Freedom to Hear: A Political Justification of the First Amendment

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COMMENTS

FREEDOM TO HEAR: A POLITICAL JUSTIFICATION OF THE FIRST AMENDMENT

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.

James Madison

INTRODUCTION: THE POLITICAL FRAMEWORK

In times of crisis and political intolerance, men tend to lose sight of historical principles which want not validity, but only modern expansion and application. A re-examination of the freedoms embodied in the first amendment, from perspectives old and new, yields insight into the structure and design of our constitutional system, and exposes one basic source of our contemporary difficulties. When attention is properly directed toward the political underpinnings of the first amendment, it may be seen that today's self-governing citizens desperately need a freedom to hear in addition to the freedom to speak. Creative implementation of the freedom to hear politically relevant information can serve as a vehicle for re-educating our populace to the needs of future decades, and may prompt a retreat from the contemporary silence and detachment of many of our people.

Some historical perspective sets the stage for this analysis. Perhaps the earliest source of our first amendment freedoms was the English Bill of Rights of 1689, which declared

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2. The Bill of Rights, 1 W. & M. 2, c. 2, § 9 (1689). This section must be read in context with sections 1, 2 and 4 of the same document, which state that there is no legal authority to suspend or execute any law or levy without the consent of parliament, and with section 8 thereof, which states that "election of members of Parliament ought to be free."
   These guarantees were established in response to protestations by the House of Commons, such as the one presented to the King in 1621:
That the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

That the evolution of freedom of speech from this provision to that embodied in the first amendment is traceable to the extension from parliamentary government to self-government\(^3\) seems to be a common view among historical analysts:\(^4\)

Perhaps the most important indication of the political emphasis of the First Amendment rights of “freedom of speech [and] of the press” is to be found in the Parliamentary prototype of these rights. . . . The justification for this immunity is that it encourages full and frank discussion of public business. The distinctive emergence in the United States of “freedome [sic] of speech [and] of the press” reflects the extension of the public forum from the legislative halls to the country at large, an extension that is appropriate to a self-governing people.

Though the Framers never explicitly relied upon this British precedent prior to the adoption of the first amendment,\(^5\) the relation between the

The Commons now assembled in Parliament, being justly occasioned thereto . . . do make the Protestation following,

... that the arduous and urgent affairs concerning the King, State, and Defence of the Realm, and of the Church of England, and the maintenance and making of Laws, and redress of mischiefs and grievances which daily happen within this Realm, are proper Subjects and matter of Counsel and Debate in Parliament;

And that in the handling and proceeding of those businesses, every Member of the House of Parliament hath, and of right ought to have, freedom of speech, to propound, treat, reason, and bring to conclusion the same;

... in such order as in their Judgments shall seem fittest;

And that every such Member of the House hath like freedom from all Impeachment, Imprisonment, and Molestation (other than by censure of the House it self) [sic] for or concerning any bill, speaking, reasoning, or declaring of any matter or matters touching the Parliament or Parliament-business.


The crux of section 9 of the English Bill of Rights was incorporated into the United States Constitution to protect the legislative speeches of senators and representatives. U.S. Const. art. I, § 6.

4. G. Anastaplo, Notes on the First Amendment to the Constitution of the United States 173-75, June, 1964 (Univ. of Chicago doctoral dissertation) [hereinafter cited as Anastaplo, Notes].
5. L. Levy, Legacy of Suppression 108-09 (1960) relies heavily on the fact that debates on the freedom of speech prior to 1798 never analogized the needs of self-governing people to those of the members of the English Parliament, as indicating that the scope of immunity for popular discussion in America was not intended to be so broad. But this argument seems to be totally deflated by Z. Chafee, How Human Rights Got into the Con-
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early document and the later expansion of the freedom of speech is apparent from the political attitudes of Americans prior to 1791.6

Early colonial theorists7 and the early leaders of the new nation8


7. Our two greatest colonial theorists of the rights of free expression, . . . William Bollan . . . [and James] Alexander . . . stressed the necessity and right of the people to be informed of the conduct of their governors so as to shape their own judgments on "Publick Matters" and be qualified to choose [sic] their representatives wisely. No one before had related the electoral process to freedom of expression—a significant advance in political and libertarian theory. The first essayist [Alexander], in depicting the wholesome influence of liberty of the press upon the formation of public opinion, also propounded the novel thesis that the "Bulk of Mankind" were quite capable of governing themselves. . . . The second essayist, in championing the "salutary effects" of "Freedom of Debate," wisely suggested that the public should be exposed to every kind of controversy, in philosophy, history, science, religion, and literature, as well as in politics, because in the course of "examining, comparing, forming opinions, defending them, and sometimes recanting them," the public would acquire a "Readiness of Judgment and Passion for Truth."9


8. For example, in a 1774 letter to the inhabitants of Quebec, the Continental Congress stated:

The first grand right is that of the people having a share in their own government, by their representatives chosen by themselves, and in consequence of being ruled by laws which they themselves approve, not by edicts of men, over whom they have no control. This is a bulwark surrounding and defending their property, so that no portions of it can legally be taken from them, but with their own full and free consent, when they in their judgment deem it just and necessary to give them for public services . . .

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.


The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.

This statement should be read in the light of Madison's later remarks:

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits.

Madison, Report on the Virginia Resolutions of 1798, in 4 DEBATES IN THE SEVERAL STATE
perceived the task of self-government as the major justification and need for protection of the freedoms of speech and press. The language of the Vermont Constitution of 1787 is illustrative:

That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government:—and therefore the freedom of the press ought not to be restrained.

The freedom of deliberation, speech and debate, in the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation of prosecution, action or complaint, in any other court or place whatsoever.

These provisions plainly established freedom of speech as an adjunct of self-government. This rationale was not lost when the Framers of the first amendment set about their task; James Madison described an early draft of the first amendment in this way:

The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will.

As this language illustrates, the principal draftsman of the first amendment viewed freedom of speech as a mechanism for communication of political ideas and attitudes among citizens and to their representatives. The available historical literature indicates that the first amend-
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ment was intended not merely to disestablish the English law of sedi-
tious libel, but to extend the theory which underlay the parliamentary
privilege to the citizens who were to perform the parliamentary func-
tions, in order to implement the ultimate goal of self-government for
which the Constitution was conceived.

Now let us attempt to fit the first amendment into this historical
context. In the form of its final adoption, the first amendment to the
Constitution of the United States provides, in part:

Congress shall make no law . . . abridging the freedom of
speech, or of the press; or the right of the people peaceably to
assemble, and to petition the Government for a redress of
grievances.

Any inquiry into the meaning of these words must rely on established
methods of language construction, even though there are practical
limitations to such methodology.

Keeping in mind the political orientation that pervaded the adoption
of the first amendment, a reader of the language quoted above should
notice that the amendment identifies two "freedoms" and two "rights." The
limitations relating to speech and press are designated as free-
doms; those relating to peaceable assembly and petition are described

12. T. COOLEY, CONSTITUTIONAL LIMITATIONS 603-04 (7th ed. 1903).
13. See Z. CHAFFE, FREE SPEECH IN THE UNITED STATES 19-20 (1941); McKay, The
15. As Representative John Page of Virginia declared during the First Congress:
The gentlemen tell us that these are the principles of the Constitution. I know not
what were the intentions of its framers, but I see and judge of the work by my fac-
ulty of understanding.
1 ANNALS OF CONG. 580 (1789). More recent observers have pointed out:
It is easier to read the words than to sense the meaning of the Constitution. The
document is written in the idiom of the late Eighteenth Century; and verbal cur-
rency passes most uncertainly between the generations.
A language is the verbal expression of a culture. As the things, the activities, and
the ideas which make it up change, the diction of a people makes its accommoda-
tion. Words quickly shed old meanings and take on fresh ones; verbal concepts get newly
filled with the stuff of everyday life; and idioms old and new come to reflect novel
twists in thought-ways among the folk. One is prone to assume that, when words
abide, meanings remain; yet some fifteen decades of cultural change—and their rest-
less impact upon the language—lie between us and the words of the Constitution.
We are doomed, unless we make a heroic attempt to get back into a world which is
gone, to read the classic document in the light of a later understanding.
W. HAMILTON & D. ADAMS, THE POWER TO GOVERN 42-43 (1937). However, our "later
understanding" can obviously be supplemented by reasoning based on inference and anal-
ogy, rather than on plain meaning alone. See C. BLACK, STRUCTURE & RELATIONSHIP IN
as rights. Our knowledge of the abilities and inclinations of the Framers and our presumptions of statutory construction justify the initial proposition that the distinction between freedoms and rights was intentional. In seeking a modern rationale for the first amendment, the absence of clear contemporaneous evidence as to the actual intentions of the Framers practically necessitates heavy reliance on the language which they used.

In view of the political motivations which prompted adoption of the first amendment, the significance of the distinction between freedoms and rights therein is naturally illuminated somewhat by the nature of the document in which it appears: a constitution enumerating the powers of the general government. Further insight may be gained by reference to the theory of reciprocity which pervades our traditional Hohfeldian analysis of rights and duties. In this context, identification of a right of assembly implies the existence of a defined relationship between the holder of the right and some second party. In a constitution enumerating the powers of government, the second party in this reciprocal relationship must be the government. Thus, the command

16. "Among the many reasons for reverencing the memory of James Madison is his unswerving insistence on using the most exact words available in the English language to convey the thought of those . . . who established the Republic." F. Morley, THE POWER IN THE PEOPLE 19 (1949). Madison drafted the initial versions of the first amendment, but was apparently not a member of the final committee on style. Yet there is good reason to have the same respect for their choice of language, for "their thinking was greatly superior to that which passes as currency today. They were at home in the field of abstract ideas upon which . . . the continuation of the American way of life depends." Id. at 23.

17. This fact has been relied upon to support a highly restrictive interpretation of the first amendment. L. Levy, LEGACY OF SUPPRESSION (1960). Of course, the absence of evidence could with equal cogency support a very broad interpretation. In view of this uncertainty, the strict "intention" theory should be discarded in favor of more supportable modes of construction.

18. Consider the apparently intentional distinction between the "rights" reserved to the people in the ninth amendment, and the "powers" reserved to the states and to the people respectively in the tenth amendment. U.S. Const. amend. 9, amend. 10. Functionally, this distinction is the same as that drawn in the first amendment between "rights" and "freedoms". The legitimacy of reliance on such textual distinctions is as much dependent on the political structures which they describe as on the difference in the words themselves. Taken together, these two bases constitute a highly legitimate and promising mode of interpretation. See C. Black, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 8 (1969). "There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text." Id. at 31.

19. See generally W. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS (1923); Radin, A Restatement of Hohfeld, 51 Harv. L. Rev. 1141 (1938); Cullison, Logical Analysis of Legal Doctrine: The Normative Structure of Positive Law, 53 Iowa L. Rev. 1209 (1968).
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of the first amendment is that the government in exercising its powers must respect the rights established therein, and must fulfill certain duties with respect to those rights. The statement that "Congress shall make no law . . . abridging . . . the right of the people" has functional significance as a protective limitation on the powers of the government and as a statement of certain obligations of the government, required by its reciprocal relationship to the people.

In contrast, the first amendment's designation of freedoms in the area of speech and press implies that control over those subjects belongs solely to those who possess the freedoms, and that no other party has any direct power over the subject matter which the freedom surrounds. Freedom involves no reciprocal relationship; it implies no limitation on its exercise, and imposes no direct obligations on any second party. The citizenry is guaranteed an absence of restraint and is vested with the power to participate in and realize its full potential with respect to a subject matter which affects its lives. Thus, the statement that the freedoms of speech and press shall not be abridged has functional significance as a recognition and guarantee of popular autonomy in those areas of activity. With regard to speech and press, the first amendment precludes all governmental abridgment, not just governmental abuse. Yet while the government has no power or duty to deal with speech as a result of the first amendment freedoms, there is still the implied power and obligation which inheres in any government to safeguard the freedom itself, since these freedoms represent a pillar of its own structure which government is committed to respect and to protect in order to maintain its own integrity.

The more limited nature of the rights established in the first amendment is apparent from its language. The "right of the people" to assemble and to petition is significantly qualified by the word "peaceably." The Supreme Court has frequently recognized that these rights are subject to reciprocal regulation under governmental police power because they protect matters of conduct which may produce destructive consequences beyond the scope of political communication.20


It should be noted, however, that conduct itself may have a very strong communicative content and effect, and it is not the simple fact that conduct is intermingled or involved which lessens the protection afforded to the communication; rather, it is the greater likeli-
In a broad functional perspective, the two classes of protections established in the first amendment operate as distinct safety valves serving differing political functions in our society. The freedoms of speech and press have been recognized in order that citizens may freely converse and communicate their feelings and desires to their elected representatives. While there is no corresponding duty on the part of representatives or the government to listen to this free speech, the constitutional plan clearly envisions that the government will in its own best interests listen to the articulated viewpoints of the citizenry. At the same time, we possess a right peaceably to assemble, which, while limited by its added potential for disorder, aids our exercise of free speech. This matrix of protection surrounds what may be considered a primary level of political involvement under the first amendment.

A second level exists in the combination of the rights peaceably to assemble and to petition the government for a redress of grievances. While these rights inhere in the people at all times, their fundamental operative utility is at moments when free speech and press are seemingly not successful instruments for communicating popular desires to the government, or when the government or the controlling majority does not listen. In such times the right to petition for a redress of grievances provides a device for tapping unrepresented emotions. This limited right is matched by a duty on the part of the government to consider the petition presented. The Founding Fathers clearly understood the importance of such a secondary safety valve in a democracy governed by a central government of limited powers and obligations. Their experience with the English system of redressing grievances,


21. See text accompanying note 10, supra.
22. See note 20, supra.
24. Cf. NAACP v. Button, 371 U.S. 415 (1963) (right to be heard is implicit in the notion of redress). Note that the government's duty is only to listen fairly and attentively. It is not under any obligation to satisfy the petition, nor to subject itself to insulting harangue which expresses no specific grievance. The government's duty is defined by traditional notions of due process. See note 72 infra.

Consider also the language of the first amendment, which confers the "right" on "the people." Query whether this language vests the right in each individual member of the populace, or whether some assembly or number of "people" is necessary for the right to become operative. If the latter is the case, how many persons must be involved?
which necessitated their own listing of grievances in the Declaration of Independence, made them both willing and anxious to permit mass appeals to the central government in times of popular discontent, and to require the government to listen to such appeals. Yet their knowledge of the dangers of popular marches and petitions, and the nature of the right of petition as a stopgap mechanism for times of revolutionary propensity, led them explicitly to limit that right by authorizing it only insofar as it was exercised "peaceably."

That the first amendment neither states nor implies the existence of any similar limitations on the freedoms of speech and press bolsters the initial conclusion that the Framers' use of the word "freedom" rather than either "right" or "privilege" was intentional. Therefore, we

25. Petition to the Parliament in pre-independence colonial days was for the most part unavailable or ineffective. Thus, for example, there was no colonial representation in Parliament, and when the Stamp Act was passed in 1765, the only means for registering protest was by public outrage and insurgency, rather than cool appeal to the assembly which passed the Act. In addition to desiring clearer channels for protest, so that upheaval and documents like the Declaration of Independence would be unnecessary, many colonists argued for greater popular representation in the assemblies and for making the executive more responsive to the popular voice of the assembly. See M. Savelle, Seeds of Liberty 352 (1965).

26. But contrast the qualities of the invasion of Washington, D.C., by Coxey's Army in 1893 with the peaceful petition presented by the more contemporary march on Washington by civil rights demonstrators in 1963.

27. Note the description of the "privilege of the Writ of Habeas Corpus," which may be suspended in certain stated circumstances. U.S. Const. art. I, § 9, cl. 2.

28. Contrast the ultimate text of the first amendment, establishing the people's "freedom of speech, or of the press," with the version of the amendment which Madison originally submitted to the House of Representatives:

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

1 Annals of Cong. 434 (1789) (emphasis added).

There has also been some controversy over the use of the word "freedom" rather than "liberty"; one analyst has distinguished the two terms in this way:

"Freedom" is pre-eminently a noun descriptive of status or condition. ... [F]reedom is obviously the realm where rulership and restraint are minimized. Ability to reason is not implied in the term "freedom," as it is in the case of "liberty." The former noun, therefore, may be used to describe a condition appropriate to the lower animals, where "liberty" would clearly be an extravagant term. Even oysters may be said to have freedom. But they will never have liberty.

When the founders spoke of the blessings of liberty, they did not discount the value of freedom. But it is apparent to any student of the period that they generally used the word "liberty" to convey a sense of individual responsibility which the alternative noun "freedom" does not imply. The blessings of freedom may be of very questionable value. Those of liberty ... are priceless.

F. Morley, The Power in the People 22-24 (1949). But these semantic doubts seem to be adequately disposed of in Anastaplo, Notes, supra note 4, at 199-201:

The typical eighteenth-century reference was to "liberty of the press" rather than to "freedom of the press." This may have been due to the emphasis in English law
must concern ourselves with the proper scope and significance of "freedom" in the context of the first amendment as a political mechanism.\textsuperscript{29}

Some might still argue that, because the first amendment expressly denies only congressional powers in the area of speech and press, there must still remain power in the federal executive and judiciary, and in the states, to abridge speech. Were that true, the first amendment could not be deemed to recognize the people's exclusive power over speech and press. But could it be a "freedom" if the President could abridge it at will? Freedom only from congressional abridgement? That interpretation seems clearly contradictory to the apparently intentional use of the word "freedom," which of itself implies absolute and exclusive power in the people, and denies the permissibility of any governmental abridgment.\textsuperscript{30} That the draftsmen went even further, and explicitly upon the \textit{liberation} of the press from the prior restraint of licensing. "Freedom of speech," on the other hand, was much more likely to be used than "liberty of speech." This may reflect the influence of the traditional wording of the parliamentary privilege. Thus the word associated with "speech" (i.e., "freedom") was selected when "speech" and "press" were coupled in the First Amendment and in other American constitutional documents. We are again reminded of the emergence in America of a self-governing people which now has the prerogative of the once sovereign parliaments.

Americans in the nineteenth and twentieth centuries have been much more apt to use "freedom" than "liberty," when speaking of either speech or the press. The example of the First Amendment may have influenced this usage, as well as the bad name "liberty" got in some quarters because of the French Revolution. . . . But, history or chance aside, "liberty" may have an inherent moral ambiguity that "freedom" does not have. That is "freedom" can be said to suggest an attitude of responsible or self-restrained liberty, of [or?] a sense of liberty in which "ought" governs "wish." . . . It is this quiet assurance that we sense to be implicit in the Constitution, especially in its injunction that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

This view seems to comport with the conclusions of other commentators:

For all their wisdom the Fathers could not anticipate the speech of the distant future; the judicial terms of a century and a half later were quite beyond their linguistic reach. In thought, in action, in resort to parchment their choice was limited to the words at hand and by prevailing usage in respect to those words.


29. Consider the sentiments of the late Alexander Meiklejohn:

To fix our attention, as we commonly do, upon an individual "right to speak" is to lose sight of the essential issue. In a field in which the basic understanding of our plan of government is at stake, in which controversy rages and misunderstanding is easy, it is imperative that we have, so far as possible, a dependable working agreement as to the topic under consideration, as to the meaning of the words which we are using. I hope, therefore, that the reader will follow this argument as an attempt to understand not merely the "freedom to speak," but the "political freedom" which the Constitution establishes as the basis of any arrangement by which men may govern themselves . . . .

A. MEIKLEJOHN, POLITICAL FREEDOM 95-96 (1948).

30. See C. BLACK, STRUCTURE & RELATIONSHIP IN CONSTITUTIONAL LAW 39 (1969): [A] basis [for more adequate protection of speech against state interferences than
denied such power in the Congress, is not surprising, since the purpose of the document was to define the powers of the general government. That the Senate declined to deny expressly any power in the states to regulate speech\textsuperscript{81} has little significance in light of this intentional use and broad meaning of the word "freedom." However unclear it may have been prior to 1868, it is now established that the pre-emptive effects of our freedoms of speech and press deny all governmental powers over those areas, through the fourteenth amendment.\textsuperscript{82} Any other interpretation allowing state infringement of the freedoms would allow the states to defeat the fundamental political goal of self-government for which the freedoms were established.

mere due process\textsuperscript{exists—... the nature of the federal government, and of the states' relations to it, compels the inference of some federal constitutional protection for free speech, and gives to a wide protection an inferential support quite as strong as the textual support ... .}

Professor Black goes on to elaborate:

\textquoteleft\textquoteleft From the very structure of the relation between the national representative and his constituency, there arises a compelling inference of some national constitutional protection of free utterance, as against state infringement. ... I start with that as the hard core, because I cannot see how anyone could think our national government could run ... on any less openness of public communication than that.

But I see no reason here for sticking to this hard core. Representatives are not in communication with their constituencies only at election time. ... I would unhesitatingly go further and say that discussion of all questions which are in the broadest sense relevant to Congress's work is, quite strictly, a part of the working of the national government.

\textit{Id. at 42-43. See also M. Savelle, \textit{Seeds of Liberty} 320-21 (1965), where the author sets forth the thinking of colonist John Wise to the effect that man's freedom to be rational is a basic liberty which must "be perfectly in his own power and disposal, and not ... controlled by the authority of any other."}\textsuperscript{31}

\textsuperscript{31} Madison had originally proposed the following amendment to the House:

\begin{quote}
No State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases.
\end{quote}

Mr. Madison conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.

\textit{Id. After debate, Madison's proposal was amended and passed by the House in this form:}

\begin{quote}
The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State.
\end{quote}

\textit{Id. This amendment was ultimately rejected by the Senate, and it has been argued that this rejection indicated an intent on the part of the senators that powers over speech and press were not to be withheld from the States. Redlich, \textit{Are There "Certain Rights ... Retained By the People"?}, 37 N.Y.U.L. Rev. 787, 806 (1962). That is obviously not a necessary conclusion.}

\textsuperscript{32} U.S. Const., amend XIV. The earliest case to apply the first amendment through the fourteenth against state encroachments on the freedom of speech was Gitlow v. New York, 268 U.S. 652 (1925). In \textit{Gitlow} the Court assumed, however, without expressly holding, that the first amendment applied to the states.
In 1798 Madison adverted to the Framers' intention to protect these freedoms from infringement by the states as well as Congress:\textsuperscript{33}

[T]here are powers . . . which, in the United States, are withheld by the people both from the general government and from the state governments. Of this sort are many of the powers prohibited by the declaration of rights prefixed to the constitutions, or by the clauses, in the constitutions, in the nature of such declarations.

The point is that the first amendment's guarantee of "freedom of speech [and] of the press" affirms a retention of powers in the people,\textsuperscript{34} as a part of their general power of self-government. It does not merely signify a generous governmental grant of rights and privileges to the people. As the late Professor Meiklejohn pointed out, most of the amendments which comprise our Bill of Rights do in fact create rights; but the first amendment and the tenth amendment, by contrast, vest powers of government in the people, in order to secure the rights granted elsewhere.\textsuperscript{35}

Of course, the freedom of speech is not the fountain of the power of self-government; it allocates only the power to communicate freely. The basic source of the people's governing powers is that constitutional provision which establishes them as the electors of the Congress.\textsuperscript{36}

Through that mechanism, the Founding Fathers chose for themselves, and committed posterity to, a democratic experiment which they intended should be permanent. In the same stroke, they imposed the task of self-government on the people of this nation, and established the first and tenth amendment powers to facilitate the achievement of that end.\textsuperscript{37} Justice Jackson offered this view of the motivation for recognition of the freedom of speech:\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{33} Madison, Report on the Virginia Resolutions of 1798, in 4 ELLIOT'S DEBATES, supra note 8, at 559.
\item \textsuperscript{34} Thus, in 1794, Madison declared that "the censorial power is in the people over the Government, and not in the Government over the people." 4 ANNALS OF CONG. 934 (1794).
\item \textsuperscript{35} Meiklejohn, Freedom to Hear and to Judge, 10 LAWYERS GUILD REV. 26 (1950).
\item \textsuperscript{36} United States Const. art. I, § 2: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." See United States Const. amend. XVII, extending to the people the power to choose senators as well.
\item \textsuperscript{37} Once "certain rights . . . retained by the people" had been removed [by the
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This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy.

The conclusion that our first amendment freedoms were adopted primarily as a political mechanism, for implementing and facilitating the people's power to govern themselves,\(^9\) may strike a dissonant chord for many readers who are accustomed to thinking of our freedoms of speech and press as simple codifications of human or natural rights. Yet this conclusion is not at all inconsistent with the natural rights theory of free speech.\(^40\) There is no doubt that the freedoms guaranteed by the first amendment serve other functions, such as enhancement of human dignity and development of personality,\(^41\) apart

ninth amendment] from the scope of federal power, it would have been inconsistent to provide that all powers resided either in the federal government or in the states. The last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights, not enumerated in the Constitution, which were "retained ... by the people," and that because the people possessed such rights there were powers which neither the federal government nor the states possessed.

Redlich, supra note 31, at 807.  
[T]he First Amendment ... derives its meaning from the Reserved Powers, the non-delegated authority, of "We, the Electors" of the United States. Our freedom of belief and of expression ... is the freedom of men who vote and, by voting, govern. This means that when the First Amendment proclaims its great guarantees of the freedoms of religion, of speech, of press, of peaceable assembly, of petition for redress of grievances, its political justification for doing so is that those freedoms are required for the exercise of that power of "electing" which We, the People, have reserved to ourselves. ... The First Amendment is, then, an implementation of the Tenth. It specifies and protects the exercise of the Power which we have reserved to ourselves as the primary political activity of a free people.  
39. "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility." Meiklejohn, The First Amendment Is An Absolute, 1961 SUP. CT. REV. 243, 255. See T. Uzell, THE TWILIGHT OF SELF-GOVERNMENT 182-83 (1961):  
Democracy is the self-government practiced by the people of a nation. Freedom, our freedom, had its origin when our ancestors insisted on shifting ultimate authority from the British king to themselves. Those determined people announced that they would be their own king. This is what freedom means. Our rights, I repeat, were not wrested from anyone. We assumed them as ours by natural right. This is the distinct uniqueness of our form of government. ... [T]he test of freedom is not the possession of rights. ... The test of freedom is the right to create government with reserved rights and see to it that the reserved rights are not violated.

40. See text accompanying note 135, infra.  
41. Neither does one seek and value freedom only to advance self-government and
from the political function of assisting the process of self-government. The purpose of this introductory analysis has not been to show that free speech is solely a political mechanism, or that political utility was the only reason for its adoption. Instead, in order to establish a theoretical basis for expanding first amendment protections, emphasis has been placed on one function of free speech, and one aspect of its necessity in the constitutional framework—namely, that our freedoms of speech and press were adopted primarily for the purpose of facilitating the task of self-government.

Decisions of the Supreme Court have frequently recognized this purpose of the first amendment freedoms, and have generally sought to ensure discussion of public issues, self-education and testing of ideas through public debate, and critical assessment of governmental operations through the medium of free speech. On general principles, without regard to the nature of political institutions, freedom of speech is often to make government productive of justice, but also to enhance his dignity and self-development. This sentiment found expression in Stone's exclamation:

We have expended our treasure, our blood, and our time, to very little purpose, if we do not think that liberty and safety exalt the human species. From the meanest to the highest rank in life, the propriety of conduct arises from the security and independence of situation. [1 ANNAHS OF Cong. 568-69 (1789)].

This exaltation comes, in part, through the realization that one participates in ruling himself, that he has duties as well as privileges and that the privileges are given and defended by himself. The dignity of the citizen's activity is enlarged if he has the opportunity to explain himself, if he can do that which is distinctly human.

Anastaplo, Notes, supra note 4, at 443. See also M. McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964), wherein the author suggests that the furtherance of self-fulfillment and emotional release are the most important functions of the first amendment's invitation to dispute.

As pointed out in the text above, the purpose of this paper is to explore the ramifications and utility of the political-justification theory of the first amendment. Yet it is clear, as we shall see, that "the first amendment does not protect speech and assembly only to the extent it can be characterized as political." UMw v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967). Indeed, emphasis on the personal justifications for the freedom of speech may in several areas give rise to protections which are broader than under the political-justification theory expounded herein. See notes 132-135 and accompanying text, infra. While the personal-justification theory of the first amendment has received much attention and expansion in recent decisions, the scope of protections thereunder is beyond the purview of this paper. It should be noted in passing, however, that corporate entities, such as the broadcast media, logically have a much weaker claim to protection under the personal-justification theory than under the political-justification theory, since their dignity and personality development are both fictional and unimportant.

42. Alexander Meiklejohn . . . has made us perceive the political frame work in which the free speech guarantee makes sense. . . . I am not here putting these political considerations forward as helps in the interpretation of the First Amendment, but rather as independent structural grounds supporting the inference of federal protection of free speech against the actions of the states.

justified on the ground that it furthers the welfare of society.\textsuperscript{43} Indeed, as late as 1897 the Court took the position that the first amendment does not expound any novel political theory.\textsuperscript{44} Yet the more common approach taken by the Supreme Court to the nature and function of the first amendment freedoms has not been so oblivious to political considerations.\textsuperscript{45}

The traditional “marketplace of thought” rationale explicitly recognizes the political necessity for our freedoms of speech and press. Justice Holmes first expounded this theory in a dissenting opinion in

\begin{itemize}
  \item \textsuperscript{43} For example, Justice Black stated in Feldman v. United States, 322 U.S. 487, 501 (1944) (dissenting opinion):
    \begin{quote}
    The first of the ten amendments erected a Constitutional shelter for the people’s liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to the attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.
    \end{quote}

  \item Though this is a common rationale among traditional thinkers, yet the absence of a political foundation for the theory may create problems when it is applied in a modern democratic setting, due to the fact that intuition of what is the “best” solution for society tends to ignore the rights of minorities. See F. CASTOREN, \textit{Freedom of Speech in the West 271-72} (1960). Of course there are drawbacks to justifying the freedom of speech solely on political grounds as well, if one fails to recognize the concurrent personal justifications which underlie that freedom. \textit{Id.} at 423-24. See note 41, \textit{supra}.

  \item In Robertson v. Baldwin, 165 U.S. 275, 281 (1897), Mr. Justice Brown stated:
    \begin{quote}
    The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the “Bill of Rights,” were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation . . . .
    \end{quote}

  Alexander Meiklejohn, relying on historical precedents, reached a contrary conclusion in A. \textit{MEIKLEJOHN, Political Freedom 102} (1948):
    \begin{quote}
    With respect to certain items in the Bill of Rights, the denial of novelty is, of course, valid. Such rights as habeas corpus, due process, fair trial, freedom of contract, security from unreasonable searches and seizures, and so on, had long been fought for, and in some measure won, in Britain and the Colonies. It could fairly be said of them that “no novel principles had been laid down.” But to say that the relation between the people and the legislature was now, in principle, as it had been before, is to miss the meaning, not only of the First Amendment, but of the Constitution as a whole.
    \end{quote}

  \item Consider, for example, the following statement by Justice Black:
    \begin{quote}
    I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.
    \end{quote}

  \textit{Drivers Union v. Meadowmoor Co., 312 U.S. 287, 301-02} (1941) (dissenting opinion).
\end{itemize}
1919. Since then, the Supreme Court has frequently relied upon the marketplace theory, recognizing the political foundation of our first amendment freedoms. In the last decade or so, the Court has placed increasingly heavy reliance on the self-government rationale of our freedom of speech to drastically expand the scope of that guarantee. The first hesitant step toward expansion of the political-justification theory was taken in 1957:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political

46. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion), in which Justice Holmes set forth the questionable theory that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." As the German people's mid-century acceptance of Nazism clearly illustrates, this is not a principle of absolute validity. A more balanced rationale is that, recognizing the possibility of human error, good decisions are more likely to be reached in an atmosphere of free and rational public discussion. Professor Marcuse argues that complete freedom of speech can lead to progress and the discovery of objective truth, even though, as Mill pointed out, it may not always triumph over persecution. Marcuse, Repressive Tolerance, in A Critique of Pure Tolerance 81, 89-90 (1968).

47. Justice Brandeis was the first to assume the theory. He first expounded upon the political justifications for the first amendment freedoms in Gilbert v. Minnesota, 254 U.S. 325, 337-38 (1920) (dissenting opinion), and later expanded upon this idea of freedom of speech as a political device necessary to the success and security of our form of government in Whitney v. California, 274 U.S. 357, 375-76 (1927) (concurring opinion), overruled in Brandenburg v. Ohio, 395 U.S. 444 (1969).

The thought that freedom of speech is necessary to effective self-education of our citizenry, which is so essential to the proper operation of our form of self-government and the continued existence of our republic has been echoed in many subsequent opinions: Stromberg v. California, 283 U.S. 359, 369 (1931); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); DeJonge v. Oregon, 299 U.S. 353, 365 (1937); Thornhill v. Alabama, 310 U.S. 88, at 95, 104-05 (1940). In 1949, Justice Douglas added this insight:

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed 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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.


48. Roth v. United States, 354 U.S. 476, 484 (1957). Yet this apparently well-stated rule has been criticized for leaving open the possibility of governmental imposition of standards as to which speech materials are relevant or irrelevant to the task of popular education and self-government:

The valid element in the position expressed in the "redeeming social importance" view is that ideas count. . . . But the term "redeeming" implies that ideas have to win their welcome in public discussion, whereas in fact they belong there by express command of the first amendment.

Meiklejohn, Public Speech and the First Amendment, 55 Geo. L.J. 234, 261 (1966). As Professor Emerson has observed, "It is the function of the individual, not the government, to sift the true from the false, the relevant from the irrelevant, the rational from the appeal to prejudice." Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 948 (1963).
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and social changes desired by the people . . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.

Later, the Court undertook to explicate in more detail the scope of protection for politically relevant speech by emphasizing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Finally, in 1964, the Supreme Court made it clear that the expansion of protection was designed to serve the ends of self-government:

Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances, honestly believed contribute to the free interchange of ideas and the ascertainment of truth . . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government.

The political-justification rationale for the freedom of speech is also expressed in the "preferred position" theory of the first amendment. This theory perceives the freedom of speech as the most essential


We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States . . . . [F]reedom to discuss public affairs and public officials is unquestionably . . . . the kind of speech the First Amendment was designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed.

Id., at 296-97.

liberty of the American people, yet recognizes that it can be regulated by the government. But, its proponents argue, whenever the freedom of speech is to be balanced against some other interest which seems to require regulation of speech, the former must weigh very heavily in the balance. Ultimately, this preference is traceable to the overwhelmingly crucial function of free speech in this self-governing nation. In that sense, to argue for a preferred position for the freedom of speech is to argue for a political justification of the first amendment.

I. THE FREEDOM TO HEAR

The foundation has been laid for the main point of this essay: Since the guarantees for speech and press in the first amendment were intended to safeguard and promote effective self-government by the American people, then if our speech is to be effective to that end, our freedom of speech must embody the essential freedom to hear what is said or otherwise communicated on public matters, and to acquire the information needed for rational self-government. This freedom—which we shall designate simply the "freedom to hear," although it must protect reading and watching as well as listening—is basic to the func-

[Freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations, a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty . . . has been enlarged . . . to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized . . . that liberty is something more than exemption from physical restraint . . .]

52. For example, in Kovacs v. Cooper, 336 U.S. 77, 87-88 (1949), the Court stated:
The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be an opportunity to win their attention. . . . [But] Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience.
The Court also alluded to the rule, which seems both to sanction and prohibit application of a balancing test to the freedom of speech, in Hague v. CIO, 307 U.S. 496, 515-16 (1939).

53. See Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 31-32 (1941).

54. Under the preferred position theory, "freedom of speech and of the press are seen as key elements in a people's efforts at self-government." Anastaplo, Notes, supra note 4, at 341. See also United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
tioning of a modern society which depends upon political debate and persuasion as its engine of progress. The importance of this need to acquire the knowledge upon which self-government relies cannot be underestimated. As President Kennedy stated in 1959:

"Freedom and security are but opposite sides of the same coin—and the free expression of ideas is not more expendable but far more essential in a period of challenge and crisis. I am not so much concerned about the right of everyone to say anything he pleases as I am about our need as a self-governing people to hear everything relevant. . . . Only in this way can we as a self-governing people choose wisely and thoughtfully in our task of self-government."

The important and critical relation between popular information and popular government was well known to the Founding Fathers. James

55. [T]he welfare of any free society rests on its fullest exercise [of the right to communicate] by the individual in receiving information and ideas, in giving expression to his own ideas, and at times in refusing to do either. To the extent that an individual is denied this right, to that extent his society fails in its trust. The right comes first in a free society and is basic to the full enjoyment of all rights of the individual and of the group.


56. [M]eaningful participation in government requires knowledge outside our normal spheres of experience to a degree so much greater than in earlier generations as to pose the problem of effective democracy in new terms. Yet we have by no means correspondingly extended realistic access to the information needed for that participation.

The ignorance of which I speak is, of course, only relative. The citizenry at large is better educated and better informed on current issues than ever before, and a larger freight of information goes out through the communications system than ever before. But it is relative to a need for competent, trained, thoughtful, and informed citizens of an almost desperate degree. The functional illiteracy of most Americans today is a far graver menace to our future than was the actual illiteracy of a century or more ago.


58. For example, Benjamin Franklin, fairly representing popular thinking in eighteenth century America, argued that "all opinions ought to be heard." Franklin, An Apology for Printers, Philadelphia Gazette, June 10, 1731, quoted in L. Levy, Legacy of Suppression at 127 (1960). Levy also quotes Tunis Wortman, a prominent New York lawyer of the late 1700's, from T. Wortman, Treatise Concerning Political Enquiry and Liberty of the Press 159-60 (1800):

How then shall erroneous opinions or wilful misrepresentations be combated [sic] by the wise and provident legislator? The proper answer to this enquiry is, That Government should by no means interfere unless by affording such information to the public as may enable them to form a correct estimate of things.

Levy, supra, at 286. The general proposition was also stated by Thomas Jefferson in 1787:
Madison stated in 1798 that "the right of freely examining the public characters and measures, and of communicating thereon, is the only effectual guardian of every other right."

In order to fulfill effectively the needs of self-government, our freedom to hear must afford us the opportunity both to acquire information from others and to seek truth by synthesis of and debate upon the information thus acquired. Probably the former is the more essential

The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.

Letter from Thomas Jefferson to E. Carrington, quoted in N. MiNow, supra note 57, at 24 (1964). The thought that the citizenry has a freedom to acquire information on public matters persisted throughout the early years of the Republic; for example, Benjamin Botts made this statement at the trial of Aaron Burr in 1808:

"In a government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, everything that is done in a public way by their public functionaries. They ought to know the particulars of public transactions in all their bearings and relations, so as to be able to distinguish whether and how far they are conducted with fidelity and ability . . . ."

2 D. Robertson, The Trials of Colonel Aaron Burr 517 (1808). Modern political institutions have not completely lost sight of this important principle. See Report of the President's Committee on Civil Rights 47 (1947); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 999 n.5 (D.C. Cir. 1966).


Self-government is possible only to the extent that the leaders of the state are agents responsive to the will of the people. If the public opinion which directs conduct of governmental affairs is to have any validity; if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provided. The importance of freedom of information to a nation which professes self-government lies in the fact that without one the other cannot truly exist. There is convincing evidence that the drafters of the Bill of Rights were aware of the vital need to keep the people informed of official operations. This realization was one of the considerations motivating the guarantees of free speech and press. Implicit in both is the right to know what the government is doing. In fact, Alexander Hamilton emphasized the importance of popular acquisition of information to the operation of the Republic in The Federalist No. 84, at 539-40 (H. Lodge ed. 1888).

61. Note that the freedom to seek truth by public debate would comprehend the right of access to the media for which there has been much argument in recent years. Exploration of the exact limits of the right of access is beyond the scope of this paper. See Barron, Access to the Press—A New First Amendment Right, 50 Harv. L. Rev. 1641 (1967), Barron, An Emerging First Amendment Right of Access to the Media?, 37 Geo. Wash.
need; the importance of an informed populace to the end of self-government is obvious. It is elementary to say that our law must guarantee the standing of all citizens to lay claim to all available information bearing on public matters, as an essential adjunct of their freedom to speak and govern themselves. This is more than merely urging that speakers must be given a right to be heard or a right of access to the press or the media. That perspective may be too limited. If our end is indeed political, in a broad but accurate sense, our perspective must consider the needs of the entire polity. Our goal must be, not that a given speaker be heard, but that every citizen hear him.

Self-government requires free and active debate on public matters, and in this process each citizen must be free to convey his own ideas, in order to educate others, and to hear all arguments which are advanced by others. He must be able to demand education on every side of any issue. If this is denied, the people can be no more than captive


62. See A. Meiklejohn, Political Freedom 88 (1948).
64. With regard to the importance of reshaping our attitudes to prefer most highly the individual consumer of communications rather than the individual speaker or producer of communications, see D. Lacy, Freedom and Communications 78-79 (1961); and Meiklejohn, Freedom to Hear and to Judge, 10 LAWYERS GUILD REV. 26, 29 (1950).
65. See notes 61, supra, and 72, infra.
66. Consider the ineffectiveness of requiring an author to run around to every library or bookstore, or a speaker to every radio or television station, in order to assert his right of access; whereas willing readers or listeners could cover much more ground with less effort.
67. See Brief for the Bill of Rights Committee of the American Bar Association as Amicus Curiae, Hague v. CIO, 307 U.S. 496 (1939), quoted in Z. Chafee, Free Speech in the United States at 415 (1954). Also consider these observations from F. Castberg, Freedom of Speech in the West 422 (1960):

First and foremost freedom of discussion and a wide measure of freedom of information has been regarded as necessary to any effective democracy. Free political discussion is believed to provide the best solutions in any conflict arising within the community, as well as producing the most valuable legislation. Discussion also serves to disarm discontent and revolutionary tendencies. Moreover it promotes a tendency to compromise solutions, which is one of the goals at which democracy aims. In a sound democracy the majority will take the opinions and wishes of the minority into account. This presupposes that every citizen has the right to speak up and call attention to his own interests and opinions and freely advance his arguments.
auditors of whatever censors control the public debate, and the ends of self-government may be defeated.

Aside from its critical necessity as a political mechanism for achieving the ends of self-government, the freedom to hear can be rationalized as a simple but necessary corollary of our freedom to speak.

The right to communicate is a two-way concept: the right to give and the right to receive information and ideas; the right to advocate, teach and write; the right to hear, read, reply and reject. The right cannot exist without both a giver and a receiver.

[A]ny right the individual has to communicate is but a reflection of the group right, a relational rather than an individual interest.

The Supreme Court has at various times apparently recognized not only the freedom to speak, but also the right not to speak, the right

69. See O'Meara, Freedom of Inquiry Versus Authority: Some Legal Aspects, 31 NOTRE DAME LAW. 3, 10 (1955). Some, however, have argued that even if a right of access to all public information and debate is established, it cannot do much to ensure the achievement of self-government because "We say recklessly that readers or listeners have a 'right to know,' yet it is a right which they are helpless to claim, for they do not know that they have the right to know what as yet they do not know." W. HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE 170 (1947). Anastaplo faces this problem in Notes, supra note 4, at 423-24. Moreover, even when complete factual information is not already available to the people, yet

Only through the free conflict of ideas can we hope to solve the great riddles of mankind, the elimination of poverty, insecurity, discrimination, and war. Those who resist such freedom of inquiry are enemies of the people for they doom our land to endless cycles of economic crises and poverty, of war and annihilation, of bigotry and spiritual degradation. And they must fail as enemies of progress have failed through the ages.

71. Cf. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), where the Supreme Court struck down a statute requiring school children to give the flag salute, on the ground that the salute is a form of expression which no one (regardless of his religious inclinations) can be compelled to give. Justice Murphy, concurring, stated that the "right of freedom of thought and of religion guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court." Id. at 645.
Cf. International Ass’n of Machinists v. Street, 367 U.S. 740 (1961), where the Court held that the Railway Labor Act’s authorization of union shops did not give unions authority to expend collected dues to support political causes to which a worker expressly objects. Justice Douglas concurred on the ground that an individual should not be
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to be heard, and the right not to listen. But it has never carried the marketplace or political-justification theory of free speech to its logical conclusion by expressly recognizing the freedom to hear and acquire information in a strictly political context so as to afford constitutional advantages to the “consumers” of ideas. While some federal district
required to finance causes with which he disagrees. Justice Black, dissenting on other grounds, agreed:
Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.
Id. at 788.
72. See Saia v. New York, 334 U.S. 558 (1948), where the Court struck down an overly broad statute prohibiting the use of sound horns without a permit on the ground (inter alia) that “Loud speakers are today indispensable instruments of effective public speech. The sound truck has become an effective method of political campaigning. It is the way people are reached.” Id. at 561. Justice Frankfurter in dissent vigorously denied the existence of any right to be heard, on the ground that it would interfere with the rights of unwilling listeners not to listen. Id. at 565.
One year later, in Kovacs v. Cooper, 336 U.S. 77 (1949), the question was again presented in virtually the same factual pattern. This time the Court found the statute to be sufficiently specific and denied defendant's alleged right to be heard on the ground that it was outweighed by the rights of passersby not to listen to his “loud and raucous” sounds. Justice Black, dissenting, restated the rationale underlying the right to be heard.
Id. at 103.


74. See Rowan v. Post Office Dep't, 397 U.S. 728 (1970); Kovacs v. Cooper, 336 U.S. 77 (1949). See also Cox v. Louisiana, 379 U.S. 536, 578 (1965) (concurring opinion of Justice Black); Public Util. Comm'n v. Pollak, 343 U.S. 451, 465 (1952) (concurring opinion of Justice Black, asserting that the right not to listen applies only as against communications on public issues, not music). Perhaps the most forceful statement in favor of the right not to listen is found in Avins, The Right Not To Listen, 51 A.B.A.J. 656, 662 (1965). See also 39 U.S.C. § 4009(a) (Supp. V, 1970), giving postal addressees in their “sole discretion” the power to stop publishers from mailing them materials which they believe “to be erotically arousing or sexually provocative.” The FCC has taken the position that the right not to listen does not comprehend any privilege to impose silence on a speaker. See Pacifica Foundation, 1 Radio Reg. 2d 747 (1964). Studies of the psychological impact of communicative actions and subliminal projection indicate that the scope of the right not to listen may be even broader than anyone has yet argued. See Steele, The Impact of Psychoanalytic Theory on the Freedom of Speech, 38 Psychoanal. Q. 583, 603-609 (1969). See also Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum. L. Rev. 960 (1953), wherein it is argued that the right not to listen and to have one's attention to oneself is a matter of personal dignity, protecting one's ability to reason. Thus, it would seem that the right not to listen is an outgrowth of the personal-justification theory, rather than the political-justification theory expounded herein. See Beard v. Alexandria, 341 U.S. 622 (1951).
court decisions seem to be moving in that direction, the Supreme Court has only recently recognized the "right to know" in a personal or natural rights context.

Yet several Supreme Court decisions recognize the importance and seem to imply the existence of a constitutional freedom to hear, as an adjunct of our system of self-government. The earliest allusion to the interests of acquirers of information was made in 1878 in a case involving a federal conviction for sending a lottery advertisement through the mail:

Nor can any regulations be enforced against the transportation of printed matter in the mail . . . so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.

While the Court naturally recognized the importance of listeners in the implementation of our freedoms of speech and press, its early approach to the needs of listeners was based on a due process theory rather than on first amendment reasoning. In a 1923 decision, the Court reversed the conviction of a public school instructor for teaching German in violation of a state statute which prohibited foreign language instruction in public schools because it might overburden the students' minds. The reversal was based upon the right of the students to acquire such knowledge as a matter of due process.

75. See Brooks v. Auburn University, 296 F. Supp. 188 (M.D. Ala. 1969), where the district court held that the university's refusal to allow a certain political speaker to appear on campus violated both equal protection and the constitutional "rights of students and faculty to hear" him speak. Id. at 192. See also Kovach v. Maddux, 238 F. Supp. 835 (M.D. Tenn. 1965), where the district court held that a state senate resolution barring a certain newspaper's reporters from senate proceedings until they agreed to abide by senate rules was overly broad and might have a chilling effect on the publisher's right to acquire and to comment upon information gathered there. The court reasoned that "without the opportunity to gather and obtain the news, the right to publish or to comment upon it, would be of little value." Id. at 839.

76. See Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Georgia, 394 U.S. 557 (1969). These cases and the personal-justification theory for the freedom to hear are discussed in the text accompanying notes 96-99, infra. For a thorough study of the historical precedent and current need for a right to know about governmental operations and private transactions, see J. WIGGINS, FREEDOM OR SECRECY (rev. ed. 1964). See also Community Security vs. Man's Right to Knowledge, 54 COLUM. L. REV. 667-837 (1954) (symposium, discussing attitudes of various religions, and experiences of various nations in implementing the right to know).

77. In re Jackson, 96 U.S. 727, 733 (1878).


79. The Court stated that the guarantee of due process of law in the fourteenth
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Uncertainty as to the source of this freedom to hear persisted until 1936, when the Supreme Court first recognized the relationship between self-government and the acquisition of knowledge under the first amendment. In Grosjean v. American Press Co., a newspaper license tax was in issue. The Court declared the tax unconstitutional because:

The predominant purpose of the grant of [first amendment] immunity ... was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country ... have shed ... more light on the public business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved ... is bad because ... it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees.

For the first time, the freedom to hear was mentioned in connection with the first amendment, even if only in general descriptive terms.

Not until Martin v. City of Struthers did it become clear that this vaguely recognized interest of hearers was a sufficient doctrinal ground for a decision in their favor. In that case, the Supreme Court reversed a conviction under a statute prohibiting door-to-door distribution of

amendment "denotes not merely freedom from bodily restraint but also the right of the individual to ... acquire useful knowledge [among other things], and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Id. at 399. Clearly this decision rested in part upon the personal justifications for the freedom to hear. See note 41, supra, and text accompanying notes 96 through 99, infra. It is not clear to what extent political considerations may have entered into the Court's reasoning.

80. For example, in Near v. Minnesota, 283 U.S. 697 (1931), the Court struck down an injunction against further publication of a newspaper which had published a truthful but defamatory statement about a police chief. The Court reasoned that such an injunction was an unconstitutional "prior restraint," but at the same time clearly based its decision on some interest of the public in acquiring such news:

Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even more serious public evil would be caused by authority to prevent publication.

Id. at 722 (emphasis added).

81. 297 U.S. 233 (1936).

82. Id. at 250.

83. 319 U.S. 141 (1943).
literature and exalted the listener's interest at least to the status of a constitutional right. 84

The right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it . . . .

In any case the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it . . . .

Subsequent decisions have expanded the scope of this "right." In Thomas v. Collins, 85 the Court explicitly recognized the right of workers to hear the proposals of a union organizer. 86 In Marsh v. Alabama, 87 the Court based its decision in part on the rights of citizens in company-owned towns to acquire the information proffered by itinerant pamphleteers. 88 And in Public Utilities Commission v. Pollak, 89 the Court ruled that the right of some persons not to listen to piped-in radio music on city transit vehicles could not prevail over the rights of the majority of passengers who did wish to hear such programs. 90

84. Id. at 143, 148-49.
85. 323 U.S. 516 (1945).
86. The Court stated: [The guaranties of national law . . . to organize freely for collective bargaining . . . included [the workers'] . . . right fully and freely to discuss and be informed concerning this choice [of a bargaining representative], privately or in public assembly. Necessarily correlative was the right of the union, its members and officials . . . to discuss with and inform the employees concerning matters involved in their choice. These rights of assembly and discussion are protected by the First Amendment. . . . That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. Id. at 534.
88. Justice Black, speaking for the Court, analysed the problem in this way: Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their States and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizens. Id. at 508-09.
89. 343 U.S. 451 (1952).
90. The Court summarized the issue in this manner: The court below has emphasized the claim that . . . no matter how much the great majority of . . . passengers may desire radio in those vehicles . . . yet if one passenger objects to the programs as an invasion of his constitutional right of pri-
Yet the Court has exhibited a certain unwillingness to broaden the scope of the freedom to hear so as to encompass acquisitive activities, such as foreign travel, which may entail "undesirable" consequences. 91

vacy, the use of radio on the vehicles must be discontinued. This position wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. Id. at 464 (emphasis added). Justice Douglas, dissenting, argued for the pre-eminence of the right not to listen over the freedom to hear. Id. at 469.

Several cases have dealt with the citizen's right to travel abroad as a means of acquiring the information and knowledge necessary to self-government. In Kent v. Dulles, 357 U.S. 116 (1958), the citizen argued that his first amendment right to acquire knowledge (i.e., his freedom to hear) was being denied by the Government's restrictions on his freedom to travel. But the Court practically ignored this argument, except to agree with Professor Chafee that foreign travel may indeed enrich our knowledge and perspective as to public affairs. Id. at 126-27. See Z. CHAFEER, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 at 195-96 (1956).

In Aptheker v. Secretary of State, 378 U.S. 500 (1964), the same argument was made, but it met with no more success, except that the Court acknowledged that "freedom of travel is a constitutional liberty closely related to rights of free speech and association." Id. at 517. Justice Douglas, concurring in the Court's invalidation of the federal statute prohibiting use of passports by members of Communist organizations, was more willing to express the doctrinal need for reliance on a freedom to travel as an adjunct of the freedom to hear:

Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged. . . . This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer . . . .

Id. at 520.

Finally, in Zemel v. Rusk, 381 U.S. 1 (1965), the Court seemed to make up its mind on whether the freedom to hear was a sufficiently strong interest to outweigh the Government's interest in regulating travel to foreign countries. The Court held that, while it certainly must take into account the need for information about Cuba and our Government's policies concerning that country, still that need was not the subject of any first amendment protection. In rejecting the argument, the Court broadly asserted:

There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information. Id. at 16-17. Of course, the breadth of this statement is somewhat tempered by the fact that the Court was clearly speaking about information-acquisition coupled with conduct, but its reasoning has still been quite justly criticized for assuming that the freedom to acquire information had to be either "unrestrained" or totally nonexistent and unprotected. Klein, Towards an Extension of the First Amendment: A Right of Acquisition, 20 U. MIAm. L. Rev. 114, 147 (1965). Justice Douglas, relying on plaintiff's testimony that he wanted a passport to Cuba in order "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen," elaborated on the importance of the freedom to hear and acquire information, which he conceived to be "peripheral rights of the citizen under the First Amendment." 381 U.S. at 23-24. Dissenting Justice Goldberg seemed to grasp the heart of the issue:

"As nations have become politically and commercially more dependent upon one another and foreign policy decisions have come to have greater impact upon the lives
The most recent decision involving the freedom to hear politically-relevant communications was *Lamont v. Postmaster General*, where the Court declared unconstitutional a statute authorizing postmasters to withhold communist literature from foreign countries until the addressee affirmatively indicated his desire to receive it. The Court’s opinion made it clear that the freedom to acquire information as one pleases does enjoy constitutional status and protection:

[T]hat the addressee in order to receive his mail must request in writing that it be delivered [is] an unconstitutional abridgment of the addressee’s First Amendment rights. . . . This requirement is almost certain to have a deterrent effect . . . The regime of this Act is at war with the “uninhibited, robust, and wide-open” debate and discussion that are contemplated by the First Amendment.

Justice Brennan made the point even more explicit in his concurrence:

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Such language, exemplifying recent judicial trends in the area, of our citizens, the right to travel has become correspondingly more important. Through travel, by private citizens as well as by journalists and government officials, information necessary to the making of informed decisions can be obtained. And, under our constitutional system, ultimate responsibility for the making of informed decisions rests in the hands of the people.

*Id.* at 28-29.

92. 381 U.S. 301 (1965).

93. *Id.* at 307.

94. *Id.* at 308.

95. Perhaps the best summary of the modern view was stated by Justice Douglas in a 1957 dissenting opinion:

Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.
nificantly bolsters the case for our freedom to hear and acquire politically-relevant information even though it does not explicitly rely on the political-justification theory of the first amendment. Justice Brennan, it should be noted, relied in his concurrence both on "fundamental personal rights" and the societal benefits to be derived from "dissemination of ideas" in the "marketplace."

Clearly either the personal or the political rationale for the freedom of speech can justify a freedom to hear. We have already seen that the needs of self-government support recognition of a freedom to hear politically relevant information for use in that task. In Stanley v. Georgia, the Court made it clear that personal benefits may also justify a freedom to acquire information which we may deem necessary for self-edification or to satisfy our curiosity. In Stanley the Supreme Court extended first amendment protection to obscene material which, while clearly lacking any redeeming social importance, may have had personal worth to its owner in the structuring of his private life.

It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] * * * necessarily protects the right to receive * * *." . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. . . . [A]lso fundamental is the right to be free . . . from unwanted governmental intrusions into one's privacy.


97. 394 U.S. at 564. The Court cited Winters v. New York, 333 U.S. 507 (1948), wherein the Court had previously observed:
We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

333 U.S. at 510. See also Hannegan v. Esquire, Inc., 327 U.S. 146 (1946):
[A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.

327 U.S. at 158.
Similarly, in *Griswold v. Connecticut*, the Supreme Court set aside a conviction of a clinician who had disseminated birth control information in violation of a state statute. By granting standing to the defendant to assert the "privacy" interests of his clients, the Court implicitly recognized the personal stake which married couples have in acquiring information relevant to their private lives. Of course, the Court did not rely on any first amendment rationale, but it did recognize the personal justification for the freedom to hear and acquire information. The Supreme Court ignored, however, the fact that political justification was also present: birth-control information may certainly be used in private spheres, but it is also clearly relevant to decision-making as to the growth and course of society. The Court failed to identify the two theories which may underlie the freedom to acquire information, and in doing so overlooked a strong alternative basis for its decision.

There is nothing inherently wrong with mingling lines of analysis to forge a stronger decisional foundation, if the emergent analysis is clear and supportable, or with relying only on one line of analysis when another is irrelevant. The point is, however, that the Supreme Court has generally failed to articulate which rationale it is relying upon, or to differentiate between the two interests which may be at stake. Specifically, the failure to isolate the political-justification theory has foreclosed the opportunity to take advantage of broader protections which are available once this line of analysis is identified. As we have seen there is abundant historical, theoretical, and doctrinal justification for the freedom to hear politically relevant communications. The advantages to be obtained by reliance on that freedom are best demonstrated by an examination of the criteria which should define its applicability.

Simply stated, there should logically be three prerequisites to applicability of the freedom to hear under the political-justification theory:

98. 381 U.S. 479 (1965).
100. The term "speaker" is used in these criteria to denote any person who communicates, whether by spoken or written word, graphic portrayal or communicative conduct. The term "listener" includes any person who receives the communication of a speaker. *See, generally,* G. Rice, *Law for the Public Speaker* 19 (1958); Green, *The Right to Communicate, 35* N.Y.U.L. Rev. 903, 914 (1960).

It might also be desirable to require that the listener have the rational presence either
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1. The speaker must be discussing public figures, public issues, or other matters of social importance.
2. The speaker must desire to be heard.
3. Listeners must have full opportunity to leave or ignore the speaker if they so choose.

The breadth of these criteria derives from the necessary scope of the self-government justification for the first amendment freedoms.

to be persuaded or to resist persuasion; such a requirement would be aimed at denying freedom-to-hear standing to listeners who are so caught up in the excitement and frenzy of a speech as to be unable rationally to assess its merits or to control their own conduct in response to the speech. Clearly, the problems of administering such a criterion in a concrete situation would be enormous. Who would determine what is "frenzy" or "rational presence"? In view of the fact that our attitudes and opinions are shaped as much by non-rational and non-verbal communication as they are by words, even in a calm situation (see Steele, The Impact of Psychoanalytic Theory on the Freedom of Speech, 38 Psychoanal. Q. 583 (1969)), it would be undesirable to impose a requirement which might allow the non-rational effect of a speech to detract from the freedom of some remarkably cool listeners to hear the content of the words. It should be noted, however, that such a criterion would leave open the door to regulations prohibiting the viewing of obscenity by children. See Ginsberg v. New York, 390 U.S. 629 (1968).

In addition, recent decisions might seem to indicate that one criterion for protection ought to be that the speaker must believe that what he is saying is true. For example, the Supreme Court stated in Garrison v. Louisiana, 379 U.S. 64, 73 (1964):

The use of calculated falsehood... would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skilful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration...

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.

Thus, politically relevant speech which the speaker knows to be untrue is not constitutionally protected, when the speaker is asserting his own freedom of speech in a libel case. But there is no justification for requiring a showing of that unascertainable belief in truth as a prerequisite to the existence of a listener's freedom to hear. Indeed, as Justice Holmes said, the best test of truth is the power of the speech to get itself accepted by those who listen to it, See note 46, supra. Untruth may be of great value to the listener in assessing the merits of the speaker, or in spurring his curiosity about public issues. In the freedom to hear context, the requirement of belief in the honesty of what one says should be operative only as a limitation on the speaker's standing to assert the rights of his listeners. Our plan of self-government leaves it up to the electors to assess the sincerity of candidates and speakers; the deterrent effect on speech and on the spread of information might be substantial if a check for sincerity were to precede every public discussion. As the late Professor Meiklejohn argued, we only need to hear those views which are "responsibly entertained." A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948). But in fact, we need to hear all views before we can decide which of them are "responsibly entertained."
A. Discussion of Public Issues, Public Figures, or Other Matters of Social Importance.

Because the freedom to hear is, under this theory, a facilitative adjunct of the obligation of self-government, the public interest in hearing arises only when the speaker is discussing public figures or issues, or other matters of social concern. There is no political justification for enforcing citizen access to information unless such access is necessary or useful in rational public decision-making and effective self-government. Discussion of public issues is essential to the task of self-government, and it is primarily that sort of discussion which the freedom of speech was designed to protect.

101. Perhaps the clearest statement of the need for discussion of public issues in a self-governing society is by Justice Murphy, speaking for the Court in Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940):

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broad conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Justice Black recognized this need in quite forceful terms in Feldman v. United States, 322 U.S. 487, 502 (1944) (dissenting opinion).


See also the pronouncements of the Supreme Court respecting the political justification for the privilege accorded to the speech of public officials acting in their official capacity: Barr v. Matteo, 360 U.S. 564, 577, 584-85 (1959) (concurring opinion of Justice Black, and dissenting opinion of Chief Justice Warren); Howard v. Lyons, 360 U.S. 593, 597 (1959).

102. If ... the principle of the freedom of speech is derived, not from some supposed "Natural Right," but from the necessities of self-government . . . [t]he guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.


The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Others have shown that the first amendment's origins in the British parliamentary privilege are evidence that the protection afforded by the Amendment "relates primarily to the consideration and discussion of public affairs, of political matters." Anastaplo, Notes,
Thus, the general rule is that the "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs...." But application of this rule raises significant questions:

1. What Listeners have a Sufficient Relation to Self-government to Invoke the Freedom to Hear Discussions on Public Issues?

At the outset we must admit that the "right to communicate cannot be restricted to the virtuous, intelligent and broadminded. Even if the eggheads and angels could in some way be identified, freedom of communication is equally available to the demagogue, the ignorant, the prejudiced, the overzealous and the wicked." But in the light of the close connection between the freedom to hear and the process of self-government, only citizens should be deemed to have a sufficient interest to exercise the freedom. Even though speaking by non-citizens is clearly protected by the first amendment, it does not follow that they are entitled to the advantages of the freedom to hear. Under the political-justification theory, only those who do the governing need to hear all viewpoints advanced by their fellow citizens and by aliens.

Supra note 4, at 179. A more recent statement by the Supreme Court regarding the privilege of a State legislator to speak out on public questions seems to proceed from the same perspective. Bond v. Floyd, 385 U.S. 116, 135-37 (1966).

Justice Harlan has suggested that the protection of the first amendment in this sphere should apply only to "controversial" public issues, not simply any matter of public interest. Time, Inc. v. Hill, 385 U.S. 374, 407-08 (1967) (dissenting opinion). The majority opinion in that case is cryptic on the issue: "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." Id. at 388. The meaning and foundation of this statement are elusive.

105. As Justice Stone stated in Hague v. CIO, 307 U.S. 496, 519 (1939) (concurring opinion): "It has been explicitly and repeatedly affirmed by this Court... that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship... ."

106. Of course, aliens who are on their way to becoming citizens, like American citizens who are not yet old enough to vote, must be able to prepare themselves for self-government, and thus comprise an exception to the general proposition. But otherwise, non-citizens generally have no political need to hear public discussion, although they certainly should be allowed to hear whatever communications citizens have initiated or demanded. Consider the fact that the "rights" in the first amendment are given in blanket fashion to the "people," whereas the beneficiaries of the "freedoms" are not defined—thus their status must be defined by reference to the interests involved from a functional perspective.

107. See A. Meiklejohn, Free Speech and Its Relation to Self-Government 60 (1948); Meiklejohn, Freedom to Hear and to Judge, 10 Lawyers Guild Rev. 26, 29 (1950). Note that the result would be different under the personal-justification theory of the freedom to hear.
2. Who shall Decide Which Communications and Viewpoints Are Entitled to Protection and Popular Dissemination as Public Issues or Matters of Social Importance?

Since we are committed to embracing the theory of self-government, we are bound initially to assume that if our citizens have the rational ability to govern, they must also be able to decide for themselves the merits of the opinions they hear. The political justification for the freedom to hear dictates that the ultimate decision as to what issues are of such social importance as to merit a discussion and hearing should be left to each individual citizen. This seems also to have been the view of the Founding Fathers. Alexander Hamilton explained the Constitution's high esteem for the popular judgment in this way:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of the government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority . . . whenever any one of the departments may commit encroachments on the chartered authorities of the others. . . . [T]he people themselves . . . as the grantors of the commission, can alone declare its true meaning, and enforce its observance . . . .

No legislature can have authority to decide for the people the critical question of what they may and may not discuss and hear. Nor can the power of a majority of citizens to decide this question for themselves be transferred to a legislative body by majority vote; since the freedom to hear is an individual freedom belonging to each citizen, each may

108. See note 34, supra; Emerson, quoted at note 48, supra; Meiklejohn, Freedom to Hear and to Judge, 10 LAWYERS GUILD REV. 26, 28 (1950); Meiklejohn, The First Amendment Is An Absolute, 1961 SUP. CT. REV. 245, 262; A. MEIKLEJOHN, POLITICAL FREEDOM 118-19 (1948); Marcuse, Repressive Tolerance, in A CRITIQUE OR PURE TOLERANCE at 81, 106 (1968); and 39 U.S.C. § 4009(a) (Supp. V, 1970).
109. The Federalist No. 49, at 314 (H. Lodge ed. 1888) (A. Hamilton). With respect to the intent of the Founding Fathers, see Anastaplo, Notes, supra note 4, at 159.
110. Justice Black took this position in Beauharnais v. Illinois, 343 U.S. 250, 270 (1952) (dissenting opinion):

My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. I reject the holding that either state or nation can punish people for having their say in matters of public concern.

reserve to himself the power to hear that which the majority chooses not to hear. As we have seen, the first amendment vests powers in each citizen, and in the face of that power, the will of the majority is irrelevant. The power involved consists of authority to choose between listening to someone who desires to speak, on the one hand, and not listening or ignoring him, on the other. Even in the hands of a unified majority, the power does not comprehend any authority to silence the speaker altogether.

Of course, in the area of broadcasting, we are told that some governmental restriction on what views are aired is justified due to the limited time available on the public airwaves. But even in that area, our administrative standards should be structured to permit judgment by citizens on what issues are important, and to accommodate citizen requests for broadcasts on certain issues within the scheme of priorities necessitated by limitations of time and frequency.

3. **What Topics of Communication Are Included Within the Category of Public Issues and Matters of Social Importance?**

Some observers have argued that the views of the citizenry respecting public issues are so coarse that the government must undertake to enrich the content of public discussion, perhaps by means of judicial remedies. In fact, the courts have in recent years broadened the scope of first amendment protections by expansively defining what types of communication are of "redeeming social importance." Jurists have identified a number of specific topics which are considered legitimate "public issues," such as organized groups which influence public af-


112. See Anastaplo, Notes, at 431-432. Peter Ustinov, noted actor and self-styled philosopher, has observed that "American democracy could be described as the inalienable right of the American to sit in his pajamas on his front porch with a can of beer, shouting 'Where else is this possible?'" Quoted in Northwest Today Magazine at 2, Seattle Post-Intelligencer, March 8, 1970.


115. This was the test for protection set forth by Mr. Justice Brennan for the Court in Roth v. United States, 354 U.S. 476, 484 (1957), quoted in text accompanying note 48, supra. This test occupies the same functional role—as a test of political relevance—as the "public issue" test adopted by the Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Note, however, that neither form of the test is relevant or applicable under the personal-justification theory of the first amendment. See text at notes 132-34, infra.
fairs,\textsuperscript{116} the facts of a labor dispute,\textsuperscript{117} and the general competency of a trade which affects public health,\textsuperscript{118} and some which are not.\textsuperscript{119} The major advances have occurred in the field of libel of public officials and figures;\textsuperscript{120} the Supreme Court has evidently adopted\textsuperscript{121} the Meiklejohn theory that even vilification of public officials may serve the ends of self-government.\textsuperscript{122}

But the fact that the freedom to hear is justified by its integral function in our system of self-government does not mean that the citizenry is entitled to be informed only about matters which can be characterized as \textit{obviously} political, as some have argued.\textsuperscript{123} Of course, the political-justification theory requires that "to exert a claim upon our constitutional protections, a social undertaking must become identified with a political undertaking,"\textsuperscript{124} but the connections which engender such identification may be extremely remote and diverse.\textsuperscript{125} Since it is

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\item \textsuperscript{116} See Justice Jackson's dissenting opinion in \textit{Beauharnais v. Illinois}, 343 U.S. 250, 301 (1952).
\item \textsuperscript{117} \textit{Thornhill v. Alabama}, 310 U.S. 88, 102-03 (1940).
\item \textsuperscript{118} \textit{United Medical Lab. v. CBS}, 404 F.2d 706, 712 (9th Cir. 1968), \textit{cert. denied}, 394 U.S. 921 (1969).
\item \textsuperscript{119} For example, Justice Murphy stated in \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568, 572 (1942), that "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any social benefit that may be derived from them is clearly outweighed by the social interest in order and morality."
\item \textsuperscript{121} Justice Brennan, who wrote the majority opinions in the three cases cited in note 120, supra, has frankly recognized that the theory adopted therein was for the most part that advanced by Alexander Meiklejohn. See Brennan, \textit{The Supreme Court and the Meiklejohn Interpretation of the First Amendment}, 79 HARV. L. REV. 1, 18-20 (1965).
\item \textsuperscript{123} See, e.g., Anastaplo, Notes, supra note 4, at 11:
\begin{quote}
Although the prohibition in the First Amendment is absolute . . . the prohibition does not relate to all forms of expression but only to that which the terms, "freedom of speech, or of the press" were then taken to encompass, political speech, speech having to do with the duties and concerns of self-governing citizens. Thus, for example, this constitutional provision is not primarily or directly concerned with what we now call artistic expression or with the problems of obscenity. Rather the First Amendment acknowledges that the sovereign citizen body has the right to discuss freely the public business, an immunity theretofore claimed only by legislative bodies.
\end{quote}
\item \textsuperscript{124} Meiklejohn, \textit{Public Speech and the First Amendment}, 55 GEO. L.J. 234, 262 (1966).
\item \textsuperscript{125} One observer has argued that even music designed to influence attitudes on social issues, or any empathic communication among citizens who have congregated to hear and play music, could qualify for protection under the self-government rationale of the freedom of speech. Steele, \textit{The Impact of Psychoanalytic Theory on the Freedom of Speech}, 38 PSYCHOANAL. Q. 583, 611-12 (1969).
\end{itemize}
relevance to self-government with which we are concerned, any subject matter which the governing powers may reach or regulate at any time in the future should be a protected topic of discussion now, regardless of whether it is currently a matter of social concern or controversy. In this sense, the definition of what "public issues" are comprehended by the freedom to hear should be as broad as possible. Clearly the form of the communication need not be one which explicitly conveys ideas of any particular sort, as long as the effect of the communication is to help shape attitudes and opinions on a subject which is deemed to fall within the freedom to hear.\footnote{126}{See Steele, supra note 125, for a psycho-legal discussion under the Meiklejohn theory, considering what we now know about the non-rational and non-verbal ways in which men communicate and form attitudes and opinions, and rejecting the unqualified "social importance" test and the classic first amendment view of man as a rational and logical communicator, adopting instead a test of protection based on the communication's persuasiveness and effect on attitudes and opinions. \textit{Id.} at 609. Steele thus argues for protection of not only facts and arguments which appeal to our rational processes and contribute to our rational thinking about large numbers of complex issues, but also the often more influential subliminal and irrational symbols, associations, biases, fears and emotions which affect our thought and perception. \textit{See also} Tinker \textit{v.} Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969).} And those subjects should include all matters which may have consequences for one's contemporaries\footnote{127}{See J. \textit{Wig}gins, \textit{Freedom or Secret}y 129 (rev. ed. 1964).} or for future generations.

It is well established that "the rights of free speech and a free press are not confined to any field of human interest."
\footnote{128}{Thomas \textit{v.} Collins, 323 U.S. 516, 531 (1945).} Thus information which may be at any time necessary or helpful to an understanding or appreciation of a public controversy, regardless whether one exists at any given moment, must be classified as politically relevant public issues.\footnote{129}{See Marcuse, \textit{Repressive Tolerance}, in \textit{A CRITIQUE OF PURE TOLERANCE} at 81, 112 (1968).} In addition, private actions which affect those subjects must themselves be matters of public concern giving rise to a freedom to hear.\footnote{130}{Thus, for example, even private handling of a work of art should be a matter of discussion which citizens should be free to hear. J. \textit{Wig}gins, supra note 128, at 128.} Indeed, any communication on any topic which may affect our attitudes or values should be given the full benefit of public discussion and should be protected by the freedom to hear.\footnote{131}{Politically relevant discussion may even cover topics which would normally be deemed purely "private": Reporting about personal relationships or family affairs, which causes embarrassment or pain, is reprehensible in itself if the motive is simply to titillate readers. The difficulty is to determine when something more important than this is involved. It could be contended that the public has a right to hear about the love-affair of a}
to obscure topics, we can never measure the loss of information or perspective on public issues which might have been gained by listening to it.

As noted previously, the "public issue" criterion for applicability of the freedom to hear under the political-justification theory is entirely irrelevant under the personal-justification theory of the first amendment. The cases are clear on that point. Thus, although the justification for the freedom to hear under the personal-justification theory is less compelling, the scope and breadth of the protection under that rationale may in many situations be much more comprehensive.

But it should be noted that the political-relevance standard derived from the self-government theory of the first amendment by no means excludes consideration of the personal justifications for free speech. The fact is that almost all forms of communication can have a beneficial impact on the personality of the listener, in the sense that they may afford him new insight into the workings of human society or may give him new ideas for the structuring of human relations or the reordering of his own life. These impacts can have decidedly political consequences, since the reorientation of each citizen's own ideas and perspectives can affect his views on public issues and the clarity of the reasoning by which he reaches decisions. The scope of political relevance can be expanded greatly by reference to the nexus which exists between well known dramatist. If people pay to listen to his judgments and opinions on life and human relations, as expressed in his plays, have they not the right to know about his life so as to be better able to weigh his judgments and views? Again, aspects of the family life of a political candidate might be relevant to the electors' assessment of his sincerity in, say, pledging himself to support a Housewives' Charter or legislation to make divorce more difficult.


132. See notes 41 and 97, supra.


134. Thus, in Stanley v. Georgia, 394 U.S. 557 (1969), the individual's right to possess and read obscenity was protected notwithstanding the fact that it had no social value (see note 97 and accompanying text, supra) and would not have been protected under the political-justification theory of the freedom to hear in general public consumption. See also Engdahl, Requiem for Roth: Obscenity Doctrine Is Changing, 68 Mich. L. Rev. 185, 217 et seq. (1969).

It should be noted that, under the political-justification theory, as Professor Kalven has remarked, "the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems ... overwhelming," but without going outside the theory the progression can never extend to matters which are strictly within the private domain. See Kalven, The New York Times Case, 1964 Sup. Ct. Rev. 191, 221.
the state of the individual's personality and the manner in which he is able to make social decisions and govern himself. This connection should obviously not be relied upon so heavily as to make all personally beneficial communications "politically relevant." The courts are equipped and possess the experience to decide what degree of proximity in this connection justifies application of the broader protection for politically relevant speech. Yet they should be constantly aware of the manner in which the personal and political justifications may dovetail in the ordinary situation. Perhaps the best definition of political relevance would include only those matters which can be said unequivocally to transcend the sphere of privacy in which only personal justifications pertain.

B. The Speaker Must Desire To Be Heard, and

C. Listeners Must Have Full Opportunity To Leave Or Ignore The Speaker

Finally, two other prerequisites logically seem to limit the availability of the first amendment freedom to hear: the speaker must desire to be heard, and hearers must be free to listen or not as they choose. This limitation comports with natural law theories concerning voluntary exchange of ideas, and is easily justifiable as an acknowledgement of collateral constitutional considerations favoring the privacy and free will of the speaker, and the rights of the hearers not to listen.


136. Abraham Lincoln once declared that "The inclination to exchange thoughts with one another is probably an original impulse of our nature." 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 359 (Basler ed. 1953).

137. See, with regard to the speaker's privacy, Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965). Thus, for example, a citizen's demand that some speaker's views be aired on Candid Camera would be outside the scope of the freedom to hear unless the speaker consented.

It is also clear that one citizen's freedom to hear cannot be so extensive as to require a speaker to communicate on any topic against his will. Cf., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The speaker must be willing to have the matter presented in the manner in which it is actually presented—thus, he could veto public quotation out of context of a speech procured to satisfy a citizen demand to hear it.

138. See note 73 and accompanying text, supra. Particularly note the dissenting opinion of Justice Black in Public Util. Comm'n v. Pollak, 343 U.S. 451, 466 (1952), wherein he argues that the right not to listen becomes operative only when the speech which is heard consists of "news, public speeches, views, propaganda of any kind." See also the dissenting language of Justice Douglas in that case. Id. at 468.

Herbert Marcuse argues that the conservative majority of the country is incapable of listening in any meaningful fashion, and that our spurious tolerance is ill-adapted to
Moreover, these criteria seem to bear an integral relation to the plan of self-government, under which each citizen's judgment to speak or not and to listen or not should prevail, especially in situations where he might be less than free to ignore some utterance. As the Supreme Court stated in 1943:

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved . . . leaving to each householder the full right to decide whether he will receive strangers as visitors . . . .

II. IMPLICATIONS OF THE FREEDOM TO HEAR FOR TRADITIONAL RESTRICTIONS ON THE FREEDOM OF SPEECH.

We have seen that proper emphasis on the political foundations of the first amendment dictates that the applicability of the freedom to hear be expansive and limited only by certain well-defined criteria. The scope of the citizen's need should not be limited to only "rational" communications; nor should the listener's freedom to hear depend on whether the speaker believes that what he is saying is true. However, our courts have not only been hesitant to recognize expressly the politically justified freedom to hear, but also quite willing to create additional limitations on the scope of first amendment freedoms which clearly operate to impede the effectiveness of our freedom to hear. For example, there have been convictions for seditious libel, for speech which creates a "clear and present danger" or a "breach of the peace", and for utterances which are classified as obscenity. These doctrinal


139. See Anastaplo, Notes, supra note 4, at 374. The willingness of listeners becomes doctrinally relevant to the protected status of the speech, particularly when public tranquility is endangered. See Meiklejohn, Public Speech and the First Amendment, 55 Geo. L.J. 234, 256 (1966). See also G. Rice, LAW FOR THE PUBLIC SPEAKER 99 (1958), where it is argued that the degree of protection due to a speaker in a breach of the peace situation should depend, not only on his intentions, but also on the character of his listeners as casual passers-by, invitees, paying licensees, or members of a captive audience.


141. See notes 125 and 126, supra.

142. See note 100, supra.
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limitations have less continuing validity in the face of the freedom of self-governing citizens to hear. Thus, the first obvious advantage of emphasizing the political justification for our first amendment freedoms is that it allows us to expand the scope of protection thereunder.¹⁴³

Perhaps it is not overly optimistic at this moment to believe that, with respect to seditious libel¹⁴⁴ and obscenity,¹⁴⁵ the Supreme Court’s more recent decisions applying the “public issue-social importance” test will adequately protect the freedoms of speakers and listeners to the extent envisioned by the Constitution. But with respect to clear and present danger and breach of the peace, the Court has seemed less inclined to modernize these limiting doctrines to comport with the self-government theory of the first amendment.¹⁴⁶ Moreover, even though our theory of the freedom to hear should impose upon the government the burden of proving both urgent justification for curtailment of speech and an absence of political relevance in the speech,¹⁴⁷ the Supreme Court, in prosecutions for clear and present danger or for breach of the peace, has refrained from according such preferential respect to our freedoms.

“Whatever the future of clear and present danger, perhaps its greatest importance has been its intimation that political criticism . . .

¹⁴³. Reliance on a theory of political rights, for example, could be used as a basis for recognition of a right to use public open spaces. But see Adderley v. Florida, 385 U.S. 39 (1966).
¹⁴⁴. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and other cases cited in note 120, supra, should be adequate to this task. Consider the historical perspective offered in Z. Chafee, FREE SPEECH IN THE UNITED STATES 505 (1941). See Anastaplo, Notes, supra note 4, at 192-93.
¹⁴⁵. The “redeeming social value” test of Roth v. United States, 354 U.S. 476 (1957), discussed in note 115, supra, should persist as a viable test for determining the rights of self-governing citizens to receive information which is not obviously political in nature. Some commentators have viewed Stanley v. Georgia, 394 U.S. 557 (1969), as undertaking a retreat from the Roth standard, insofar as that later decision afforded protection to obscenity which was clearly without redeeming social importance. See Engdahl, Requiem for Roth: Obscenity Doctrine Is Changing, 68 Mich. L. Rev. 185 (1969). Insofar as the freedom to hear is justified on personal values, this is correct, and the Court was quite correct in not applying a test of “social importance” to a very personal right. But the Roth test survives completely intact as a criterion for protection under the political-justification theory, which was not at issue in Stanley.
¹⁴⁶. However, in the Court’s most recent decision on breach of the peace by a public speaker, it held that an anti-war protestor’s conviction must be reversed where there was a possibility that it derived from a jury charge which allowed a finding of guilt merely because the protestor’s views on Vietnam were offensive to some bystanders. Bachellar v. Maryland, 397 U.S. 564 (1970). This decision seems to be moving in the right direction.
is generally not congenial to the public welfare."¹⁴⁸ Even in imposing the few limitations on speech which may be permissible under the political rationale of the freedom of speech,¹⁴⁹ we should be ever cognizant that a basic function and purpose of the first amendment guarantees is the maintenance of public order and stability.¹⁵⁰ To say that internal security is an indispensable condition for free speech is to put the cart exactly before the horse; instead, our freedoms are the means of self-preservation.¹⁶¹ Justice Black has made this point most eloquently.¹⁶²

Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. . . . I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees


¹⁴⁹. Some regulation may be necessary and permissible without constituting an "abridgment" of the freedom of speech. See Meiklejohn, The First Amendment Is An Absolute, 1961 SUP. CT. REV. 245, 252. But see text accompanying note 30, supra. The point is, however, that any regulation that occurs must seek to protect, not necessarily our existing set of political institutions, but the general interest in popular self-determination. See Anastaplo, Notes, supra note 4, at 124-25.

¹⁵⁰. A healthy consensus is possible only where freedom of expression flourishes. Such freedom is essential to the whole process of legitimation of social decisions. And suppression not only is ineffective in promoting general agreement or stability, but hinders the process by engendering hostility, resentment, fear and other divisive forces.

¹⁵¹. The essence of the principle was stated by the Court in DeJonge v. Oregon, 299 U.S. 353, 365 (1937):

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights."

Our historical knowledge of the feelings and intentions of the Framers indicates they would have disagreed with Justice Frankfurter's assertion that "no government can recognize a 'right' of revolution, or a 'right' to incite revolution." In fact, James Madison in 1789 proposed an amendment to the Constitution which recognized the people's "indefeasible right to reform or change their Government, whenever it be found inadequate to the purposes of its institution." Clearly, a prohibition of speech which merely tends to produce the result of governmental revolution would have been even more unthinkable to Madison. The interest which justifies our prohibition of counseling crimes is not a factor in the case of political clear and present danger, because, unlike a crime, governmental refashioning, even by upheaval, is not a totally forbidden result. Under our system of self-govern-ment, each citizen must be as free as any Congressman to question whether our present form of government is operating properly or whether another form might be better, and every other citizen must be free to hear such criticism. Comparative government is an appropriate and essential topic for consideration by a self-governing people, as

153. Id. at 549 (concurring opinion).
154. 1 ANNALS OF CONG. 451-53 (1789) (emphasis added). See Anastaplo, Notes, supra note 4, at 150.
155. Madison stated in 1798 that:
   Nor can it ever be granted, that a power to act on a case, when it actually occurs, includes a power over all the means that may tend to prevent the occurrence of the case. Such a latitude of construction would render unavailing every practical definition of particular and limited powers.
   Madison, Report on the Virginia Resolutions of 1798, in 4 ELLIOT'S DEBATES, supra note 8, at 546, 558 (emphasis added).
156. See Williams, Freedom to Speak—But Only Ineffectively, 38 TEX. L. REV. 373, 376 (1960). Theoretically, it is not even certain that we can always punish speech which does tend to produce a forbidden result. See Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 931 (1963).
   Justice Brandeis managed to prostitute even this argument to comport with the clear and present danger rule. Whitney v. California, 274 U.S. 357, 377 (1927) (concurring opinion); overruled in Brandenburg v. Ohio, 395 U.S. 444 (1969). Brandeis and other

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the men who conceived this nation well knew. The choices open to those
who govern themselves must comprehend all the possible forms of
government, not just the identity of the leaders under the present
form. Our present collection of institutions and procedures in the form
of a democracy is only one manifestation of self-government. It is
absurd to say we may not have access to different ideas for govern-
mental structure. 189

Why may we not hear what . . . men from other countries, other
systems of government, have to say? For what purpose does the
Attorney General impose limits upon their speaking, upon our
hearing? The plain truth is that he is seeking to protect the
minds of the citizens of this free nation of ours from the influence
of assertions, of doubts, of questions, of plans, of principles which
the government judges to be too "dangerous" for us to hear.

The intent of the first amendment is that we, as self-governing citizens,
shall each decide for ourselves what topics are and are not "dangerous"
at any given moment, what we shall or shall not hear, what is or is not
worthy of our present attention. 160 In the end, the quality of our self-
government depends on the quantity of diverse ideas we hear and
analyze, and thus on our willingness to listen to even those thoughts
and assertions which constitute a so-called "clear and present dan-
ger." 161

The primary effect of applying the self-government theory of the
freedom of speech to "breach of the peace" situations would be to
expand the range of interests which are relevant to the constitutional

clear and present danger analysts miss the important point that the phenomenon which is
apprehended must be determined to be an "evil" by each citizen for himself—not by the
courts—or else the citizens' power to govern themselves in the best possible manner may
be lost. The clear and present danger rule is applied to prevent citizens from even hearing
the apprehended communication, much less assessing its merits or evil tendencies.

159. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT xiii (1948).
160. See note 168 and accompanying text, supra; Marcuse, Repressive Tolerance, in
A CRITIQUE OF PURE TOLERANCE at 81, 100 (1968).
161. Professor Emerson has expressed some rather strong thoughts about this point.
Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, at 887,

Note that additional involvement of the personal-justification theory for the freedom
to hear would bolster the case in favor of public access to the thoughts and argument of
such speakers who are deemed to create a so-called clear and present danger.
See also Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959), holding that peaceful
advocacy even of ideas which are generally believed to be "immoral" is still protected by
the first amendment.
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analysis. When we think of public speeches as instruments of self-government, we are bound ultimately to assess their propriety or viciousness by reference to the rights and needs of listening citizens, not merely by balancing the individual speaker's need to speak against the generally weightier public interest in safety and order. In addition, it is important to our analysis to note that the threat of agitation and unrest in breach of the peace situations commonly proceeds from members of the audience who are hostile to the speaker's viewpoint and who are unwilling to let him continue speaking; and that such hostility is most likely to arise as to those certain issues and in those parts of the nation for which public discussion is most necessary.

Taking all these factors into account, the principle to be derived from the political-justification theory of the first amendment is that a speaker should not be punished for a speech which has prompted hearers to react in a disorderly manner not advocated by the speaker at that time.

*Feiner v. New York* is the classic illustration of our courts' persistent failure to apply logical principles in breach of the peace cases. In that case, a speaker was confronted by a generally angry, muttering and agitated crowd, and by a threat (not an attempt) by one listener to haul him from his platform. The police deemed this a sufficient

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162. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 65 (1948).

163. See, e.g., United States v. U.S. Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897, 904 (M.D. Ala. 1961), in which the high probability of mob violence was held to be justification for restraining student Freedom Riders from riding buses, on the poorly reasoned ground that the political reactions of the “hearsers” of the students' expression constituted a “clear and present danger” which, when bolstered by considerations related to interstate commerce, was sufficient to justify infringement of the students' rights to travel and free expression, even though such restriction of their freedoms was only likely to encourage more violent reactions by the “hearsers” in future situations.

This may be an extreme case, but it is not the unusual case. “Studies of public support for freedom of expression reveal an alarmingly high proportion of the population who are unwilling to apply the basic principles of the theory in practice.” Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 889 (1963).


Of course, if the speaker is in fact intentionally inciting a riot or advocating violence, all protection for him and for his willing listeners ceases.

emergency to justify arresting the speaker after he ignored their orders to stop speaking. The Supreme Court, while purporting to recognize "that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and . . . the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings,"166 affirmed the conviction of the speaker for breach of the peace. That decision abounds with doctrinal disappointments.

Considering the importance of the freedom to hear in our self-governing society, courts should always begin with the assumption, absent very clear proof to the contrary, that there are present in every audience some listeners who want to hear what the speaker has to say. The preferential rule of law to be applied on the basis of that assumption then should be that whenever there are willing listeners in the crowd no speech may be curtailed, absent clear exigency. The rationale is that both the speech and the speaker in such cases are protected by the listeners' freedom to hear. On the street, this rule will create practical problems of implementation. In the ordinary situation, the police will not know that there are no willing listeners in the audience. To preserve peace without violating anyone's freedom to hear, they will either have to assume (like the courts) that such listeners are present, or attempt to ascertain the actual presence or absence of such listeners. The latter alternative is rendered unfeasible by its difficulty, especially in view of the probability that interested listeners might be so intimidated by the presence of unruly hecklers that they would not vocalize their interest. Absent some better proof, the police should be required to choose the first alternative—assume there are willing listeners present, and structure their peacekeeping conduct accordingly. In view of the critical importance of ensuring that willing listeners may hear so that they may better govern themselves, the police should never assume that there are no such listeners in the crowd. The police apparently did indulge that assumption in Feiner, or else they did not care, and despite the Court's implication to the contrary, the police did act in an overzealous censorial manner by stopping the speech without

166.  *Id.* at 320.

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even trying to control the hecklers in the crowd even though they were not beyond control.167

When the presence of willing listeners in an audience is either known or unascertainable, the police not only must keep the peace without violating the freedom of those listeners, but also must take positive steps to protect their freedom to hear. The essential role of that freedom in the plan of self-government requires such protection. It should be doctrinally mandatory that police control unruly members of a crowd rather than silence the speaker, if such is at all possible.168 As we have seen, the speaker’s desire to speak and the willing listeners’ desire to hear him are protected by the first amendment as essentially inviolable freedoms; by contrast, the rights of hecklers who have assembled there for the purpose of heckling rather than hearing are merely “rights” qualified by the requirement that they act “peaceably.” The hecklers are free to leave.169 If the police make no effort or only a token effort to silence or disperse unruly hecklers before pulling the speaker from his rostrum, and if such curtailment is not immediately necessary to preserve the public peace, then the police, as agents of the state,170

167. See Justice Douglas’ dissenting opinion, id. at 331; Note, Free Speech and the Hostile Audience, 26 N.Y.U.L. Rev. 489, 504 (1951). That such control often cannot be maintained over street confrontations between politically opposed groups is pointed out by Justice Black, concurring in Gregory v. Chicago, 394 U.S. 111, 117 (1969). But still the policeman’s command cannot be given the same force and effect as a criminal statute. Id. at 120.

168. See Excerpt from Brief for the Bill of Rights Committee of the American Bar Association as Amicus Curiae, Hague v. CIO, 307 U.S. 496 (1939), quoted in Z. Chafee, Free Speech in the United States 426 (1941); Note, Free Speech and the Hostile Audience, 26 N.Y.U.L. Rev. 489, 492 (1951); R. O’Neil, Free Speech: Responsibility Communication under Law 43 (1966); 49 Colum. L. Rev. 118 (1949) (proposing “rational” standards for when restraints should be imposed upon public speakers, recognizing that the speech must be permitted to proceed if only the audience intends to create disorder, but still not going far enough to protect the interests of willing listeners). See also Edwards v. South Carolina, 372 U.S. 229, 236 (1963), where the Court deemed it relevant to a reversal of a breach of peace conviction that “There was no violence or threat of violence on their part or on the part of any member of the crowd watching them. Police protection was ‘ample’.”

Where there are two (or more) speakers with opposed views vying for the exclusive attention of the same audience, the problem of determining which is the “speaker” entitled to protection may be quite difficult, and every member of the audience may be a sympathizer of one speaker and a “heckler” of the other. In such cases, the speaker who arrived first, or who has arranged for a public permit to speak at the location, should be afforded the exclusive freedom to speak, perhaps within certain time limits.

169. One of the prerequisites of the freedom to hear is that the listeners must be able to listen or not as they please. See text accompanying notes 136-140, supra.

170. See United States v. Guest, 383 U.S. 745 (1966), where the unwitting involve-
are choosing the least reasonable alternative course of action, and are subordinating the freedoms of willing listeners to the qualified rights of hecklers not to listen.

The police may, of course, curtail a public speech when listeners who are sympathetic to the speaker’s exhortations have been genuinely aroused by him and threaten violence. A speech may also be curtailed when the police know on the basis of highly reliable evidence that there are no willing listeners in an unruly audience, or when there are such listeners in the crowd but the disorder prompted by the speech is so rampant and uncontrollable that the police cannot protect those listeners’ freedom to hear anyway. In those situations, the individual speaker’s interest in speaking may be balanced alone against the weightier public interest in tranquility. But in all other situations, the interested citizen’s freedom to hear must always be allowed to prevail over the voices and rights of unruly hecklers not to listen.

The freedom to hear may also play a significant role later, in a criminal prosecution for breach of the peace. In a case where the police have wrongfully or prematurely curtailed a public speech by arresting the speaker, it is not always likely that any listeners who then wanted to hear him speak will show up at his trial, especially if they did not speak up for him on the street. In view of that fact, arrested speakers should be entitled to assert the rights of those listeners (whether

ment of state police by third persons in their efforts to abridge constitutional rights was discussed as a form of state action. See Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964); Collins v. Hardyman, 341 U.S. 651 (1951).

171. See Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964) (discussion of first amendment applications at 267-93); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Martin v. City of Struthers, 319 U.S. 141, 147-48 (1943); Shelton v. Tucker, 364 U.S. 479, 493-94 (1960) (dissenting opinion of Justice Frankfurter); Sherbert v. Verner, 374 U.S. 398 (1963). Moreover, there is some evidence that the governmental interest in silencing the speaker rather than the hecklers is not as legitimate and substantial as one might think. It appears that to punish the speaker rather than the heckler is psychologically and sociologically naive and ill-adapted to ultimate achievement of social order and tranquility. Marx, Psychosomatics and the First Amendment, 55 Dick. L. Rev. 322, 333 (1951).

172. This may also constitute a violation of the equal protection clause. See Murphy, Free Speech and the Interest in Local Law and Order, 1 J. Pub. L. 40, 64 (1952).

173. Note, Free Speech and the Hostile Audience, 26 N.Y.U.L. Rev. 489, 504-05 (1951). This rule would make the arrest and conviction of the speaker depend largely upon what reaction he intends to evoke from his sympathizers, and whether he intends to create a public disorder. See the standards proposed in 49 Colum. L. Rev. 1118 (1949).

174. See note 162, supra.

175. See Griswold v. Connecticut, 381 U.S. 479 (1965) where the Supreme Court granted birth-control clinic operators standing to assert jus tertii rights of marital couples
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they are known or merely assumed to exist) as a *jus tertii* defense, and as proof that his speech was constitutionally protected, even though his own interest in speaking might not have been sufficient to outweigh the public interest in order and tranquility. The prosecution then should have the burden of proving that there were no willing listeners in the crowd, or that their freedom to hear could not have been protected because of the great disorder generated by the defendant's speech. Furthermore, if any such listeners are willing to come forward, they should have standing to challenge the speaker's arrest and prosecution. In view of the close relationship between speakers and listeners in the process of communication, and the interest which the courts of this self-governing nation have in preserving public discussion, these procedural variations seem justified in circumstances where fundamental freedoms are threatened.

III. THE FREEDOM TO HEAR IN NON-TRADITIONAL CONTEXTS.

We have seen that reliance on the political-justification theory of the first amendment, and on the freedom to hear as well as to speak, should profoundly alter our conceptions of various traditional forms of governmental infringement on public speech. Yet there remain other in-

who were their clients. The rights of the couples which were at stake were rights of privacy and to acquire information on birth control, which rights might have been diluted had not the clinicians been given standing to assert them. The situation is clearly analogous to the prosecution of a speaker for breach of the peace. But see Tileston v. Ullman, 318 U.S. 44 (1943).

176. For a discussion of the assertible interest recognized by the Court in Lamont v. Postmaster General, 381 U.S. 301 (1965), see Klein, *Towards an Extension of the First Amendment: A Right of Acquisition*, 20 U. MIAMI L. REV. 114, 141, 144-45 (1965). Perhaps time will tell whether recognition of standing in the listener or recipient is all that is necessary to combat existing impediments to free public discussion, but the evidence appears to be that courts take too long to grant such standing. The FCC recognized the ascendancy of the public interest in broadcasting as early as 1941. Mayflower Broadcasting Co., 8 F.C.C. 333, 340 (1941). But it was not until 1966 that the federal courts began to recognize the right of audience-members to challenge FCC license renewals. United Church of Christ v. FCC, 359 F.2d 994, 1001-02 (D.C. Cir. 1966). The reasoning in that case seems directly applicable to our present concern.

177. Since the freedom of speech is designed for the benefit of the social order, it is only logical that society should be able to supervise its administration. See Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903, 916 (1960).

178. See Barrows v. Jackson, 346 U.S. 249, at 257-59 (1953) (holding that a homeowner bound by a racially-restrictive covenant could assert a Negro buyer's right to non-discrimination as a defense to an action by other covenantors for breach of the covenant), and cases cited therein. Cf., Truax v. Raich, 239 U.S. 33 (1915).
fluences, from the private sector, which severely restrict the communication necessary to our task of self-government. Recognition of the freedom to hear under the political-justification theory can have an impact on these private abridgments as well, and this constitutes an additional reason for its recognition.

The effect of these private influences is to impede effective self-government no less than direct state action restricting speech on matters of vital public importance. Indeed, "it may be that our problem today is not that of insufficient checks [on governmental infringement], but rather that of too many unofficial restraints on public expressions on political matters. Otherwise it becomes difficult to have that 'mature deliberation, ample discussion, and full information' needed to frame public measures properly ...."

The mass media are the major private repressive influence on our freedom to hear. Their hindrance of our task of self-government has been motivated primarily by their close ties to commercial interests and advertisers. Today, only a small part of the matter transmitted to us by our largest media is the kind we need to govern ourselves effectively. The media have, to a shocking degree, been persuaded or forced by commercial interests to play down their political-information function (and perhaps even to forsake their protection) under the freedom of press guarantee of the first amendment.

The domination of mass communication by commercial interests has had diverse and critical adverse effects. It has resulted in newspapers

179. Anastaplo, Notes, supra note 4, at 393 (quoting 1 ANNALS OF CONG. 107 (1789)).
180. See the remarks of Newton Minow, former Chairman of the FCC, in his Address to the Conference on Freedom and Responsibility in Broadcasting, Northwestern University School of Law, Aug. 3, 1961, quoted in N. MINOW, EQUAL TIME at 74 (1964).
181. See F. CASTBERG, FREEDOM OF SPEECH IN THE WEST 422-23 (1960); M. MCLuhan, UNDERSTANDING MEDIA 308-37 (1964) (wherein the author points out that today's electronic media are ill-suited to making public issues meaningful to a highly literate viewing or listening public, because they become so preoccupied with the process that they tend to ignore the substantive content of the broadcast).
182. Commercial communications, and communications which are uttered only for commercial purposes, are not entitled to the protections of the first amendment. Valentine v. Chrestensen, 316 U.S. 52 (1942); Ginzburg v. United States, 383 U.S. 463 (1966). This is not, however, to say that all paid advertisements lack political relevance or social importance, as the Court made clear in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
183. See A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 104 (1948): "the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage."
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which soften and distort facts to suit their unseen financial backers, and television and radio stations which seek more to please than to inform and which, while flaunting their commercial orientation, strive to appeal only to majority tastes and the largest possible audiences. These commercial restraints downgrade the quality of the information we receive and the quality of our citizenry.

In addition, the mass media have acquired such hegemony over the process by which we communicate politically relevant information and views that minority speakers, particularly the poor, and the views they represent are in large measure denied access to the media which most occupy our attention. This situation has ominous consequences for our plan of self-government, even aside from the equal protection problem which it presents. The unavailability of effective speech

184. T. Uzzell, The Twilight of Self-Government 65-66 (1961). See also Ernst, The So-Called Market Place of Thought, 2 Bill Rts. Rev. 86, 88-89 (1942). The reader should also note that since the American press has recently been relieved of most of the dangers of private libel (see note 120, supra) it can no longer use those dangers as an excuse for the blandness of its content; the situation is different in England. D. Sington, Freedom of Communication 44 (1963). That the American press has not substantially altered its approach to public issues since the New York Times decision, (discussed at note 120, supra) seems to support the proposition that some factor other than fear of lawsuits prompts its shy and tranquilized treatment of public issues.

185. See T. Uzzell, The Twilight of Self-Government 67-68 (1961); D. Sington, Freedom of Communication 82 (1963). In Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959), the Supreme Court explicitly recognized the tendency of radio stations to seek only not to offend rather than to inform, and deemed it necessary to prohibit censorship in that form. Regrettably, the Court failed to recognize that economic motivations may constitute an even stronger influence than political beliefs in the motivation of such censorship.

Of course, there still will be a place for some inoffensive pleasure programs on the media even after our needs for politically relevant information are met; the point is that the one truly beneficial value of the media to society is their capacity to inform us rapidly on topics of quickly changing content, and the media should justify their existence in those terms. A nation badly in need of information cannot afford to sit back and believe that the media are doing fine, when in fact they are lining the pockets of a few and numbing the minds of many.

186. See D. Lacy, Freedom and Communications 39 (1961); N. Minow, quoted at note 180, supra; D. Sington, supra note 185; Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1645 (1967).

187. See N. Minow, supra note 180; D. Sington, supra note 185.


189. Justice Douglas sympathetically recognized this frustration of access in Adderley v. Florida, 385 U.S. 39, 50-51 (1966). See D. Lacy, Freedom and Communications 69 (1961); note 61, supra. One quite prominent political figure has recently asserted that minority viewpoints are getting too much attention on the media, but this criticism ignores the obvious fact that the attention which the minorities receive is caused in large part by their reaction to the denial of the public forum to them in the first place, and that much of the attention given to them is biased against them due to the fact that it commonly focusses on their reactionary activities instead of on their ideas in a balanced setting.

190. See Griffin v. Illinois, 351 U.S. 12 (1956) (state cannot discriminate against indi-

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outlets may force our minorities to resort either to less effective communication devices which are more strictly regulated and attract fewer listeners,\textsuperscript{191} or to violent or outrageous conduct designed to attract the attention of the mass media to their cause.\textsuperscript{192} The latter of course, is the direct opposite of the process contemplated by the first amendment: the free speech outlet was designed in part to help release tension and social unrest in order to avert violence.\textsuperscript{193} Furthermore, to relegate any view advocated by our minorities to dissemination by word-of-mouth would doom it to defeat in competition with the media.

To fashion our mass media into efficient tools for self-education and self-government, we must not only improve the quality of the information which they impart to us, but must also expand the quantity of access which divergent opinions have to channels of communication.\textsuperscript{194} Our traditional view of the "free press," as an autonomous vehicle free from all compulsion and restraint, and devoted primarily to publishing the views of its editors and owners, must change when the press is subjected to severe commercial restraints and when corporate media supplant individual speech as the main instrumentality for

\textsuperscript{191} Minorities are forced to use, for example, loud speakers and sound trucks, which may be strictly regulated as to volume of sound and, hence, the number of hearers reached. See Kovacs v. Cooper, 336 U.S. 77 (1949). Justice Black, dissenting in that case, pointed out how unfair it is to thus hobble one of the few means of communication competing with the mass media. Id. at 102. Minority interest advocates may also have to resort to pamphletizing in order to reach a market for their opinion; this may be an effective means of persuading those whom the pamphlets actually reach. B. Schwart, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON 292 (1968). But the mass media are even more persuasive, and, in terms of numbers of citizens reached, the effectiveness of this mode of communication is clearly negligible by comparison.

\textsuperscript{192} See Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1647 (1967). Of course, such attention-getting becomes more and more difficult to accomplish, thus necessitating even more violence and/or outrageousness; by contrast the media seem to become even more mesmerizing as time passes. See note 138, supra. See also Marcuse, Repressive Tolerance: Postscript 1968, in A CRITIQUE OF PURE TOLERANCE at 117, 119 (1968).

\textsuperscript{193} Although it is clear that some non-rational communication-by-conduct should fall within the protective mantle of the first amendment—for example, communication by portrayal, or by waving a (red) flag. See Steele, The Impact of Psychoanalytic Theory on the Freedom of Speech, 38 Psychoanal. Q. 583 (1969).

\textsuperscript{194} Barron, supra note 192, at 1650; see notes 67, 150, 151, supra.

\textsuperscript{195} Barton, supra note 192, at 1656. See also, D. LACY, FREEDOM AND COMMUNICATIONS 24 (1961); Meiklejohn, Public Speech and the First Amendment, 55 Geo. L. J. 234, 257 (1966).
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disseminating information in our self-governing society. The Founding Fathers

Talked of free speech and free press but what they meant of necessity bore a direct relationship to the then capacity of the nation to read and communicate. ... [At that time] public education was unknown and of the four million people in this country six hundred thousand were illiterate negroes. These factors limited the capacity of the population to receive printed ideas and naturally laid the emphasis on oral communications and town meetings.

Today the predominance of the media means that conversational speech is little used for disseminating political ideas. Even the newspapers are less used for that task, though we are for the most part a literate people. Instead, our attention is increasingly focused on the electronic media, which now perform the function which the Framers intended for face-to-face debate.

The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than the government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant.

If the media of today are the functional equivalent of speech in the eighteenth century—the bedrock upon which rests the success of our constitutional experiment—we not only must protect spirited debate through simple speech, but also must guarantee adequate popular education by dealing with the activities and hindrances of those who in fact control this modern "press". We, as citizens, must decide what information we need and shall hear in our jobs as governors, and must demand that the media of general circulation be free to afford us all the politically relevant information we desire. The law must guar-

196. For a rather provocative commentary on this topic by a seasoned newspaperman, see K. Cooper, The Right to Know 16 (1956).
198. See Barron, supra note 192, at 1656.
199. See note 108 and accompanying text, supra.
antee standing for listeners to demand information, as well as for speakers to demand access to the public forum.

Many have argued that the media can fulfill this constitutional need on their own and should be allowed to take the lead themselves in expanding politically relevant programming and the flow of information on public issues. On reflection, however, there appears to be little justification for placing our complete trust in an industry which, as long as it is dominated by commercial interests, caters almost exclusively to the views of the majority. We have a vital interest in hearing the views of minority speakers, and there is no reason to believe that the media can or will alter their practices in this regard without some form of compulsion, reorganization, or liberation.

200. See notes 175 and 176, supra.
201. See note 61, supra.
203. K. Cooper, The Right to Know 308 (1956), conjures up threatening spectres of what governmental supervision might be like, and argues that the press should be given the advantage of self-control. See also D. Sington, Freedom of Communication 85 (1963). However, the "free" press is in many significant respects not really free, and has thus failed to promote lively public discussion. It has instead allowed the interests of citizens to be subordinated to those of its commercial sponsors.

James Madison stated in 1789 that:

[T]hough I acknowledge that a majority ought to govern, yet they have no authority to deprive the minority of a Constitutional right; they have no authority to debar us the right of free debate. An important and interesting question being under consideration, we ought to have time allowed for its discussion. Facts have been stated on one side, and members ought to be indulged on the other with an opportunity of collecting and ascertaining other facts. We have a right to bring forward all the arguments which we think can, and ought to have an influence on the decision.

1 Annals of Cong. 857 (1789). See also Representative Tucker's remarks, at 1 Annals of Cong. 108-09 (1789).

Indeed, the majority view of the country may in fact be opposed to the fundamental theory which underlies the first amendment, and may be disinclined to allow full exercise of the freedom to speak and hear. In combination with other influences, the commercially-dominated media have kept the majority of our citizens educationally disengaged from the task of effective self-government for several decades now; even if the decision as to what matters we should hear were to be made by the majority, there would be serious doubt as to the competency of their dominant judgment. That "the people are ignorant and apathetic . . . is due largely to the failure in the past to consult them." T. Uzzell, The Twilight of Self-Government 96 (1961).

205. Of course, there must be a place in public broadcasting for majority viewpoints, humor, the arts, and frivolity. But the extent to which these subjects are now made to occupy our attention renders our communications process a meager preparation for self-government.
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The remedy which today’s situation demands is a significant expurgation of commercial influence over the content of the communications broadcast or printed by our media. While it may be true that, under a broad definition of political relevance, most of today’s television programs do have some social importance, the object of any effort to implement the freedom to hear must be to diminish greatly the amount of such bland material, and to increase the amount of communication on topics of high political relevance.

Our ultimate goal must be to restore the citizenry to its constitutionally ordained position as the judge of public issues, by eliminating the stultifying influences which have reduced them to reactors and followers rather than governors. Many citizens have become so unaccustomed to grappling with public issues that it would be unrealistic to expect them to start doing so now, without the information they need and with no way to acquire it. Therefore, some form of governmental action seems to be the most promising form of accomplishing such restoration and protecting our freedom to hear that which is relevant to our task of self-government.

Many private interests and institutions in this country, however, stand ready to resist such efforts to preserve our freedoms, and now is the time to recall Madison’s perceptive warning that, because the greatest danger to liberty resides “in the body of the people, operating..." This need not involve giving listeners a steady diet of news. But it must entail decreasing the existing fare of shows which are chosen by commercial sponsors for their complacent substance. The diet must be changed in order to raise the citizenry’s level of information, curiosity and involvement, rather than appealing to the majority’s taste for relaxation.

No doubt the restoration of our freedom to hear will be a delicate task, threading treacherous straits between private self-interest and governmental oppression. See 2 Z. Chafee, GOVERNMENT AND MASS COMMUNICATIONS 713-14 (1947). But in view of the importance of this restoration, difficulty should not frighten us from taking any action at all. There is no reason to think that achievement of this goal is impossible, or that some governmental impetus is not the proper first step toward that goal.

Whatever plan of implementation is adopted need not consist of the government prescribing what we can hear—the media of general circulation could still exercise a prominent role in determining the specific content of programs. The governmental function should be to set standards which the media would attempt to fulfill, such as percentage of prime space or time devoted to politically relevant information, spectrum of views represented, degree of response to citizen demand for increased exposure of obscure topics or viewpoints, etc. In the opinion of Newton Minow, former Chairman of the FCC, such supervision is “the very reverse of censorship." Address to the Conference on Freedom & Responsibility in Broadcasting, Northwestern University School of Law, Aug. 3, 1961, quoted in N. Minow, EQUAL TIME AT 94 (1964).

See F. Biddle, FEAR OF FREEDOM (1951).
by the majority against the minority; governmental restraints are necessary "against the community itself; or, in other words, against the majority in favor of the minority."

The sources of governmental authority for protection and promotion of our constitutional freedom to hear must be found in the federal Constitution. The authority of the federal courts to protect us from Congressional restrictions on our access to the information we need to govern ourselves should be clear from the explicit language of the first amendment and the bold marshalling of authority which occurred in *Marbury v. Madison.* The argument is equally strong for federal judicial authority over such encroachments by state and local governments, through the fourteenth amendment's limitations on the states. Moreover, application of political-relevance or opinion-influencing standards would not be a totally new task for the federal courts.

However, while it is obvious that Congressional regulation of the broadcasting field does not preempt constitutional requirements, there is no judicial precedent for controlling private encroachments upon the self-governing citizenry's freedom to hear by the commercially-dominated mass media. Some have proposed use of anti-trust theories as a solution to the problem. Others have argued that the media's broadcasts should be considered so tainted with "commercial exploitation" as to place them outside the protection of the first amendment, and thus render them susceptible to regulation. The scope of these attacks is limited, however, and their approach indirect.


210. *Id.*

211. 5 U.S. (1 Cranch) 137 (1803).

212. This proposition hardly needs citation, as there are myriad cases on the point. *See, e.g., DeJonge v. Oregon,* 299 U.S. 255 (1937).


214. *But see Brewer v. Hoxie School Dist.,* 238 F.2d 91 (8th Cir. 1956), upholding the authority of a federal court to enjoin private obstructions of a state's efforts to implement its affirmative constitutional duties.

215. *See 2 Z. Chafee, Government and Mass Communications* 537-677 (1947), for an illuminating and comprehensive treatment of the anti-trust attack on the mass media, with particular emphasis on Associated Press v. United States, 326 U.S. 1 (1945). In that case, the Supreme Court affirmed a judgment enjoining enforcement of a news agency's by-laws which prohibited spreading news to non-members, on the ground that "freedom of the press from governmental interference . . . does not sanction repression of that freedom by private interests." *Id.* at 20. It is also well-established that news media have no "free press" right to create a communications monopoly. *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951). *See also Barron,* *supra* note 198, at 1655.

216. This theory is based on Ginzburg v. United States, 383 U.S. 463 (1966), in which
The federal courts can directly reach private hindrances of the freedom to hear and acquire politically-relevant information by characterizing such encroachments as "state action" within the ambit of the fourteenth amendment. Under an extension of the rule of *Marsh v. Alabama*, the operations of the mass media can be so characterized. In *Marsh*, state enforcement (by means of a trespass prosecution) of private restrictions on the distribution of literature on the sidewalk of a company-owned town was declared unconstitutional because the company which ran the town was performing a "public function" and was thus, as an instrument of the state, bound by the fourteenth amendment. Significantly, the Court pointed out that private ownership does not always give the owner absolute dominion, especially where constitutional rights are concerned. In general terms, the Court held that, regardless of claims to autonomy based on private ownership, a private concern which performs a public function related to the free speech interests of citizens who depend upon the private concern to fulfill that public function, is constitutionally prohibited from restricting first amendment rights or freedoms in the performance of that function.

The analogy from the *Marsh* holding to the mass media of general circulation is readily apparent. The media perform a public function, because they are essential to the flow of information and to the process of self-government. What function could be more "public"? A more recent case, *Terry v. Adams*, illustrates that the public function analysis of state action is equally applicable to situations where the interest at stake is the integrity of elections. Significantly, private

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218. See note 88 and accompanying text, supra. It should be noted that, while the "public function" holding in *Marsh* was intertwined with a "public use" rationale, a later case, *Evans v. Newton*, 382 U.S. 295 (1965), seems to have made it clear that the "public function" rationale was the "real holding." Id. at 319. See Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 18-26 (1968). See also *Barron*, supra note 198, at 1669.
219. 345 U.S. 461 (1953), holding that racial discrimination by the Jaybird Club, which, with the consent of the state, controlled selection of primary candidates, was "state action."
220. Perhaps most important of all in *Terry* was the theory advanced by three con-
denials of our freedom to hear impair the legitimacy of our electoral process under the self-government theory, just as much as a racially-discriminatory primary election does. Thus, the public function rationale of state action compels the conclusion that our mass media are instrumentalities of the state subject to regulation under the fourteenth amendment, insofar as they infringe upon our freedom to hear. The injury inflicted by the commercially-oriented restraints of the media is a direct and substantial infringement of our constitutional freedom to hear. As instruments of government, the media have an obligation not to impede our self-government by instilling apathy in our citizenry, and the federal courts have a clear obligation to abate such impediments. Thus, we should state a valid claim when we attack the actions of the media in the federal courts.

The media should not be allowed to assert immunity on the basis of the freedom of press. There is no reason to prefer that freedom over the freedom to speak and hear. Moreover, the involvement of concurring Justices (Black, Douglas and Burton) that, with respect to the performance of public functions in the area of voting, there is a "positive duty" on the states to see that the public function is performed in a constitutional manner, and thus state action (under the fifteenth amendment) may consist of mere state failure to implement effective and equal voting. Id. at 469-70.

In view of the importance of our freedom to hear to rational electoral judgments and effective self-government, it seems perfectly legitimate to transplant this entire theory of state action to cases dealing with first amendment freedoms under the fourteenth amendment. Thus, regardless of the involvement of the mass media in their "public function" role, the simple fact that our freedom to hear is less than optimal should imply that the states have failed in their duty not to allow that which the fourteenth amendment, incorporating the first, was intended to combat. Thus state action exists, and may justify either judicial or legislative action by the federal government. But the most important effect of adopting such a theory might be to spur state protection of the freedom to hear, insofar as that could be done outside the field of federal pre-emption in the area of broadcasting. Cf., Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964), which cases imposed an affirmative duty on the states to effectuate the equality contemplated by the fourteenth amendment in the electoral process, by reapportionment.

221. Note that the media are really in no respect more "private" than are the "privately held bridges, ferries, turnpikes and railroads" which the Court named as examples of public functions in Marsh v. Alabama, 326 U.S. at 506.

222. See notes 176 and 177, supra.

223. See note 215, supra, quoting Associated Press v. United States. Barron argues that the courts must cease treating freedom of the press (as it now manifests itself) as being non-antagonistic to the public interest. Barron, supra note 192, at 1658. Cf., Shelley v. Kraemer, 334 U.S. 1 (1948), where the Court held that it was unconstitutional state action for private individuals to invoke the protection of state law (contracts) in order to perpetuate their scheme of discrimination by racially-restrictive covenants. That one has a constitutional right does not necessarily permit him to exercise it in a manner which impinges upon or denies the constitutional freedoms of others. As between constitutional freedoms, there must be balancing or re-definition of their scopes.

224. Freedom of the press is not an absolute, all-pervasive, or unlimited privilege.
commercial domination raises significant questions as to the validity of their claim to protection. Our view of the media as an arm of free enterprise should not lead us to believe that their continued independence from regulation is necessary to the success of self-government. Exactly the opposite is true. The media, like drug companies and issuers of securities who are required to make certain information available to the public, are subject to governmental regulation of their work. We must be careful not to put the media above the law; their function is as important to us as an election, which obviously should not be free from governmental supervision. Our courts have long recognized the permissibility of requiring newspapers to publish certain materials when there is a sufficient private interest at stake, as evidenced by statutes requiring opportunity for reply or requiring retraction of libelous statements. In some cases, we have even recognized the possibility of judicial prohibitions against publishing certain materials when a sufficient public interest is involved. Surely the public interest in effectuating self-government is sufficient to justify a positive requirement that the media meet certain standards of quality in the information which they afford us.

The ability to characterize this sort of private infringement of the freedom to hear as “state action” is a major advantage obtained by

Giragi v. Moore, 49 Ariz. 74, 64 P.2d 819 (1937), appeal dismissed, 301 U.S. 670 (1937), aff'g on rehearing 48 Ariz. 33, 58 P.2d 1249 (1936). To be sure, it is a “freedom,” but, like the freedom of speech, the breadth of its protective mantle must be occasionally redefined according to the needs and functions which justify its existence.

225. See notes 194 and 216, supra.

226. Clearly, the press has no special immunity from laws of general application. Associated Press v. NLRB, 301 U.S. 103 (1937).

227. The power of regulation of the press is as broad as that over other private businesses. Associated Press v. United States, 326 U.S. 1 (1945).

228. A showing that a business is affected with a public interest is not necessary in order to subject it to governmental regulation. See Nebbia v. New York, 291 U.S. 502 (1934); Olsen v. Nebraska, 313 U.S. 236 (1941). Needless to say, the case for regulation can be compelling when such public interest is involved.

229. See, e.g., Wash. Rev. Code § 9.58.040 (1956), imposing liability on a publisher for libel appearing in his publication, unless it is “promptly retracted... with an equal degree of publicity.”

230. Such as adverse or intimidating commentary on the facts or proceedings of a highly inflammatory unfinished criminal prosecution. See Times-Mirror Co. v. Superior Court, 314 U.S. 252 (1941) (leaving open the possibility of judicial prohibition of publication through the contempt power in a case where publication would present a clear and present danger of actually obstructing justice). See also Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (Justice Frankfurter’s opinion respecting denial of certiorari). Finally, see Wash. Rev. Code §§ 9.73.010, .020 (1958), respecting the criminality of publications which invade privacy.
emphasizing the political-justification theory of the first amendment. The finding of state action supports the authority of the federal courts to protect and intervene on behalf of that freedom under the fourteenth amendment. But judicial protection of our freedom to hear may not be a sufficient guarantee for our needs, considering the magnitude of the problem posed in today's society. While a cause of action for consistent exclusion of certain points of view from public exposure, or for distortion of politically relevant information by the media would facilitate public education, the number of such violations might be so large as to make it impracticable to achieve our goal through judicial actions alone. The task of the courts must be either clarified or supplemented by positive legislative action by Congress.

In recent years, our perception of government as a mere arbiter and policeman has changed somewhat, so that we now view the government also as a provider, particularly in the area of civil rights and of such things as welfare benefits and appointed counsel. An "entitlement" theory has begun to pervade our notions of the individual's claim to civil rights. Indeed, in the area of voting rights, Congress has already shown its willingness to assume a positive role as the guarantor of political rights.

In this setting, it is significant that most contemporary analysts of the first amendment agree that, considering the state of society and the extent to which our freedoms are unrealized, the amendment should be interpreted as a statement of positive intention and purpose, imposing an affirmative duty of implementation upon our government. The "conditions in a modern democratic society demand that a deliberate, affirmative, and even aggressive effort be made to support the system of free expression. The natural balance of forces in society today tends to be weighted against individual expression. Only through a

231. Perhaps the best example of judicial implementation of this theory is Griffin v. Illinois, 351 U.S. 12 (1956), discussed at note 190, supra. See Reich, The New Property, 73 Yale L.J. 733 (1964) (entitlement to welfare benefits, etc.).

232. See American Civil Liberties Union, Affirmative Obligation of Government to Implement the Exercise of the First Amendment, Report to the Committee on Communications Media and Free Speech 1-3 (1968).


positive approach, in which law and judicial institutions play a leading role, can an effective system be maintained."

We must cease to think of the first amendment language as being restricted to simple prohibition; we must expand our reliance on absolute language to a perception of the absolute goals of the freedom of speech and the Constitution in general.

It is noteworthy that the first amendment reads: "Congress shall make no law . . . abridging the freedom of speech." The emphasis is added to highlight the obvious fact that the amendment is, at worst, silent as to the permissibility of effectuating legislation. It cannot be legitimately maintained that the first amendment itself prohibits affirmative legislation to aid rather than abridge the freedoms recognized therein. Of course, under no analysis, especially that of political justification, could Congress ever tell the media what materials they cannot publish or broadcast, except in extreme and well-defined cases.

But Congress can tell the media what they must publish and what standards they must meet, even though such standards cannot be so extensive as to wholly supplant and deny the opportunity for the media to communicate their own views.

Besides prohibiting certain kinds of legislation, the first amendment explicitly recognizes and lends constitutional authority to the "freedom of speech," which describes a power of self-governing citizens and embodies a freedom to hear as an adjunct of the constitutional goal of effective self-government. The amendment not only sets up a limitation, it also identifies a fundamental goal; and the former is no bar to legislation designed to implement the latter. "If the First Amendment is read to state affirmative goals, Congress is empowered to realize them."

The fact that the naming of a "freedom" implies an absence of govern-

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237. Such as obscenity which is without "redeeming social importance," or the details of a criminal prosecution (see note 230, supra).
239. Of course, it is not clear that a corporate broadcasting company has much of a claim to self-expression (see note 41, supra), unless that expression is directly controlled by individual shareholders, and maybe not even then. Note that former Chairman Minow of the FCC did not consider governmental standards of quality for the media to be any form of "censorship." See note 207, supra.
240. Barron, supra note 192, at 1676.
mental power over the *subject* of the freedom (speech) does not mean that the government is without power to preserve its own structure and integrity by preserving that *freedom*. The meaning of the first amendment is that we citizens possess the exclusive power to exercise or curtail our own freedom of speech in public. Beyond that, it is obvious that both the government and the citizenry must have concurrent power to maintain an atmosphere in which our individual freedoms may be exercised.

In attempting to identify a source for congressional power of this nature, it is worth noting that the Supreme Court has consistently been lenient in discovering constitutional authority for congressional powers over subjects from which the Congress derives its legitimacy. For example, in *Ex parte Yarbrough*, \(^{241}\) the Supreme Court upheld congressional authority to punish persons who deprive citizens of their voting rights in a federal election on the ground that there must be implied some such inherent authority in Congress to protect the source of its own power, *viz.*, federal elections. Similarly, in *South Carolina v. Katzenbach*, \(^{242}\) the Court approved the Voting Rights Act of 1965 even though its operation was antecedent to any existing controversy, on the ground that section 2 of the fifteenth amendment \(^{243}\) gives Congress authority to pass implementing legislation, and thus Congress need not await specific state infringements before establishing guidelines for acceptable practice respecting literary tests.

These authorities bolster the case for future legislation protecting our freedom to hear. There are available two express sources for congressional authority to affirmatively implement our freedom to hear: (1) Section 5 of the fourteenth amendment \(^{244}\) which gives Congress the power to adopt "appropriate legislation" to enforce the substantive portions of that amendment; and (2) the constitutional mandate that "The United States shall guarantee to every State in this Union a republican form of government." \(^{245}\)

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241. 110 U.S. 651 (1884).
243. U.S. Const. amend. XV, § 2: The Congress shall have power to enforce this article by appropriate legislation.
244. U.S. Const. amend. XIV, § 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
The fifth section of the fourteenth amendment furnishes the clearest approach to the congressional power we need. Its language is practically identical to the language of the fifteenth amendment which was so expansively construed in *South Carolina v. Katzenbach*. Considering that the elements of political and electoral legitimacy are as compelling in the case of our freedom to hear as they were in that decision, the broad interpretation of congressional power seems clearly appropriate.

The power of Congress under the guaranty clause of article four is less clear, because neither Congress nor the Supreme Court has clearly stated what it comprehends. But there is no doubt that some congressional power is available under this clause, and that it could be used by mere statutory recital of that source for the power with assurance that the Supreme Court would not question the legitimacy of such an undertaking. Application of the guaranty clause to the solution of

246. *Compare* notes 243 and 244, supra.

247. In fact, such a broad interpretation of section 5 of the fourteenth amendment was adopted, with reference to the equal protection clause, but without reliance on any compelling political justifications, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *See also Ex parte Riggins*, 134 F. 404 (5th Cir. 1904), recognizing the auxiliary power of Congress to come to the aid of state governments when private persons cause unconstitutional conditions. Additionally, section 5 could be used to implement other constitutional values, such as equal protection in the case of denial of media access to the poor. *See note 190, supra.*

248. The Supreme Court has consistently refused to pass on the meaning of the guaranty clause, believing that its interpretation is a "political question" to be decided by Congress. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Taylor & Marshall v. Beckham* (No. 1), 178 U.S. 548 (1900); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1911); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

249. Here a duty is imposed upon the General Government, not upon Congress alone. A republican form of government was taken to refer primarily to a government chosen by the people. In addition, it seems to have been thought that virtually all citizens should be eligible for office. . . . In addition, it seems to have been thought that virtually all citizens should be eligible for office.

The standard, "republican form of government," may not require only the elements we have just discussed. Does not effective choice by the people imply, with respect to State government elections also, that the choice must be more than perfunctory or nominal? The people must be permitted a real choice—that is, an opposition must be given an opportunity to be heard, issues must be discussed or open for discussion. This, too, we have suggested may be implied by the Article I election provisions. The guaranty in Article IV would reinforce the Article I provision by governing State institutions as well.

Republican government may also require *some* degree of recognition of certain critical rights, among the foremost of which would be the general right to freedom of speech and of the press, a right not limited merely to the electoral process. Anastaplo, *Notes*, supra note 4, at 117-19. The reference to the article I election provisions is based on U.S. Const. art. I, § 2, cl. 1, and on art. I, § 4, cl. 1. Anastaplo reasons that Congress must have power to insure that the Congress is indeed chosen by the people, and that a reasonable choice by the people implies adequate public discussion and, there-
problems under the self-government theory of the first amendment has an alluring simplicity and consistency. However, legislators should be aware that the "freedom of speech would not be protected as unequivocally under this provision as it is in the First Amendment. Rather, freedom of speech would have to be revived . . . only to the extent that it contributed . . . to republican government." Of course, this is all that is necessary under the political-justification theory of the freedom of speech. But perhaps the clearer and more effective means of protecting our freedom to hear would be enactment of appropriate implementing legislation under section 5 of the fourteenth amendment, which does incorporate the substantive gloss of the first amendment.

CONCLUSION

Governmental intervention is obviously not the only remedy which we can trust or which will be effective in safeguarding our freedom to hear in the future. One should, however, recognize its importance in beginning the monstrous task of restoration which lies ahead. There is a clear need to balance our perspective between public and private leadership in this cause. While we cannot afford to ignore the dangers which inhere in governmental supervision of our most precious freedoms, someone must take the first step in this joint venture, and the necessities of the current predicament should encourage us to trust our legislators to perceive and ordain legitimate and comprehensible standards for improving our mass media and upgrading the quality of our communications on public issues. Moreover, there is historical justification for trusting our courts to guard faithfully our freedoms, should Congress transgress the boundary between implementation and

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infringement of our interests.\textsuperscript{255} Now we must hope that Congress and the courts act conscientiously to fulfill the obvious needs of the polity over which they preside. We have no other choice:\textsuperscript{256}

The paranoia of living under a nuclear balance of terror, the divisiveness of an unpopular war, the racial tensions existing throughout the country, the economic and social deterioration of our inner cities, and the insecurity of unprecedented technological change are but a few of the forces which continue to threaten our constitutional form of government. If our First Amendment's freedom to speak and freedom to listen are unduly infringed, our plan of self-government is seriously weakened.

\textit{John M. Steel*}


\textsuperscript{256}. Brooks v. Auburn University, 296 F. Supp. 188, 198 (M.D. Ala. 1969).