the police to help you attack and disrupt something like a minority cultural identity fair, even if the police are not inclined to do so. Tell the police your plans ahead of time, and bring photographers. Get a determined group of disrupters and go in with the most offensive and incendiary chants, slogans, insults, and symbols—the more offensive the better. The object is to stir up some physical response. Then, when things get rough (your goal), insist that the police protect you, and (ironically) *your* First Amendment rights, by serving as a protective guard. The peace officers cannot at that point tell you to leave, even to avoid injury to you, because if the peace officers do that, they will have to pay you damages. Faced with the choice of allowing you to be an injured martyr (keep your cameras ready) or serving as a protective guard as the disruption escalates, the peace officers will doubtless choose the latter and become your phalanx. It's a win-win situation for you, and a lose-lose situation for the minority group putting on the fair.<sup>87</sup>

This result, Judge Rogers concluded, was not just perverse but unnecessary. Indeed, “[o]nly a formalistic application of First Amendment doctrines . . . could lead to a result so inconsistent with the core of the First Amendment.”<sup>88</sup> Even worse was the “unfortunate[] iron[y]” that the Bible Believers had “succeed[ed] in their tactics . . . based on towering . . . cases involving minority civil rights protests.”<sup>89</sup> For, “[i]n the greater Detroit community, it is the minority’s cultural expression that loses from today’s decision,” given that the Bible Believers had come “from a different part of a larger community to disrupt the First Amendment activity of Arab Americans—a sometimes feared, misunderstood, or despised minority within that larger community.”<sup>90</sup> Looked at “realistically,” the Bible Believers, not the festival-goers, were the real hecklers.<sup>91</sup>

Judge Rogers, along with the four judges who joined his dissent, clearly felt that the majority had misused the heckler’s veto. But his dissent does not quite as clearly indicate how they had misused it—what made the use of that notion and doctrine there so unhelpfully “formalistic.” It could certainly seem, after all, as though the majority had only followed out the doctrine to its natural, if ugly conclusion. The Bible Believers had come to preach, and the adolescents came to heckle. As the crowd grew angrier at what the Bible Believers were saying, the police stepped in only to end up ejecting the speakers. To all appearances, the speaker-focused model fit. And yet the majority could find no evidence that the police had made any effort to defend the Bible Believers’ right to

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87. *Id.*

88. *Id.*

89. *Id.* at 278 (Rogers, J., dissenting).

90. *Id.*

91. *Id.*

speak before leading them away under threat of citation—a plain violation of the defend-the-speaker rule. The result seemed irresistible.

Although Judge Rogers ultimately rested his rejection of the majority's view on the apparent outbreak of violence,<sup>92</sup> he nevertheless hinted that their use of the speaker-focused model resulted from a serious misunderstanding. Something in the facts of the case, he suggested, was atypical, or “unusual,” as Judge Sutton echoed in his own partial concurrence.<sup>93</sup> And that unusualness revealed itself in what the model ultimately required the majority to rule there: the “unfortunately ironic” result that the county would have to pay the group that had come quite deliberately to disrupt a festival celebrating a community of minorities, no less expressive than a hateful sermon. The speaker-focused model, in a word, did not quite seem to fit. And Judge Rogers's dissent suggests three reasons why, in the form of three anomalies.

### C. HECKLER OR COUNTER-SPEAKER?

The first and perhaps most obvious anomaly had to do with labeling. As Judge Rogers pointed out, it seems less than obvious who the hecklers really were here: the outraged teenagers or the reactionaries who came to enrage them. And that is because in a case like *Bible Believers* there no longer appears to be just a single, if perhaps collective, speaker and a single hostile audience. Instead we have a clash of many speakers, and, as a result, no unproblematic way of picking the hecklers out from the heckled.

Just look again at what happened on the streets of Dearborn. The Bible Believers, brandishing their pig's head, begin preaching their gospel of slurs; a crowd gathers and some people in the crowd bicker with the Bible Believers, while others simply curse them; the Bible Believers, feeling drowned out, grow louder, the edge of their sermon sharpening with every insult; and on it spirals, ominously, into chaos. Once the police arrive, which side do they pick as the constitutionally deserving speaker, and which do they escort away as the undeserving heckler? Obviously, one might think, the party that appears to have come with the provocative message, and the one that appears to be its disagreeable audience. But the festival also had a message of its own, as did the festival goers, some of whom fell to debating the Bible Believers. And the festival goers were also expressing themselves first. Their presence on Dearborn's streets was the only reason the Bible Believers showed up at all. Why, then, were the Bible Believers not the hostile audience bristling at the festival's and

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92. *Id.* at 277–78.

93. *Id.* at 266 (Sutton, J., concurring in part and dissenting in part).

the festival-goers' messages, the hecklers whose veto the majority voted to uphold? And so the difficulty remains.

This is not to say, of course, that the police have no way of picking one side as the collective speaker and the other side as their hostile audience under the circumstances. But it does suggest that, to do so, the police will end up having to do exactly what neutrality would rather them not: simply identify the respective points of view being expressed, then pick the seemingly saner side as the speaker and the side that feels just a bit too outrageous as the heckler. Or as one police officer told the Bible Believers: "I mean look at your people . . . This is crazy."<sup>94</sup> But this certainly seems like an odd way to enforce neutrality: today's absurdity could well be tomorrow's orthodoxy, after all. Nor is it at all clear how the police could avoid labeling the sides, consciously or not, based on what they are saying or, even, who they are. The Bible Believers would not unreasonably have wondered if the all-too-human police on the scene were refusing to move more aggressively against the adolescent bottle throwers because they were fellow Arab Americans or Muslims or, more likely, just their neighbors' kids. That easily, an implement of an inclusive neutrality winds up a weapon for neutralizing the appeal of outsiders. And so the problem only deepens. Just to be able to use the model it seems that the police would end up having to violate its basic principle—that the government should not be in the business of picking sides. And such a result, if not self-defeating, is quite problematic.

#### D. SUBSIDY FOR DISRUPTION?

Even if there were a neutral way of deciding which party was the "speaker" and which party was the "heckler" under these circumstances, the speaker-focused model ends up in a still more vexing anomaly. As Judge Rogers asked, why would its application here not effectively force the government to undermine the very theory of viewpoint neutrality it is supposed to uphold? As the "roadmap" lays out, the question is hardly rhetorical.

Just examine what *Bible Believers* holds. The whole point of the speaker-focused model, fully endorsed by the en banc majority, is its promise of a subsidy for speech. For a speaker like Feiner, the subsidy would have meant the difference between his having a public say on an important public question or, marginal college student that he was, likely not much of one at all. In other hands, however, that subsidy becomes something decidedly less noble—a license not to speak but to disrupt, on pain of liability for the police if they dither or skimp in their supporting

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94. See Campbell, *supra* note 75.

role. And though Judge Rogers raised this point only hypothetically, it in fact proved to be anything but. For shortly after the events that led to this case the Arab festival the organizers decided to call it off indefinitely, partly out of concern that a group like the Bible Believers would return, this time reinforced by police escort.<sup>95</sup> If, as the Court has emphatically said, the “whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views,”<sup>96</sup> it is difficult to see how that theory can consistently support a doctrinal rule all but ensuring that the members of a majority can enlist the support of the government, through the subsidy of police escort, to disrupt a festival put on by a minority community. A doctrine capable of diminishing an already vulnerable voice in American life would hardly seem to honor a principle calling for the respect for all voices.

#### E. LESS SPEECH, NOT MORE

The last point, unlike the first, does find an answer of sorts under the speaker-focused heckler’s veto. But that answer only adds to the list of misgivings about its use. For even granting that things worked out badly in the end for the Dearborn public, this answer runs, their misfortune need not be taken as an argument against the model but the way that the Bible Believers had, in effect, weaponized it. And the tables could easily turn: a group of radical imams, reading *Bible Believers*, could decide to stage their own counter-rally at a Christmas festival, say, railing viciously against Christian belief, and yet they, too, would be assured the same backing of police escort, the same subsidy to disrupt. The subsidy promised by the traditional heckler’s veto, even if spent disrespectfully, is at least not handed out discriminatorily. And nothing about that subsidy should therefore offend our constitutional scruples, or at least not the basic scruple of content neutrality.<sup>97</sup> All that neutrality commands, after all, is that the *same* measure of respect be meted out to all parties—Muslim and Christian, minority and majority—however thin.

This, though obviously true, still does not quite get at the more basic problem, one that became especially conspicuous in the aftermath of *Bible Believers*. For even though this subsidy for disruption may be equally free to all comers, its effects would likely spread less evenly. Indeed, there is good reason to believe that its use would fall much harder

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95. Opinion, *Canceling the Arab International Festival Was an Admission of Defeat*, THE ARAB AMERICAN NEWS (Apr. 3, 2015, 3:28 AM), [http://www.arabamericannews.com/news/news/id\\_10291/Canceling-the-Arab-International-Festival-was-an-admission-of-defeat.html](http://www.arabamericannews.com/news/news/id_10291/Canceling-the-Arab-International-Festival-was-an-admission-of-defeat.html).

96. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

97. See PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 32 (2013) (describing content neutrality as “[t]he central command of First Amendment doctrine”).

on already marginalized groups, groups that are almost by definition more vulnerable to the sort of disruptions sanctioned by the speaker-focused model. Again, one need only look at what followed in the wake of *Bible Believers* itself: public fatigue over the ugly street clashes, and the escalating costs of insuring against them, took an ultimately fatal toll on the festival. And the situation hardly looked like a fluke rather than the natural, perhaps inevitable, result of expressly handing would be disrupters the legal cover to wage campaigns of disruption.<sup>98</sup> To model the heckler's veto after the hostile audience here, then, appears to imperil another belief basic under the First Amendment: that we should strive for "more speech, not enforced silence."<sup>99</sup>

#### F. SAME CONCEPT, NEW MODEL

Together, these three anomalies help explain why the result in *Bible Believers* could feel so "unfortunately ironic," so unfortunate in its irony as to make the use of the speaker-focused heckler's veto there feel like a blunt and awkward misfit—"formalistic," as Judge Rogers put it. Judge Rogers, focused on the violent stir on the streets, declined to explain just what he might have meant by the accusation. But Judge Gibbons, also dissenting, arguably did. And putting together their two dissents we can begin to see just where the majority went wrong in *Bible Believers*: by collapsing the distinction between the heckler's veto concept and its speaker-focused conception.

In her own dissent, posed as an "alternative path to the same result" reached by Judge Rogers, Judge Gibbons agreed that the court could have rejected liability against the county.<sup>100</sup> But she did so by taking on the majority on different grounds. "The concept" of the heckler's veto, she argued, did not clearly draw anything like the constitutional line that the majority claimed to have traced in heckler's veto cases past, its "'heckler's veto' rule" requiring the police to defend the speaker, not just first, but apparently to the end, no matter how bitter it becomes.<sup>101</sup> At most, she countered, the court had explicitly adopted a broader—and practically more dilute—proposition: that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."<sup>102</sup> Nor could

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98. I use 'campaign' advisedly: the Bible Believers had gone to the festival before, drawing each time a similarly angry reaction, and did so expressly to make a point about "free speech." See WXYZ-TV Detroit, *Emotions Run High at Dearborn Festival*, YOUTUBE (June 17, 2011), <https://www.youtube.com/watch?v=TSULV3atKg> (featuring the leader of the Bible Believers describing why they came to the 2011 Arab International Festival).

99. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

100. *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 266 (6th Cir. 2015) (Gibbons, J., dissenting).

101. *Id.* at 269, 271.

102. *Id.* at 268 (quoting *Cox v. Louisiana*, 379 U.S. 536, 551 (1965)).

she discern among the more recent opinions of the Justices a ‘heckler’s veto’ concept quite like the powerful “doctrinal tool” wielded by the majority.<sup>103</sup> It had instead become mere “shorthand for the undesirability of opponents being able to cut off some disfavored speech, idea, or policy”—a “debater’s point.”<sup>104</sup> Clearly, then, neither of these—the concept or the principle—articulates a rule anywhere near as particular as the majority’s, and so neither, she concluded, could support liability against the county or its officers.<sup>105</sup>

Judge Gibbons, like Judge Rogers, was ultimately less concerned about making a positive doctrinal point than pressing home a practical one, about the violent realities that confronted the police during the festival. But she clearly had a negative point to make, effectively the same made at the close of the last Part. The heckler’s veto concept, she rightly saw, was not the same as the *Bible Believers* court’s conception of it. And while the court has obviously acknowledged the heckler’s veto (the concept) and the impermissibility of effecting one (the principle), Judge Gibbons also rightly noticed that the Court had never fully endorsed that conception, essentially the speaker-focused model limned by Justice Black in *Feiner*. Moreover, even if the Court had made the occasional suggestion that the speaker-focused model would make sense of some cases, it had never implied that it was the only one—the conception of the heckler’s veto, applicable to every case. And here her dissent dovetailed with Judge Rogers’s. Because precedent did not bind the court in the conflation of the two—heckler’s veto concept and speaker-focused conception—there was simply no reason why the majority should have felt compelled to deploy that conception in a case like *Bible Believers*. They could claim that they had to reach the result they did, then, only by feigning that compulsion. And, as Judge Rogers polished off the point, that old conceptual sleight-of-hand goes by a familiar name—formalism.<sup>106</sup>

As one would expect, the point of these twin dissents was mainly critical, and in fairness to the majority, they more raised a question than answered it. And the anomalies produced by the speaker-focused model suggest that their question was, and remains well-worth raising. Their question divides naturally into halves. What would it have meant, first, for the court to have reconsidered the heckler’s veto on the unusual facts of that case, and to have poured a new conception into an old conceptual

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103. *Bible Believers*, 805 F.3d at 271 (Gibbons, J., dissenting).

104. *Id.* at 269–71.

105. *Id.* at 271.

106. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511–512 (1988) (noting that “[w]e condemn *Lochner* as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion”).

bottle as a result? And why, secondly, was the majority so unwilling to do so? The next two Parts suggest answers to each of these questions.

### III. DEFENDING THE PUBLIC'S FORUM

To the en banc majority, *Bible Believers* should have made for “an easy case to resolve,” at least “[f]rom a constitutional standpoint.”<sup>107</sup> But even they were willing to admit that it was “easy to understand” why the bitter realities of their result—turning over “a joyous Festival celebrating the city’s Arab heritage” to a roving band of reactionaries—left something to be desired.<sup>108</sup> Yet those desires apparently found no sanction in doctrine, at least as they conceived of the heckler’s veto. So what choice did they have but to hand judgment to the Bible Believers?

Judges Rogers and Gibbons pointed the way of an answer: rethink the heckler’s veto, in light of the oddity of that case’s facts. But where, exactly, should they have looked to in their rethinking? None of the dissenters clearly addressed that question, but, once again, Judge Rogers hinted at an answer: the “towering . . . cases involving minority civil rights protests.”<sup>109</sup> This Part takes up that suggestion, and argues that indeed one of those cases—*Edwards v. South Carolina*—leads off a closely connected series of decisions on the heckler’s veto that make them, in yet another respect, a far cry from a hostile-audience case like *Feiner*. Drawing that distinction is a basic difference in doctrinal focus—away from an attack on a *speaker* to an attack on the *public’s forum*. And that focus reveals an altogether new way of conceptualizing the wrong of the heckler’s veto: what we might call the problem of the *hostile takeover* rather than the *hostile audience*. In these cases, the government arrives not to join a crowd in shutting up a speaker but in shutting down a forum, and, in doing so, ends up violating a principle other than neutrality: its duty not to abet the standardization of expression in public forums. Together this duty and that focus yield not just a new way of thinking about the heckler’s veto—a new forum-focused conception—but, also, a new constitutional rule, requiring the police to protect provocative speech by defending the forums where the provocative have their say.

#### A. *EDWARDS V. SOUTH CAROLINA* AND THE ORIGINS OF ANTI-STANDARDIZATION

The facts of *Edwards v. South Carolina*, like those in *Feiner*, would seem at first blush to present the heckler’s veto in its classic form. There,

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107. *Bible Believers*, 805 F.3d at 261.

108. *Id.*

109. *Id.* at 278 (Rogers, J., dissenting).

as in earlier heckler's veto cases, the speakers represented a clear minority: African American youths protesting the de jure discrimination of segregated South Carolina. And like in *Feiner*, their protest was by all accounts peaceful, with well-dressed late-teens and twenty-somethings making their way from Zion Baptist Church, in Columbia, to the state house grounds. They walked single-file or two-abreast, some toting placards, declaring them "proud to be a Negro," and crying "Down with segregation."<sup>110</sup> None obstructed pedestrian or vehicular traffic, and, despite the crowd of 200 to 300 onlookers that had gathered to watch, there were no obvious signs of impending disorder or violence.<sup>111</sup> And yet, as in *Feiner*, the police sensed trouble. Eventually several officers approached the protestors to give a now familiar warning: they had fifteen minutes to disperse or face arrest. Instead, they began to sing and clap; hymns filled the air.<sup>112</sup> Fifteen minutes later, true to their word, the police arrested them, leading to convictions in state court for breach of the peace.

The Supreme Court had little trouble reversing the protestors' convictions. Yet at the heart of Justice Stewart's opinion for the Court, joined by all but the southerner Justice Clark, there appeared an arguably new thought about the heckler's veto, addressed to concerns somewhat different from those that shaped Justice Black's dissent in *Feiner*.

For Justice Stewart, the decisive doctrinal point was familiar enough: the First Amendment could not tolerate government officials "mak[ing] criminal the peaceful expression of unpopular views."<sup>113</sup> Yet, continuing on with a long quotation from *Terminiello v. City of Chicago*, another case involving the heckler's veto, Justice Stewart suggested that the worry moving the Court may not have been quite so familiar.

An important "function of free speech under our system of government," as Justice Douglas famously wrote in *Terminiello*, "is to invite dispute." Speech could be thought to "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>114</sup> To this extent Justice Douglas was simply agreeing with Justice Black in *Feiner*: a speaker has a right to express "provocative and challenging" ideas, and allowing hecklers a veto clearly conflicts with the government's duty to

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110. *Edwards v. South Carolina*, 372 U.S. 229, 231 (1963).

111. *Id.* at 231–32.

112. *Id.* at 233.

113. *Id.* at 237; Under the now standard doctrine of incorporation, Justice Stewart attributed this proposition to the Fourteenth Amendment, as a bar specifically against state officials, but the point applies generally to government officials at whatever level.

114. *Id.* (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

remain neutral between the sides.<sup>115</sup> Yet the central reason why silencing the provocative speaker was problematic in that case was not, as Justice Black had implied, because it involved a privileging of one set of clashing speakers over the other. The concern moving Justice Douglas in *Terminiello* seemed instead to revolve around a different, though equally intolerable counterfactual: had the Court allowed the police to move against the protesters there, it would thereby have permitted “the standardization of ideas either by legislatures, courts, or dominant political or community groups.”<sup>116</sup> This phrasing, peculiarly passive, bears some attention. The result that the Court feared was a *fact* that followed from the government’s intervention: the standardization of ideas by dominant political or social groups, including of course the government itself. And formulated this way, Justice Douglas’ concern invites a certain refocusing of the problem—away from what the government itself does in effecting the heckler’s veto (the act of privileging of one speaker over another) and toward the effect of the veto once accomplished.

We can see this more distinctly by concentrating on the natural limits to this concern. Clearly, if the police were allowed to move against a speaker who had become too provocative, giving her hecklers a veto over her message, that, in itself, need not result in the standardization of her ideas, or ideas more broadly. Silencing a speaker is obviously not the same as changing her mind, or anybody else’s. And besides, there are other ways to spread a belief than by standing on soapboxes or marching on the state capitol. But this means that the normative considerations that Justice Douglas was gesturing at on behalf of the *Terminiello* Court would seem not to take any particular interest in the heckled speaker and her message at all. The wrong of the veto seems to turn instead on the effects that the veto has for public expression itself, the sum total of ideas expressed in the forum.

In Justice Douglas’s telling, the focus of the worry shifts subtly: away from the effects on who is speaking and what is being said to the effects on where it is being said. In this refocused view, the wrong of the heckler’s veto is not that the government effectively sides against an unpopular voice by helping its enemies to stifle it, which is a paradigmatic violation of neutrality, a concern not clearly suggested in either *Edwards* or *Terminiello*. The wrong is instead that, by siding with those who have come not to speak but to disrupt the speech of others, the government arrives only to end up shutting ideas out of the one place where they should be able to flow most freely. In a quite real sense, the law joins the

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115. *Edwards*, 372 U.S. at 237.

116. *Id.* at 238.

disrupters in shutting the forum down. And so, on this view, the wrong of the veto in a case like *Edwards*—a large demonstration on a public street, where as the numbers swell, the wrong against any one speaker grows more diffuse—has little directly to do with the government's privileging one voice over another. It instead has to do with the government's ceding a place traditionally open to all comers to only the most dominant voices, its failure to defend the public's forum.

#### B. CONTESTING PLACE AND THE HOSTILE TAKEOVER

The principle that Justice Douglas arguably enunciated in *Terminiello*, and that Justice Stewart saw fit to repeat in *Edwards*, we might call a principle of *anti-standardization*: that the government may not join in standardizing expression within the forums it has opened to the public.<sup>117</sup> And what matters most about this principle is not what it allows or forbids, but what it takes as its normative focus: the wrong against the forum itself. This quite different sense of wrong not only explains why the heckler's veto, in these cases, seems such a non-starter, but also what to do about it. A new principle, by giving us a new way of modeling the concept, also offers a new solution to the problem of the provocative speech. Before going to consider that solution, however, it may help first to see what, more exactly, this talk of normative focus comes to, and where the difference in focus comes from, and what both can tell us about a case as seemingly unusual as *Bible Believers*.

Another way of indicating the particular focus I envision here is by way of contrast, with a rival principle and differing focus. As Jed Rubenfeld has argued, one might think that the principle lying behind and informing our commitment to the freedom of speech is what he calls the anti-orthodoxy principle,<sup>118</sup> a principle stated famously by Justice Robert Jackson:

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 or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>119</sup>

Now, as Rubenfeld understands it, the normative gist of this principle—that officials must not prescribe some opinion by proscribing others—reflects the intuition that people generally have the “right to

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117. What counts as a forum open to the public may be thought of as the same forums deemed ‘public’ under the public forum doctrine. For a general discussion of the contestable nature and boundaries of these distinctions, see Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

118. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 818 (2001).

119. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

their opinion,” so that any punishment for having or expressing those opinions must be presumptively suspect.<sup>120</sup> It could well be that this intuition produces a principle too broad to explain the much narrower reach of ordinary First Amendment doctrine, as Rubenfeld acknowledges.<sup>121</sup> Here the important thing is where that principle directs Rubenfeld’s doctrinal attention, to the wrong inflicted on the individual speaker and her opinions. The normative foundation of anti-orthodoxy, the right to an opinion, thus gives rise to a certain doctrinal focus, the wrong of curtailing the convictions of the individual conscience. And applying the principle to the problem of the heckler’s veto, we naturally find ourselves tracing the veto’s wrong to the effects it has on the silenced: the violation of the individual’s right to express the deliverances of her conscience, however provocatively unorthodox.

Contrast this picture with the one drawn by anti-standardization. Under that principle, as explained in the last Part, the normative scrutiny turns from the harm specifically done to individuals cut off by the assisted hostility of a crowd, and looks instead to the place where those disappointed speakers hoped to have their say—the public streets, sidewalks, and parks. Intuitively, then, we could say that the normative gist of anti-standardization boils down to a right to the room to express oneself, a right to expressive space, rather than the right to the opinion expressed there. And that this concern should have assumed such centrality in a civil-rights era case like *Edwards* should also come as no surprise. The very point of the protests in those cases, after all, was not just to make the protestors’ opinions known but to make themselves seen in those places. As Timothy Zick has explained:

Racial segregation was an extensive and distinctly *spatial* regime that expressly separated people by place—separate restrooms, separate dining facilities, segregated courthouses. To contest this racial-spatial segregation, protestors sought access to legally and culturally forbidden public and private places. Place was often used to reach and affect specific audiences such as lawmakers, jailors, or judges. ‘Unauthorized’ spatial presence was also used as a repertoire of contention owing to its symbolic connection to messages of equality. In many instances, of course, protestors hoped that by contesting places they would generate wider public and media attention. In addition to images of police brutality in public streets, spatial contests succeeded in riveting local and more general audiences.<sup>122</sup>

In a string of cases after *Edwards* the Court gave constitutional standing to this focus on contested place, holding that protests outside a

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120. Rubenfeld, *supra* note 118, at 818.

121. Rubenfeld, *supra* note 118, at 818.

122. TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 106 (2009).

courthouse<sup>123</sup> and the Chicago mayor's residence,<sup>124</sup> and even inside a public library,<sup>125</sup> all received constitutional protection, and all apparently for the same reason as in *Edwards*.

Of course even this concern, for the right to expressive space, has its limits. And the Court appeared to indicate where some of those limits fell in the one aberration from this otherwise unbroken line of victories for the right to expressive space, in *Adderley v. Florida*.<sup>126</sup> There the Court upheld the convictions of several dozen Florida A&M students who had marched to the local jail to protest, chiefly, the arrest the day before of several other protesting students.<sup>127</sup> Justice Black, writing now for the majority, explained that a principal point of distinction between that case and those other seemingly similar civil rights cases, like *Edwards*, came down to a question of space. It came down, more precisely, to the way that space had traditionally been used: the capitol grounds where the protestors in *Edwards* marched were open to the public, he briskly noted, while the driveway to the jail in *Adderley* was not.<sup>128</sup> *Adderley* was apparently as far a cry from *Edwards* as *Edwards* was from *Feiner*. And the distance between them could be measured, somehow, by their differing uses.

The Court itself never cashed out that 'somehow,' but one way we might read the difference between these cases, taking a cue from Zick, is as a matter of compatibility, between the nature of the protestors' demonstration and the forum where they staged it.<sup>129</sup> As Justice Black implied in *Adderley*, protesting in "a driveway used only for jail purposes"<sup>130</sup> is simply incompatible with the sensitivities of a jailhouse, where concerns not just for security but for privacy naturally run higher than on a public driveway encircling a capitol or a courthouse. And so the protestors' takeover of the driveway there could not receive the same constitutional blessing as, for example, the public library sit-in did in *Brown*. Indeed, the plurality in *Brown* had made something like that point. Brushing aside another sharp dissent by Justice Black, Justice Fortas explained there that even though the protestors in that case had somewhat regrettably chosen the library as their "stage for a confrontation," still, they had left its usual "quiet" and "beauty"

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123. *Cox v. Louisiana*, 379 U.S. 536 (1965).

124. *Gregory v. Chicago*, 394 U.S. 111 (1969).

125. *Brown v. Louisiana*, 383 U.S. 131 (1966).

126. 385 U.S. 39 (1966).

127. *Id.* at 39.

128. *Id.* at 40–41. In this case, as in many others on the heckler's veto, the Court also put some stock in the difference of definitional precision found in the common-law crime at issue in *Edwards* and the trespass statute challenged in *Adderley*.

129. See ZICK, *supra* note 122, at 107.

130. *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

undisturbed—likely because nobody besides staff was there at the time.<sup>131</sup> Unlike the demonstration in *Adderley*, the silent occupation of a few seats in a public library—the expressive takeover of that space—was not hostile to its ordinary uses, the norms of the place. And that distinction apparently made the constitutional difference.

Even though *Adderley* and *Brown* each involved a kind of expressive takeover of public space, then, only in *Adderley* was that takeover hostile to the norms of the forum itself, and so only there were the protestors' convictions upheld. And that teaches a number of important lessons about the way this forum-focused heckler's veto works.

First, all of these civil rights era cases reveal that the heckler's veto can and sometimes does take on a different focus. That focus in those cases draws from the point of the speech involved in them: the speakers came not just to have their say but to contest the very place where they proposed to have it—the streets and sidewalks around a capitol or a courthouse, or the seats of a public library. In each case the Court struck down those speakers' convictions for breaching the peace, as in *Edwards*, despite apparently genuine fears that their presence threatened to stir their onlookers to unrest, possibly violence. In all of these cases, that is, the Court did as it always has since *Feiner*, and thwarted a heckler's veto. But the Court did that in *Edwards*, and in the toppling dominos of cases afterward, because of what those convictions represented: an attack less directly on the speakers in those cases than on the norms of the public streets and sidewalks themselves, what Zick has called their democratic functions.<sup>132</sup> And so what made the heckler's veto of these cases so clearly out of the question had nothing directly to do with privileging one voice over another, a violation of neutrality. The veto's wrong instead turned on what that accomplished attack meant for the forum: the empowering of dominant groups to, in effect, rewrite the norms of the public's forums for their own purposes, making the forum in a very real sense theirs. Anti-standardization, raised into a principle, merely makes this wrong against the forum articulate.

On this reading, then, the civil-rights era cases beginning with *Edwards* and leading to *Gregory* represent a different strain of heckler's veto case, what we might call the problem of the *hostile takeover*. In each of those cases, the focus fell where the protestors themselves directed it: to the space they had come to contest. The protestors had found, in their temporary takeover of public places, a way to amplify their otherwise publicly muted voices, and in all but one of those cases, their takeover

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131. It appears that the only others in the library at the time were two of its librarians, a Mrs. Reeves and Mrs. Perkins. See *Brown*, 383 U.S. at 140–41.

132. See ZICK, *supra* note 122, at 13–19.

was fully compatible with the spaces they came to contest, the norms of those places. In *Adderley*, however, the protestors had trespassed those norms by trespassing onto the private driveway of a jailhouse, and for that reason their expression no longer received constitutional protection. Their takeover of that space was, to that extent, hostile. And for precisely that reason we could also put the wrong of the heckler's veto in *Edwards*, *Cox*, and *Gregory* into the normatively laden terms of place. By letting a crowd of onlookers, or just one librarian's nerves, decide who can contest a public space, the government joins in shutting that space down to the public. In these cases the government wrongs us all by letting that attack on one of our democratic forums go unanswered.

And *Bible Believers* arguably represents that wrong as well. As Judge Rogers pointed out, the reason why pinning the label of heckler or heckled was so hard there was precisely because the Bible Believers had come to disrupt the festival—their takeover was to that extent hostile to our long democratic tradition of holding open the public sidewalks and streets to all ideas and identities. The case was a far cry from *Feiner*, then, precisely because it drew that much closer to *Edwards*, presenting not a reasonably simple picture of a hostile audience attacking a speaker but the much messier portrait of agitators staging a takeover of a forum already occupied by others. Thus, the question that Judges Rogers and Gibbons left unanswered in *Bible Believers* was what, doctrinally, should be required of the police in cases of the latter type, where the threat of an audience's attack against a speaker recedes into the assertiveness of a group intent on making the forum exclusively theirs.

### C. THE HOSTILE TAKEOVER AND A NEW HECKLER'S VETO DOCTRINE

Even if we can clearly conceive of the heckler's veto in these forum-focused terms, the case law, as Judge Gibbons saw, offers rather little guidance as to what ought to be done about it. What, doctrinally, should the courts say about the heckler's veto found in a case involving the hostile takeover of a forum? And how would a focus on the forum help resolve the problem that had so puzzled Kalven about these cases, that of articulating a clear constitutional rule that can keep the peace while encouraging expression in a contested space, besieged by speaker and counter speakers? Perhaps the most obvious solution, fitting not only the focus of this approach but also other constitutional principles, could come by way of compromise: the police must preserve the openness of the forum to as many speakers of as many viewpoints as possible. They must defend the forum first.

What this doctrinal rule would require, more practically, is space: specifically, enforced buffers between the clashing sides for as long as they can be maintained. In keeping with the strictness of the scrutiny

applied to restrictions in a public forum,<sup>133</sup> the police must make every effort not to silence anybody, which would help effect the very standardization of views there that the forum-focused model centrally rejects. Instead, their principal obligation would be to keep the warring messengers separate within the forum, and shutting down only those whose conduct turns from violently expressive to simple violence. Thus, on this model, the Bible Believers could have had their say, but at a reasonable distance from the festival they came to disrupt. As Judge Rogers suggested, “[i]f bringing in a larger police force is not a then available option in the reasoned view of the peace officer on the scene, separating the parties” should and under this model would be considered constitutionally sound.<sup>134</sup>

And this is true even if that enforced separation may have meant that the Bible Believers would have had their voices somewhat drowned out, their message diminished, by that distance. Nothing in the formulation of anti-standardization suggests that speakers must have an equally visible say, after all, only that they should have room enough to have one.<sup>135</sup> More, because the police could constitutionally move against any one speaker only at the outbreak of considerable violence—violence that could no longer be reasonably suppressed by separation—there would be no question whether this restriction would face a separate challenge as a violation of content or viewpoint neutrality. The question of what the sides are saying need never and ought not come up. Instead, having reframed the wrong of the heckler’s veto, the model focuses attention directly on the effects on the forum, and only indirectly on the particular listeners or speakers.

Aside from its consistency with the basic principle behind many of the most important heckler’s veto cases,<sup>136</sup> this forum-focused doctrine

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133. Arguably, as a regulation only of the manner in the way the forum itself operates, this rule would only need to satisfy a lesser form of scrutiny. Indeed, the consensus among lower courts is that restrictions much more oppressive than what I contemplate here would qualify as time, place, and manner regulations, needing only to meet intermediate scrutiny. *See, e.g.*, *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (holding that a “holding pen” established in advance of the 2004 Democratic National Convention was a neutral regulation needing only to have met intermediate scrutiny). *See generally* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) (discussing critically the generally intermediate standard of review applied by lower courts to free speech zone restrictions in public forums). For the sake of the analysis, however, I have assumed it must meet strict scrutiny, which I believe it would, for the reasons outlined above.

134. *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 277 (6th Cir. 2015) (Rogers, J., dissenting).

135. There are limits to the point, however, as zoning speech to the point of extinction—by excessively large obstructions between the sides, say, or by removing speakers too far from others—would make a mockery of the openness of the forum to all comers. For a discussion of these considerations, see Zick, *supra* note 133.

136. Although under a forum-focused approach the principle of anti-standardization occupies a central justificatory position, it does not occupy that position to the exclusion of other constitutional principles. And so the doctrinal conclusion of that model—the defend-the-forum rule—need not be

has several other key virtues. First, a defend-the-forum rule deliberately mirrors the speaker-focused doctrine in its clarity and simplicity: it provides relatively plain instructions to policing officials (create a buffer, only move against speakers if violence gets out of hand and then only to disperse all the crowds until order is restored), instructions already followed by major police forces.<sup>137</sup> Moreover, by dispensing with the need to distinguish the sides, this model not only better respects the demand of neutrality in cases of disruptive speech, it also eases administrability. On this conception of the heckler's veto, the police must do whatever they can to keep the forum as open as possible to whomever is speaking, no matter what they are saying. They must at least try, then, to make room for everybody, regardless of who they are or what they might mean to represent. Amid a disruption like the one witnessed in *Bible Believers*, a rule of that simplicity is not only neater to apply, certainly more so than one requiring an intractable sorting of speaker from counter-speaker, it also leaves far less room for the play of bias in the policing. Not needing to say who is who frees the police to do the job they know best—keeping the peace—while efficiently caging their discretion within the literal barriers they would instead be tasked with enforcing.

Finally, the forum-focused doctrine also gets right what the speaker-focused doctrine seemed to get badly wrong in *Bible Believers*. Unlike that doctrine, the forum-focused model would not have called for an essentially unlimited subsidy to protect disruptive speakers at the cost of silencing an already little heard voice in American life. But this is also not to say that the forum-focused approach would necessarily have counseled a different result in *Bible Believers*. As the majority there pointed out, the police did practically nothing to keep the forum open to both sides,<sup>138</sup> not even offering the Bible Believers the modest free speech zone they had received the year before.<sup>139</sup> But modeling the heckler's veto this way does mean that the Bible Believers, even had they prevailed, would also have snatched a far more modest victory: a right to some room at the festival, certainly, but not the right to tear a path of disruption through the next year's festival, police escort at their side. And that might just have been

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taken to exclude other restrictions on the types of sanctions imposable on speakers in a public forum. It is, for example, consistent with the rule suggested by the Court in *Brown v. Louisiana*, that a speaker eliciting a hostile reaction cannot be charged for the resulting breach of the peace. Thus, if the police found it necessary to escort the Bible Believers from the festival grounds to continue their protest just outside it, they could still not be cited for the unrest provoked by their speech. *Brown v. Louisiana*, 383 U.S. 131, 134 n.2 (1966).

137. See, e.g., D.C. METRO. POLICE DEP'T, STANDARD OPERATING PROCEDURES FOR HANDLING FIRST AMENDMENT ASSEMBLIES AND MASS DEMONSTRATIONS 15–23 (2016), [https://go.mpdconline.com/GO/SOP\\_16\\_01.pdf](https://go.mpdconline.com/GO/SOP_16_01.pdf); see also Zick, *supra* note 133.

138. *Bible Believers*, 805 F.3d at 261.

139. *Id.* at 236.

enough to convince the weary Dearborn public and the jittery festival organizers to keep putting on their festival, knowing that they, too, had a right to the public street, backed no less by the police baton.

#### IV. THE LAW OF THE PATCHWORK

*Bible Believers* was a case of many unfortunate ironies. Judge Rogers and his fellow dissenters felt one especially acutely: the irony of reading cases like *Edwards* and *Cox* and *Brown* to say that a group as hateful as the Bible Believers had the right not just to wage their disruptive campaign against a minority community's festival, but to the public's subsidy to do so. And then there was the irony of the decision itself: that the majority could call the case so easy when, to seven of the fifteen judges, it was anything but. As the last two Parts have suggested, these twinned ironies have their roots in a third: that the majority felt the result not just on balance the right one, but indeed compelled by the Court's rejection of the heckler's veto.<sup>140</sup> The last Part has sought to explain why, whatever the majority's feeling, that compulsion had rather little to do with either precedent or the open-ended concept of the heckler's veto.

But that does not quite put the majority's position to rest. Merely noticing that the majority appears to have slurred over the distinction between the heckler's veto concept and one conception of it obviously does not argue that they erred in that conflation. But the first of these ironies, summed up in Judge Rogers' three anomalies, arguably does. Since the court was at least notionally free to come out differently on these facts, given that play in the conceptual joints, why in the face of these anomalies would it not have done so? Irony can give us reason not just to regret a result, but to reconsider it.

Clearly, however, the majority found that argument less than convincing, and at least one member of the majority suggested why. As Judge Boggs explained in a concurrence written directly in answer to Judge Rogers, all of the talk of irony was simply beside the point, even dangerous.<sup>141</sup> "The beauty of our First Amendment is that it affords the same protections to all speakers, regardless of the content of their message."<sup>142</sup> This is true no matter whether one could fairly "characterize [the Bible Believers] as disruptors," or whether they came not to speak at all, but just to get "violence . . . visited upon themselves."<sup>143</sup> Nor, to Judge

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140. *See id.* at 248 ("Supreme Court precedent firmly establishes that the First Amendment does not countenance a heckler's veto.")

141. *See id.* at 263–64 (Boggs, J., concurring).

142. *See id.* at 264.

143. *Id.* at 263.

Boggs, was it remotely relevant that the Bible Believers might have to come to disrupt what certainly looked like a “minority” community’s fair—a characterization that Judge Boggs was not even willing to concede in the case—or that one side was “punching up” and another “punching down.”<sup>144</sup> In short, Judge Boggs suggested that the court was bound to apply the speaker-focused conception, for that conception sounds in neutrality, and if any principle can lay claim to being the law of the First Amendment, it surely would be that.<sup>145</sup> “The law,” Judge Boggs concluded, “simply requires the government to refrain from silencing speakers.”<sup>146</sup> And if that happens to upset the court’s sense of irony, then so be it.<sup>147</sup>

This objection obviously runs much deeper than just a skirmishing over practicalities. Indeed, it arguably draws much of its plausibility from a considerably richer jurisprudential picture. On that picture, it makes perfectly good sense to think of a principle like content neutrality as something like a universal law of the First Amendment, subject to exceptions only rarely, and then only for good reason.<sup>148</sup> These near-exceptionless principles govern the universe of legal creatures much as physical laws that govern the literal universe in its galactic expanses as well as its quantum interstices. And just as physicists aspire to physical theories capable of unifying all the forces of the natural world under a closed, deductive system, constitutional lawyers too are called on to seek out and enact the ultimate theories—or values—that would unify the organized forces of the state as well.<sup>149</sup>

This is obviously only a very brief sketch of a much richer view, but it suffices to make clear that an objection like Judge Boggs’ is hardly insubstantial. In this final Part, I outline an answer to that objection by giving a few reasons why we can and should give up on the faith in the picture informing it. That faith we might call a *free speech fundamentalism*, and ultimately what makes that fundamentalism untenable, this Part argues, is what it misses about the way our doctrine works: that both theory and doctrine only come alive through the kinds of models discussed in the preceding sections. Without those models, we would have no way of applying those principles and allied theories. And because we need those models to use our theories at all, we can also only

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144. See *id.* at 264 (suggesting that it was “highly dubious” that the festival goers represented a minority in the context).

145. See *id.* at 264.

146. *Id.*

147. *Id.*

148. See HORWITZ, *supra* note 97.

149. For a general overview of this position, see David S. Han, *The Value of First Amendment Theory*, 2015 U. ILL. L. REV. 87 (2015). For an example of such a theory, see Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015 (2015).

ever be sure that our theories will apply when new cases look sufficiently like the models we already have. To see the truth of these claims, or perhaps just their sense, it will be easiest to begin with the way that this lesson has come home to the philosophers of science who first pioneered them in their study of the natural sciences—beginning with, of all things, a fable.

#### A. FREE SPEECH FABLES

Consider the story-in-miniature told by one of the great luminaries of the German Enlightenment, Gotthold Ephraim Lessing:

A marten eats the grouse;

A fox throttles the marten; the tooth of the wolf, the fox.<sup>150</sup>

There is also a moral to this tiny tale, as Lessing tells it: “The weaker are always the prey to the stronger.”<sup>151</sup> Whether this questionable story has any truth to it is beside the point here, which is instead structural: what is the relation between the story and the lesson, the fable and its moral? Analytically, on one side we have the vivid scenery of a picture, the particulars depicted by the story: the concrete facts of martens darting after plump grouses, of martens being hunted down by sleek foxes, and of foxes being snatched up in the jaws of the wolf. On the other side, by contrast, stands a line of stark abstractions—the weaker, the stronger, the relation of being-prey-to. So our question could be reformulated to ask: how do the gripping facts of the fable relate to the indifferent abstractions of its moral? How do the particulars connect to the general?

For Lessing, the answer has two dimensions, one ontological and the other epistemological: “The general exists only in the particular and can only become graphic [*anschauend*] in the particular.”<sup>152</sup> Only the first of these, the ontological, matters for us here: the abstraction, Lessing says, exists through the concrete story, and only there. But what does that mean? Consider another example, offered by the philosopher Nancy Cartwright:

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150. In fact, the fable is borrowed from von Hagedorn. Nancy Cartwright & Robin Le Poidevin, *Fables and Models*, 65 PROCEEDINGS ARISTOTELIAN SOC'Y 55, 59, 59 n.8 (1991). As will become clear, in this discussion I am closely following Cartwright's exposition of this point and her theory of scientific models more generally.

151. *Id.* at 57.

152. *Id.* at 59.

What did I do this morning? I worked. More specifically, I washed the dishes, then I wrote a grant proposal, and just before lunch I negotiated with the dean for a new position in our department. A well-known philosophical joke makes clear what is at stake: 'Yes, but when did you work?'. It is true that I worked; but it is not true that I did four things in the morning rather than three. 'Working' is a more abstract description of the same activities I have already described when I say that I washed dishes, wrote a proposal, and bargained with the dean.<sup>153</sup>

Working is not something that you do alongside the dishes or preparing a grant proposal; it is a more general way of characterizing those things that you did do, an abstract way of capturing of all those concrete details that made up your morning.<sup>154</sup> Nor is it the case that what you did while working bears some kind of resemblance to something called 'work.' As Lessing says of his fable, "[w]hat similarity here does the grouse have with the weakest, the marten with the weak, and so forth? Similarity! Does the fox merely resemble the strong and the wolf the strongest or is the former the strong, the latter the strongest. He is it."<sup>155</sup>

Cartwright, again quoting Lessing, helpfully recasts the point:

The relationship between the moral and the fable is that of general to the more specific, and it is 'a kind of misuse of the words to say that the special has a similarity with the general, the individual with its type, the type with its kind.' Each particular is a case of the general under which it falls.<sup>156</sup>

Fables are not like their morals in some metaphysically mysterious sense of likeness, nor are the morals concealed somehow within their fables, as if the fable were just one of those optical illusions that we can unlock by squinting hard enough at it, revealing its hidden picture.<sup>157</sup> Instead, the fable fits out [*einkleiden*] the moral of the story, much as you fit yourself out with a wardrobe for a new job.<sup>158</sup> There is no property of weakness disguised in the fluttering grouse or the flailing marten; nor is 'strength' somehow there alongside the slash of the fox's paw, or the chomp of the wolf's bite. The abstractions of the moral—the weakness and strength, the preying upon—just are there, concretely, in the

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153. *Id.* at 60.

154. Note that the relation here is not the same as between genus and species. There is no conjunction of genus and differentiae that would make what Cartwright did that morning, work, rather than, say, the relief from it—as washing dishes after negotiating with a difficult dean could well have become. *See id.* at 61.

155. *Id.* at 59–60.

156. *Id.* at 60.

157. *Id.*

158. *See id.*

characters of the fable, and those particulars are our way of understanding those abstractions.<sup>159</sup>

Just the same is true, Cartwright claims, of the relationship between abstract and concrete terms generally—as in her special case of physical theory. Fables, after all, show us how to “transform the abstract into the concrete.”<sup>160</sup> But that transformation does not imply identification. And Cartwright is clear that in saying that generals exist through particulars, she is not suggesting the reduction of one to the other. Saying that you were working this morning when washing the dishes adds something that simply saying you were washing the dishes otherwise lacks. That is because ‘work’ brings with it its own living tissue of abstract relations—invoking with it concepts like ‘value’ and ‘leisure’ and even ‘dignity’<sup>161</sup>—that hardly follow from the mere dunking of plates into sudsy water. We can understand the fable before mentioning its moral, just as we can learn what it means to rinse the glasses before we understand that doing so is often a tiresome chore, a sort of work. And yet, as shown in the example of the fable, the abstract moral exists for us only through the concreteness of the story, by coming to be fitted out by the particulars of the fables we tell.

What is true of our fables, Cartwright claims, is also true of our science—and, I want to add, of our law as well.<sup>162</sup> Indeed, we can regard constitutional law *as* a collection of many fables—a collection of models that we use to fit out the simple and absolute words of our Constitution. To see the truth of this claim we need look no farther than the now standard model of the heckler’s veto and where it got its start: in the story that began this Article, of Feiner’s confrontation with the Syracuse mob. That story just *is* our way of fitting out the principle that courts have ever since taken it to stand for—its moral of neutrality. And in case after case since, from *Edwards* down to *Bible Believers*, we can see the courts dutifully fitting out the scenes depicted in the pleadings before them with the same roles of the same drama that unfolded on the streets of Syracuse half a century ago—of the law arriving on the scene only to end up silencing the unpopular, the fabled strong conquering the weak.

The way this works in detail—the way we cash out what might feel more like a metaphor than an analysis—also closely resembles the way

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159. For an account of how this insight—the epistemological side of Lessing’s point—figures in scientific thinking, see RONALD N. GIERE, *SCIENCE WITHOUT LAWS* 84–118 (1999).

160. Cartwright & Le Poidevin, *supra* note 150, at 57.

161. This is of course why we can say that much of what women traditionally did at home was just an uncompensated, and unacknowledged, sort of *work*—a thought that would not occur to somebody who did not regard washing dishes as *working*.

162. See Cartwright & Le Poidevin, *supra* note 150, at 62–68; see also Nancy Cartwright, *Models: Parables v Fables*, in *BEYOND MIMESIS AND CONVENTION: REPRESENTATION IN ART AND SCIENCE* 19 (Roman Frigg & Matthew C. Hunter eds., 2010).

Cartwright sees physical laws coming to be fitted out with models. As Cartwright explains, in the context of Newton's second law of motion:

Once we know how to pick the characters, we can construct a fable to 'fit out' Newton's [second] law by leaving them alone to play out the behavior dictated by their characters: that is what I called . . . a *model* for a law of physics. For Lessing's moral, he picked the grouse and the marten. Now we can look to see if the grouse is prey to the marten. Similarly, we have the small mass  $m$  located a distance  $r$  from the larger mass  $M$ . Now we can look to see if the small mass moves with an acceleration  $GM/r^2$  (since  $GM/r^2=F/m$ ). If it does, we have a model for Newton's law.<sup>163</sup>

Many of the same features can be found in our First Amendment doctrine.<sup>164</sup> On the one hand, we have a principle like that of neutrality, structurally not unlike the physical principle articulated by the universal law of gravitation ( $F=mGM/r^2$ ), telling us both what characters and relations to look for—a speaker riling up a crowd with her words, police stepping in to silence her—and what normatively to think of those relations.<sup>165</sup> The fable, on the other hand, makes those characters and relations concrete; the story brings the abstract moral or principle to life, in a visible clash of voices in which the government is seen to be picking sides. Thus, the story of Feiner on his soapbox fits out the principle of neutrality—building what I have called a *model* of that principle—much as a two-body system fits out or models the physical interactions revealed by Newton's universal law of gravitation. The laws of physics come to life in the particulars of these models,<sup>166</sup> just as our First Amendment principles gather concreteness in the telling of stories like Feiner's. Those stories transform the generality of a principle like neutrality into the memorable particulars of a plot.

These fables have more than just an illustrative or pedagogic point, however. They are also our way of applying and extending the morals we tell with them; our tools for devising rules out of the principles we take our doctrine to stand for and for reapplying those principles to future cases.<sup>167</sup> In the case of physical theory, once we have gotten the hang of

163. Cartwright & Le Poidevin, *supra* note 150, at 63.

164. I am hardly the first to claim that something like what I am calling fables or models are central to our understanding of constitutional text, though the lessons I seek to draw from this observation differ somewhat. See, e.g., Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1170 (1995) (describing the so-called "[p]aradigm cases" that "form the spine of interpretation on the model of writing").

165. On this latter point the doctrinal and the physical models diverge: a physical model tells us what is true in the model, while the doctrinal tells what ought to be true.

166. Cartwright, *supra* note 150, at 62–63.

167. The account I give here is only of principled constitutional decisionmaking, where, as Robert Post has put it, the decisionmakers strive to implement constitutional objectives. I do not mean to suggest that all constitutional decisions need be or are this principled. See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2361–63 (2000); see also Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1,

how to fit out a law we can begin to draw up hypotheses about how that still-idealized system will work in detail.<sup>168</sup> It is only a short step from seeing that a moon swirling around a planet fits out the law of gravitation to making specific claims about the interactions and properties of those bodies, like the magnitude of the moon's accelerative force. Constitutional doctrine, once again, works much the same way. As already seen in the case of the heckler's veto, once we have in hand a principle like neutrality or anti-standardization we also come by an indication of what doctrinal rule would make sense. The relation here is not quite like that in the physical model. In general there is no deducing a doctrinal rule from a legal principle in the way that hypotheses can, at least sometimes, be deduced from mathematized models.<sup>169</sup> But that is not to say that doctrinal principles impose *no* limits: neutrality would not tolerate a rule saying heckled protestors sympathetic to the current administration should be defended and others not, just as anti-standardization would not brook the closing of the public streets to all but those boosting the police. Doctrinal rules may not emerge through *modus ponens*, but they often do arise from some argument.<sup>170</sup>

And these models, our fables, do more than just fit out doctrinal rules. They also guide our application of those rules to new cases. Once we have learned to focus our attention on the right relations and characters indicated by a moral, there is no principled limit to the uses we can make of that moral or of a well-fitted fable. A story of wolves and martens can become one about big-box stores luring customers from the mom-and-pop shops, just as Feiner's story can speak to the case of the unpopular politician shouted down from her podium in a public square. We thus fit and refit our free speech fables from case to case, from one fact pattern to the next. And so the courts have applied the standard model of the heckler's veto to cases that look much like Feiner's and even to cases that do not, as in *Bible Believers*.

#### B. AGAINST FUNDAMENTALISM

Obviously this is only a glimpse of a much larger view, and much more would need to be said to complete it convincingly. But if the relation

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3 (2007) (describing instances of "full particularity" where "people agree on a result without agreeing on any kind of supporting rationale").

168. See Ronald N. Giere, *How Models Are Used to Represent Reality*, 71 PHIL. SCI. 742, 744 (2004).

169. See NANCY CARTWRIGHT, *THE DAPPLED WORLD: A STUDY OF THE BOUNDARIES OF SCIENCE* 3-4 (1999). This is not to say that deduction figures all that commonly even in the treatment of real physical systems. See *id.* at 9-10.

170. There are also discernible strengths and weaknesses of such arguments, even if not strictly logical in nature. See Scott Brewer, *Relevancy*, in EVIDENCE 1, 44-49 (10th ed. 2017) (on file with the Author).

between the doctrinal principle and cases can be pictured this way—if applying a constitutional concept requires, like a physical concept, that it first be fitted out with a model—then we will also see why the fundamentalist picture seems to get things upside down. And that is because, if models matter in the way just described, there is simply no reason to believe that the fables we tell for the First Amendment will apply universally.

To see why this is so, we need only look at the way models work: that they, like fables, can fail to fit. The point is hardly unique to the theoretical concepts found in physics or, for that matter, constitutional doctrine. As Cartwright points out, even a concept like ‘work’ can hardly be said to apply with total generality. Is it really fair to say, as a pre-school teacher once did to her, that a child’s work is play? The point becomes all the more obvious when we try to apply the implications of a fable’s moral to an ill-fitted case: if a child’s play really is her work, what would she do with her time off? And that was the lesson Judge Rogers effectively drew in *Bible Believers*. The majority’s struggling to press the facts of that case into the speaker-focused model produced exactly those anomalies that made the result there so “unfortunately ironic,” and the use of that doctrine so “formalistic.” Those anomalies, to put the point in these terms, were the result of trying to make the moral of neutrality and the fable we tell about it—*Feiner’s* fable—fit facts that just would not bear out that moral.

Already, this puts considerable strain on fundamentalism. If the only way to apply a theory is by fitting it out with a model, and if models at least occasionally do not fit, then there will be cases where the theory simply will not apply. But Cartwright goes on to make a still stronger claim: though a moral will be true of its fable, just as law is true of its model, there is no guarantee, and little reason to believe empirically, that the moral (or law) will be true of much beyond it.<sup>171</sup> It is not that legal principles, like morals, fall just short of full universality. Much worse, we can be sure that they make sense only in the circumstances depicted in their models, or in circumstances exceedingly like them. And that is because these models, like the fables we tell, are themselves creatures of abstraction and idealization. We simplify—or idealize—real situations by assuming away in our thought-experiments, or carefully eliminating in the laboratory, conditions that interfere with the system we are trying to model: as, in the case of the pendulum, when we set the frictional or other forces acting on the ball and string to zero. Similarly, we abstract from those real systems by subtracting features of the real-life situation irrelevant to the properties under study: thus we consider the abstracted

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171. Cartwright & Le Poidevin, *supra* note 150, at 67–68.

property of the swinging ball's mass, ignoring its material properties.<sup>172</sup> The result is a working model of a highly idealized system, of which we can say with mathematical precision what will happen when, in that example, the ball is released at a certain angle from vertical.

But the price of fruitful simplification is a narrowing of fit. By the time we are done with all our idealizing and abstracting, few, if any, real systems will resemble the resulting model. Trimming and fine-tuning the situation just so means that only systems closely approximating that trimmed and tuned picture will work just that way. And hence Cartwright, along with other post-positivist philosophers of science like Ronald Giere, have drawn the perhaps startling conclusion that scientific laws—themselves a kind of moral on this account, outfitted with their own fables—are never strictly true of situations beyond their interpretive models. We instead have to be quite fortunate, or quite careful, to see a law come to life.<sup>173</sup>

This is equally true of the First Amendment. As others have pointed out, no First Amendment principle extends to all cases and contexts.<sup>174</sup> At some point the doctrinal principle will inevitably begin to mislead,<sup>175</sup> just as outside of the careful experimental calibrations the laws of physics will begin to lie.<sup>176</sup> And that is also why an otherwise serviceable conception will sometimes lead to intolerable anomalies, as the speaker-focused model did in *Bible Believers*. Precisely because we need these models to apply concepts like the heckler's veto, we can only ever be sure of how those concepts will apply when new cases look sufficiently like the models we already have. And in those not atypical cases where our existing models do not quite seem to fit, their principles will fit our judgment of the cases quite poorly, if at all.<sup>177</sup>

The reason for that misfit, moreover, is the same in law as it is in the natural sciences. For like any other science, law also lives in a world

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172. I am simplifying here to some degree, but these simplifications do not alter the point made above. See Nancy Cartwright, *Reply to Eells, Humphrey, and Morrison*, 55 PHIL. PHENOMENOLOGICAL RESEARCH 177, 177-78 (1995) (discussing her view of idealization and abstraction).

173. CARTWRIGHT, *supra* note 169, at 4.

174. Post, *supra* note 167, at 2373-74.

175. HORWITZ, *supra* note 97, at 42-67.

176. See generally NANCY CARTWRIGHT, HOW THE LAWS OF PHYSICS LIE (1983) (discussing the limits of physical laws); see also GIERE, *supra* note 159, at 84-96.

177. Here I am appealing to two distinct notions of 'fit.' One is descriptive, and has natural affinities with the notion of fit that we use when we say that the plastic and metal models found in biology classrooms "fit" the double-helical chemical structure we have come to know as DNA. But there is another notion of 'fit' having a normative dimension, 'fit' as intuitive 'rightness.' Although I cannot defend the point here, it seems to me clear that both have bases in our basic cognitive psychological makeup. For a recent and illuminating discussion of this point, see HUGO MERCIER & DAN SPERBER, THE ENIGMA OF REASON 299-315 (2017) (describing the role of 'intuitive inference' in moral and political reasoning); see also GIERE, *supra* note 159.

peopled by idealizations and ruled by abstractions. One need only flip through the pages of law reviews and case reporters to see the truth of that, with our highly stylized talk of speakers and forums. Among the casualties of this idealizing is a sense of relevance, of what goes missing from our models. Just consider the strangely detached ways we discuss the heckler's veto: the party heckled in a case like *Feiner* is not just any speaker, but a *person* giving voice to a real, unique, often idiosyncratic take on things.<sup>178</sup> The original puzzle of provocative speech, lest we forget, first appeared in a book about *The Negro and the First Amendment*<sup>179</sup>—a fact that could hardly be read off the sanitized abstractions articulating Justice Black's model of the problem.

Idealization and abstraction are as much a fact of life in the law as in the laboratory.<sup>180</sup> And so to have a working constitutional concept, one capable of deciding anything doctrinally, one must first find for it a suitable working model. Models matter immensely, then, in our constitutional law. For, as already seen, models directly mediate between otherwise quite open-ended concepts like the heckler's veto and far more practical doctrinal rules.<sup>181</sup> They are therefore central to making a rule of law out of the quite capacious abstractions of our Constitution.<sup>182</sup> They structure and consolidate our expectations, by assigning definite doctrinal limits in particular institutional and other contexts. They also draw those limits in light of our sense of what makes for a democratic wrong, expressing what John Dewey once called the "basic loyalties" that define our democratic values—our ideals.<sup>183</sup> Ultimately, however, they

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178. Paul Horwitz has nicely captured this point in what he calls the lure of acontextuality. See HORWITZ, *supra* note 97, at 5–7.

179. KALVEN, JR., *supra* note 9, at 140.

180. For some, like the philosopher Charles W. Mills, this may be a fact more for regret than celebration, for, as Mills fairly points out, careless idealization can all too easily build profound injustices into our moral or legal doctrines. See Charles W. Mills, "Ideal Theory" as Ideology, 20 HYPATIA 165 (2005). I am inclined to say, however, that the answer to Mills' worries about impoverished idealization and bad abstractions are richer idealizations and better abstractions. For an answer to Mills's concerns along these lines, see Leif Hancox-Li, *Idealization and Abstraction in Models of Injustice*, 32 HYPATIA 329–332 (2017).

181. There is thus a clear symmetry here with Margaret Morrison and Mary S. Morgan's characterization of scientific models as instrumental mediators between scientific theory and data. See generally Margaret Morrison & Mary S. Morgan, *Models as Mediating Instruments*, in MODELS AS MEDIATORS: PERSPECTIVES ON NATURAL AND SOCIAL SCIENCE 2 (Mary S. Morgan & Margaret Morrison eds., 1999).

182. In this way, models occupy, and vindicate, a middle ground between what Farber and Frickey have called fundamentalism and the sort of "pure eclecticism" suggested some while ago by Steven Shiffrin. See Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1627–28 (1987) (discussing both views).

183. John Dewey, *The Basic Values and Loyalties of Democracy*, in 14 JOHN DEWEY: THE LATER WORKS: 1939–1941 275 (2008). In this sense the approach I advocate in this Article is also resolutely Realist—or, as Dewey would have said, experimentalist. See Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1907 (2015) (noting the Realist belief

can do both only in a piecemeal way, context by context. A patchwork First Amendment will be as much as we can ever hope for, then, on this picture. But with all the sense it can make of the diverse ways we live out our lives, that is already quite a lot.

### C. TOWARD A DAPPLED HECKLER'S VETO DOCTRINE

A reader of fundamentalist persuasion, skimming the last two sections, would no doubt shake her head in disbelief. Surely, we should not let the law to become this unruly even if it were notionally possible, the disbelief might go, for surely we want the sort of predictability and stability that comes standard with a world governed according to fundamentalist belief. And *Bible Believers* might make a case in point: why would we not want a world in which we could confidently say, with Judge Boggs, that, “The law simply requires the government to refrain from silencing speakers”?<sup>184</sup>

The answer to that also finds a case in point in *Bible Believers*: as Judge Rogers and the dissenters showed, irony can and sometimes should matter. What sense would it make, after all, to cling to the speaker-focused conception of the heckler's veto in the face of the increasingly common cases where heckling bleeds into and blurs with counter-speech, and where the supposed “speaker” has come not primarily to express herself but to take over the forum by enlisting the police to shut it down? In these cases, only a formalistic inertia could support a rule requiring the police to join in the hostile takeover of the public's forum by becoming a phalanx to the hostage takers. In these cases, where the forum itself has come under attack, it seems simply to make better sense to say that the police should defend it first.

But it also seems to make sense only of those cases. Justice Black sensed fairly enough that the police had wronged *Feiner as speaker* by pulling him down from his box—that the police had arrived to take over by literally taking him. The wrong of what the police did there, in other words, fell just where the speaker-focused model would place it: what that silencing meant for *Feiner as speaker*, and thus for his message. In these cases, where drawing the line between heckled and heckler is as easy as drawing a cordon around the soapbox orator, we naturally feel that wrong runs directly to her, as speaker. And we therefore feel it only right that our doctrine should defend her first. This Article has suggested that what makes those feelings legitimate—what makes good

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that the core functions of law are consolidating expectations and expressing our ideals); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 27 (1924–1925) (pitching his theory of law and legal reasoning as experimentalist).

184. *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 264 (6th Cir. 2015) (Boggs, J., concurring).

constitutional sense—has much more to do with the practicalities of context than with something as abstract, and as practically inert, as a concept like the heckler's veto. And as that context drifts, so too will our sense of what is constitutionally legitimate.

The *Bible Believers* majority was therefore not altogether wrong in seeing the heckler's veto as they did. Their mistake lay instead in failing to see that the veto could also be something more. And so the subsidy for provocative speech rightly flowed in that case, but along the wrong normative currents. This Article has argued that the time has come for a redirection in the law of provocative speech. But this need not mean, nor ought it to mean, that we should replace the familiar speaker-focused model. We should instead *displace* it from the center of our doctrinal attention, by giving more exacting consideration to the many cases where other models, differently focused, would better fits the facts. To do that, however, we will first have to convince ourselves that our doctrine will need to be far more dappled than it already is.

#### CONCLUSION

Our constitutional law will always be deeply dappled,<sup>185</sup> more a messy patchwork of models than the simpler world of broad and largely exceptionless theories. And so it will also be a law in which irony has its place, as it should have had in *Bible Believers*. As this Article has argued, taking seriously the ironies of that case would have yielded a law of the heckler's veto in some ways messier than the law we have now, gripped as it still is by a fable like Feiner's, of hostile audiences and soapbox orators. But introducing that little bit of messiness, through renewed focus on the public's forums, would also have its compensations. Not least among them would be a little more room for voices still too rarely heard today amid the sometimes discomfiting din of democratic life.

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185. I owe this term as well to Cartwright, who borrowed it from Gerard Manley Hopkins's paean to "Pied Beauty." See CARTWRIGHT, *supra* note 169, at 19.

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