COLONIAL INTENTIONS AND CURRENT REALITIES OF THE FIRST AMENDMENT*

THOMAS I. EMERSON†

I. THE ORIGINAL INTENTION

History is seldom simple or forthright. This is surely true of the concept of freedom of expression as expounded in the Declaration of Independence and the Constitution. It is by no means clear exactly what the colonists had in mind, or just what they expected from the guarantee of freedom of speech, press, assembly, and petition.

Some starting points are relatively certain. The framers of the Declaration of Independence and, perhaps less intensely, the drafters of the Constitution, began with John Locke's social compact theories.[1] And, as a corollary, they viewed certain rights of the individuals who entered into the compact as natural and "unalienable" rights, inherent in the individual and not dependent upon the largess of the state. Some, but apparently not all, of these rights were embodied in an actual compact, the Constitution. The guarantee of the first amendment was clearly intended to reach the extent described by Blackstone,[2] namely as a prohibition of any system of control over the process of printing, any advance censorship of publication, and the like.

Many issues were not fully resolved. It was not clear whether all groups were to be included within the protection of the guarantee to freedom of expression. Slaves were obviously excluded, and women did not seem to matter. John Milton, a leading English exponent of freedom of expression who was well known to the colonists, would not have extended freedom of

---

* This Article was presented as a paper at the Bicentennial Program of the Judicial Conference of the Third Circuit in Philadelphia, September 1976.

† Lines Professor Emeritus of Law, Yale University.

[1] *See* J. LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 164-79 (Everyman's Library ed. 1924).

[2] *See* 4 W. BLACKSTONE, COMMENTARIES *151. Blackstone construed liberty of the press as consisting of "no previous restraints upon publications and not in freedom from censure for criminal matter when published." Presumably, government suppression could legitimately begin at the time of publication.

speech to Catholics, atheists, Turks, or other non-Christians.[3] Locke would apparently have denied political liberties to Catholics and would have punished those who "will not own and teach the duty of tolerating all men in matters of mere religion."[4] Moreover, the impact of the first amendment upon the law of seditious libel, which punished any militant attack upon the government or its officials, was not explained. Nor was there any effort to reconcile the first amendment with the law of private libel, the offense of blasphemy, or the emerging law of obscenity. Professor Zechariah Chafee, Dean Leonard W. Levy, and others have differed sharply concerning the intentions of the founding fathers with respect to these and other matters.[5]

The era in which the Declaration of Independence and the Constitution were framed was actually a period of transition. Milton's and Locke's views concerning the exclusion of distasteful groups were being challenged. The colonial courts were still enforcing the law of seditious libel, but political theorists were moving toward ideas of absolute protection for political expression. Different individuals, holding different philosophies, placed different interpretations upon the broad concept of freedom of speech, press, assembly, and petition. Moreover, not only was there no real concensus on these issues, but there was no extensive discussion of detailed constitutional application.

The Alien and Sedition Acts, enacted in 1798, did serve to focus attention upon some major problems and did generate some elaboration of the theory underlying the constitutional guarantee of freedom of expression.[6] But there was no Supreme

---

[3] J. MILTON, AREOPAGITICA 38 (Everyman's Library ed. 1927) [hereinafter cited as AREOPAGITICA]; J. MILTON, *A Treatise of Civil Power in Ecclesiastical Causes*, in 6 THE WORKS OF JOHN MILTON 13-14 (F. Patterson ed. 1932); J. MILTON, *Of True Religion, Heresie, Schism, and Toleration*, in 6 THE WORKS OF JOHN MILTON 172-73 (F. Patterson ed. 1932).

[4] J. LOCKE, *A Letter Concerning Toleration*, in 6 THE WORKS OF JOHN LOCKE 46 (London 1823).

[5] *See* Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 3-35 (1941); L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960). Professor Chafee argues that the framers of the first amendment intended to eliminate the common law crime of sedition and to prevent prosecutions for criticism of the government. Dean Levy, however, claims that "libertarian theory from the time of Milton to the ratification of the First Amendment substantially accepted the right of the state to suppress seditious libel." L. LEVY, *supra* at vi. He believes that it is impossible to ascertain the actual intentions of the framers.

[6] The Alien Act allowed the President to compel the departure of aliens whom he judged dangerous to public safety or who were suspected of plotting against the government; the Sedition Act punished false, scandalous, and malicious writings against the

Court decision on the matter. And subsequently no other federal legislation raised first amendment questions for well over a century. In addition, the first amendment was not applicable to the states.[7] Civil liberties conflicts were usually fought out in nonjudicial arenas or solved by escape to the frontiers. Consequently, in the immediate post-Constitution era, the views of the framers were never fully explicated in either legislative chambers, court opinions, or legal treatises.

Surprisingly, the Supreme Court did not consider any major first amendment question until 1919, when issues arising under World War I legislation were presented.[8] It was not until 1925 that the first amendment was held applicable to the States, precipitating extensive judicial examination of state restrictions.[9] By that time the historical events surrounding the adoption of the Constitution had long receded. Moreover, greatly changed conditions faced the courts.

As a result the Supreme Court, in interpreting the first amendment, has not seemed particularly concerned with the specifics of the original intention, and has not addressed itself in depth to these issues. In *New York Times v. Sullivan*,[10] it did pick up the threads of history enough to declare the Sedition Act of 1798 a violation of the first amendment; but the Court was perfunctory in its examination of the intentions of the drafters of the Constitution. Here, as in interpreting the equal protection clause and most other provisions of the Constitution, the Court has instead looked to the underlying principles sought to be achieved by the Constitution, in terms of their current applicability. It has, in short, adopted the theory of a living constitution, rather than one fixed in time as specifically visualized by the founders. In my judgment, this approach is entirely correct.

---

government if published with the intent to defame or to stir up sedition or resistance to the law.

[7] *E.g.*, Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1921); Patterson v. Colorado, 205 U.S. 454, 462 (1906); *cf.* Twining v. New Jersey, 211 U.S. 78, 92 (1908) (first 10 amendments inapplicable to the states).

[8] *See* Schenck v. United States, 249 U.S. 47 (1919). In *Schenck*, the Court adopted the "clear and present danger" test to affirm the conviction of defendants who had printed and circulated a document opposing the military draft. *See generally* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

[9] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (dicta). *See also* Herndon v. Lowry, 301 U.S. 242 (1937); Fiske v. Kansas, 274 U.S. 380 (1927); Whitney v. California, 274 U.S. 357 (1927).

[10] 376 U.S. 254, 276 (1964).

When turning back to history, therefore, it is more profitable to explore the minds of the framers in the very broadest terms in order to try to ascertain the fundamental principles that they sought to establish. What, then, were the basic functions of a system of freedom of expression that the founders hoped to realize in guaranteeing the specific manifestations which were at that time important to them—freedom of speech, press, assembly, and petition? And to what extent have these functions been secured in the present system?

The historical evidence reveals that the colonists viewed the essential functions of a system of freedom of expression much as we do today. First, the colonists conceived of the right to freedom of speech, press, assembly, and petition as vital to the process of discovering truth, through exposure to all the facts, open discussion, and testing of opinions. In a famous passage Milton thus declared:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[11]

The preamble to the Virginia Statute of Religious Freedom of 1785, written by Thomas Jefferson, reiterated Milton's view,

> that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.[12]

The most famous restatement of the proposition in modern times is that of Mr. Justice Holmes:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of

---

[11] AREOPAGITICA, *supra* note 3, at 36.

[12] 2 THE PAPERS OF THOMAS JEFFERSON 546 (J. Boyd et al. eds. 1950-1974).

> truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[13]

Today we are not inclined to speak of the process as one of discovering "the truth." We are more likely to talk in terms of "advancing knowledge" or "reaching the better decision." But the underlying function is basically the same. The essential point is that the process is necessary for reaching the best social decision, regardless of whether ultimate values are conceived in absolute or relative terms. The theory is invalid only on the untenable premise that society already possesses all truth or on the authoritarian premise that only a single individual or small group can know and proclaim the truth.

The process is essentially the method of science. The theory of freedom of expression, indeed, developed in conjunction with, and as an integral part of, the growth of the scientific method. Locke, following Hobbes, based his philosophical and political theories on the premises of science. And the proponents of free expression were all men who, in the broad sense at least, put their faith in progress through free and rational inquiry. Hence the process they envisaged operates upon the same principles as those that guided the men of science: the refusal to accept existing authority; the constant search for new knowledge; the insistence upon exposing their facts and opinions to opposition and criticism; the belief that rational discussion produces the better, though not necessarily the final, judgment. This process did not ignore prior knowledge or opinion, but it did insist upon the responsibility of the individual to challenge such opinion and upon the obligation of all to make reasoned conclusions based upon the evidence.

A second major function of the system of free expression was also clearly intended by the colonists who proclaimed the Declaration of Independence and adopted the Constitution. Freedom of expression is necessary to a democratic political process. The Declaration of Independence rests on the proposition, straight from John Locke, that governments derive "their just powers from the consent of the governed." From this premise it follows that the citizens, the ultimate holders of sovereign power,

---

[13] Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).

must have full freedom of expression in order to reach their individual judgments, in order to arrive at a common decision, and in order to instruct their servant, the government. The protection extended by the Constitution to freedom of speech, press, assembly, and petition was obviously designed to implement this underlying political structure.

The most persuasive contemporary exponent of this function of freedom of expression is Dr. Alexander Meiklejohn. Pointing out that the function of the first amendment "lies deep in the very foundations of the self-governing process," he proceeded to say:

> When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.[14]

I believe that history confirms Dr. Meiklejohn but goes beyond his position. The basic right to freedom of expression was not meant to be confined to the political realm. As the guarantee of freedom of conscience, also incorporated in the first amendment, reveals, the scope of the constitutional protection was intended to extend to religion, art, science, and all areas of human learning and knowledge.

A third function of the system of freedom of expression, though not as clearly articulated by the colonists, was implied in the social compact theories of John Locke. The system is a form

---

[14] A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960) (emphasis in original).

of social control that strikes a balance in society between stability and movement, thereby allowing for necessary change without resort to violence. It shields the community from sterility and stultification, allows society to test proposed new measures in the realm of ideas and discussion before committing itself to actual trial and error, and provides a legitimizing process for reaching hard, and to some participants objectionable, decisions. This way of life—this sense of vital, rational, and peaceful progress—was expressed most eloquently by Milton:

> Behold now this vast City: a city of refuge, the mansion house of liberty, encompassed and surrounded with His protection; the shop of war hath not there more anvils and hammers waking, to fashion out the plates and instruments of armed Justice in defence of beleaguered Truth, than there be pens and heads there, sitting by their studious lamps, musing, searching, revolving new notions and ideas wherewith to present, as with their homage and their fealty, the approaching Reformation: others as fast reading, trying all things, assenting to the force of reason and convincement. What could a man require more from a Nation so pliant and so prone to seek after knowledge? What wants there to such a towardly and pregnant soil, but wise and faithful labourers, to make a knowing people, a Nation of Prophets, of Sages, and of Worthies? We reckon more than five months yet to harvest; there need not be five weeks; had we but eyes to lift up, the fields are white already.[15]

In a remarkable letter to the inhabitants of the Province of Quebec, the Continental Congress neatly capsuled the expectations of the colonists with respect to all three functions of a system of freedom of expression that I have just summarized:

> 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 op-

[15] AREOPAGITICA, *supra* note 3, at 32.

> pressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.[16]

A fourth function of the constitutional guarantee of freedom of expression remains. Not only was freedom of speech, press, assembly, and petition considered as a social good, essential for the progress of society, but it was also viewed as an important means for personal fulfillment. Again, this function was not as fully articulated in colonial times as it is today. The colonists were not thinking as intently as we do now in terms of protecting the individual against the manifold pressures of the collective. In the new country with its endless frontiers the collective was not that powerful or pervasive or confining. Nevertheless, basic notions of Western individualism were inherent in the social compact theories embraced by the colonists. These notions were given express recognition by Milton when he declared, in opposing licensing of the press, that such restraint over expression is "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him."[17]

The goal of the first amendment to allow the realization of full individual potential has changed. As we have grown into a highly technical, heavily populated, more collective world, it has evolved in importance. But the core of the concept was certainly present in the colonial mind, awaiting fuller development in our time.

The ideas and attitudes of the colonists toward the "unalienable" right to freedom of expression were based upon political, economic, and psychological premises that differ in some important respects from those held today. But the basic meaning of the first amendment for present society remains essentially the same. That meaning was best summarized by Mr. Justice Brandeis concurring in *Whitney v. California*:[18]

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.

---

[16] 1 JOURNAL OF THE CONTINENTAL CONGRESS, 1774-1789, at 108 (W. Ford et al. eds. 1904-1937), *quoted in* Near v. Minnesota, 283 U.S. 697, 717 (1931) (Chief Justice Hughes).

[17] AREOPAGITICA, *supra* note 3, at 21.

[18] 274 U.S. 357 (1927).

> They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[19]

Our remaining task is to examine briefly the extent to which these objectives of the first amendment have been actually realized in our nation today.

II. The Search for Truth

On the whole, the function of the first amendment in promoting the search for truth, or in advancing knowledge, has in my judgment been substantially realized in the United States. In our constitutional theory the right to freedom of expression now extends to all groups in our society. Even antidemocratic groups—those that would destroy freedom of expression if they achieved political power—are entitled to the protection of the first amendment. Although this proposition has never been the

[19] *Id.* at 375-76 (concurring opinion) (footnote omitted).

express subject of a full opinion by the Supreme Court, it was stated very early in the development of first amendment doctrine by Mr. Justice Holmes, dissenting in *Gitlow v. New York:*[20] "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[21] Some individuals have argued to the contrary, but I think it fair to say that the views of Mr. Justice Holmes stand today as the accepted law of the land.

Similarly, in our constitutional theory the guarantees of the first amendment encompass the right to express all ideas, opinions, and judgments, regardless of how objectionable they may be to others. A partial qualification nevertheless remains for obscenity, which in its "hard core" manifestations may be suppressed.[22] Also, the 1952 decision of the Supreme Court in *Beauharnais v. Illinois*,[23] in upholding a group libel statute, suggested that racist opinions may be restricted; but I do not believe the Court would reach the same conclusion today. As a general proposition, prevailing first amendment doctrine extends protection to all kinds of expression, no matter how "fraught with death."

Indeed, the Supreme Court has gone somewhat further. On a number of occasions the Court has recognized a constitutional foundation for the principles of academic freedom.[24] Although this area of constitutional theory has been slow to develop, it does give promise that the principles and practices that enable institutions of learning and research to function as social critics and innovators may be entitled to a special place under the protective umbrella afforded by the first amendment. It should be noted, however, that hard problems are now looming on the horizon. Courts must soon decide, for example, whether certain kinds of genetic research may be prohibited or regulated.[25] It is

---

[20] 268 U.S. 652 (1925).

[21] *Id.* at 673.

[22] *See* Miller v. California, 413 U.S. 54 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[23] 343 U.S. 250 (1952).

[24] *See, e.g.*, Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 613-14 (1970).

[25] For example, the Cambridge, Massachusetts City Council recently took steps to curb recombinant DNA research at Harvard University and at the Massachusetts Institute of Technology, declaring a three-month "good faith" moratorium on the work. Whether local involvement in decisions concerning biological research is permissible

hard to predict where these issues will lead.

I have thus far dealt with constitutional theory. Practice, however, has not always conformed to theory. Our society places real obstacles upon the search for truth and the advancement of knowledge, sometimes through government regulation. On the whole, these restrictions have been indirect, rather than direct, sanctions upon expression. They have involved such controls as loyalty programs, other impositions of political qualifications for holding positions of power or obtaining benefits, inquisitions by legislative committees, surveillance, harassment, and the like.[26] I think it fair to say, however, that the effect of these restrictions has been more to limit political participation in the democratic process than to inhibit the exposition of abstract ideas. They will therefore be considered in connection with the second function of a system of freedom of expression, the preservation of a democratic political process.

Nor can it be said that our system affords equality in the ability to communicate different points of view or to pursue different goals of inquiry. As we shall see, neither equal access to the mass media nor equal right to the support of public funds presently exists. What we have secured in this area is rather the right of the individual to follow the truth wherever it may lead, though the road is often a lonely one.

This is a real accomplishment. It should not be casually written off or slowly whittled away through the failure to acknowledge its significance.

III. Political Participation

The function of the first amendment in affording citizens the opportunity to exercise their prerogative as wielders of ultimate power has, in my judgment, been less fully achieved. There are important positive features in the system as it operates today. It has already been noted that, in general, expression of unorthodox or radical political ideas, as such, is protected. The right of association, in general, is also recognized.[27] Moreover, the system has in practice achieved important successes. Spectacular

---

may face judicial determination in the future. *See* Culliton, *Recombinant DNA: Cambridge City Council Votes Moratorium*, 193 Science 300 (1976).

[26] For a discussion of the pervasiveness of loyalty programs during the 1950's, see generally R. S. Brown, Jr., Loyalty and Security (1958); W. Gellhorn, Individual Freedom and Governmental Restraints (1956).

[27] *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

examples of such successes include the operation of the system in supporting the civil rights movement, in legitimizing opposition to the Viet Nam war, and in exposing the abuses of Watergate.

Nevertheless, the full potential of the first amendment has certainly not been realized. Most of the problems arise out of changes that have occurred since the colonists framed the first amendment. These developments include our growing industrialization, technology, bureaucratization, and other features of our post-industrial society. They are, in short, the product of mass democracy, a situation with which the colonists did not have to deal. They must be dealt with, however, if the first amendment is to function properly under modern conditions.

A. *Legal Doctrines*

The first problem concerns legal doctrines developed by the Supreme Court in a number of critical first amendment areas, primarily pertaining to radical speech and radical political associations. One important aspect involves the dividing line between militant expression and illegal action. The problem is crucial. Most radical political movements contain the seeds of, and may be accompanied by, violent or other illegal action. Submerged groups or groups with grievances face a full panoply of laws, institutions, and practices, designed mainly to preserve the status quo. Leaders, and often rank and file, trying to break through the encrusted establishment become frustrated and angry. The rhetoric becomes militant. Some converts to the cause may break over the traces and seek a solution by "direct action." In this they may be helped along by police provocation or by agents provocateurs. Many social movements in the United States that have achieved valuable social gains have had such a history; one finds the same pattern in efforts for increasing political power initiated by labor, by racial minorities, and by feminists. The various facets of the problem are not easy for society to sort out. Society must defend law and order without suppressing expression; achieve necessary social change rather than ignore valid grievances; and punish excesses without destroying a whole movement plus many others on the periphery of the movement.

Present legal doctrines for attaining these goals seem inadequate. Originally the Supreme Court applied, very erratically,

the clear and present danger test.[28] Later it flirted with balancing theories, and still does. The current prevailing doctrine seems to be the *Brandenburg v. Ohio*[29] rule: speech may be punished when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[30] None of these doctrines seem to me to be either sound in theory or workable in practice. The purpose of the first amendment is to give special protection to expression, as distinct from other conduct. The fact that speech is inciting (as is a great deal of speech) or that it may result in illegal action (as effective speech may be likely to do) is not a sufficient ground for suppression. Society has other ways to control action without controlling speech. Moreover, the formulations are so vague and undefined that, while purporting to apply them, the courts, prosecutors, police, and other officials can reach almost any result. Only a serious effort to separate expression from action and to give expression full protection will provide a satisfactory answer.

Other legal doctrines have been applied to the problem of symbolic speech. This form of expression was elaborated and refined during the 1960's. Its development was a response in part to the difficulty of reaching an audience, and in part to the growing impact of television. Whatever the reasons for its advent, the use of symbolic expression constituted an important innovation in the system. It also presented the difficulty of separating expression from action. The Supreme Court's solution in *United States v. O'Brien*[31] was, in my judgment, a disaster. The formula employed by the Court did not even reach the level of a balancing test. In essence the Court adopted a test of mere reasonableness: if the government's regulation has some valid

---

[28] The phrase "clear and present danger" originated in Schenck v. United States, 249 U.S. 47, 52 (1919). *See* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919). Under the test, speech may not be curtailed until there is an immediate risk of danger; the proximity and degree of danger are the crucial factors to be assessed. *See* Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971).

[29] 395 U.S. 444 (1969). For a more recent invocation of the *Brandenburg* incitement standard, see Hess v. Indiana, 414 U.S. 105 (1973) (using *Brandenburg* as the primary ground for reversal of a disorderly conduct conviction).

[30] 395 U.S. at 447.

[31] 391 U.S. 367 (1968). *O'Brien* seemed to subordinate the elements of speech and expression in symbolic draft-card burning and has received critical attention. *See, e.g.*, Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1.

purpose, its effect upon expression will be ignored. More true to the function of the first amendment would be a test that first attempts to determine whether expression or action was the dominant element in the conduct and then, if expression were found to predominate, gives that expression full protection.

Another set of legal doctrines relates to the problem, already mentioned, of indirect sanctions imposed upon political expression. The issues here are crucial. Protection against direct sanctions does not mean much in terms of political participation, if indirect restraints may be imposed. Citizens may have full freedom to exchange ideas, but if benefits may be cut off, livelihoods obstructed, or careers destroyed as soon as citizens attempt to implement ideas through political association, the system cannot be said to function as the framers had in mind. The Supreme Court's original reaction to this problem, in *American Communications Association v. Douds*[32] in 1950, was to apply the balancing test. This test afforded little protection and can hardly be expected to furnish more. Later Supreme Court decisions have imposed somewhat stricter requirements, approaching standards used in direct sanction cases.[33] But the Court has never fully clarified the issues. We are now in a less repressive period, but the problem still exists and could become acute again at any time.

One further doctrinal area requires serious attention. This involves the attitude and approach of the courts to various practices of the police and intelligence agencies. Again the issues are critical. The impact upon freedom of expression of political surveillance, political harassment, and similar police conduct cannot realistically be doubted. Yet the courts, led by the Supreme Court, have refused to curtail the activities of the intelligence services in surveillance cases.[34] It is hard to believe that the

---

[32] 339 U.S. 382 (1950). The "balancing" approach, as opposed to the "absolutist" position, was a classic area of confrontation between Mr. Justices Harlan and Black. Compare their views for the majority and in dissent, respectively, in Konigsberg v. State Bar of California, 366 U.S. 36 (1961). *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877 (1963).

[33] *E.g.*, Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[34] *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972); *cf.* California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (upholding extensive data collection). *But see* United States v. United States Dist. Court, 407 U.S. 297 (1972) (rejecting claims of inherent power in President to use wiretapping when required by "national security"); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967) (establishing con-

courts will not find first amendment violations in the harassment cases now pending; but *Rizzo v. Goode*[35] indicates that they are ready to place major obstacles in the way of proof and to afford inadequate remedies. The reluctance of the courts to place effective controls over the intelligence agencies is a troublesome sign of weakness in our system of freedom of expression.

B. *Monopoly and Distortion*

Perhaps the major discrepancy between the system of freedom of expression visualized by the colonists and the system as it exists today is the nature of the marketplace in which political expression takes place. That marketplace is dominated by the mass media, and the communications flowing into the market largely reflect a single political, economic, and social point of view. Many would-be speakers do not have access to the market, and there is a serious lack of diversity. The marketplace today, in short, is hardly a pure Adam Smith type of market, as the colonists undoubtedly expected it would be.

The solution is clearly not government regulation of the mass communications industry in the same way the government attempts to regulate the nuclear power industry or other business enterprises. Such regulation has been suggested or hinted at by former Vice President Agnew and other critics. The system of freedom of expression, however, must remain essentially *laissez faire*. It may be the last vestige of *laissez faire*, but the one thing it cannot be, and still remain a free system, is government controlled.

This brings us to a basic question to which we have not given much attention. How much equality of access to the marketplace should there be, or need there be, in a functioning system of free expression? Plainly we cannot have exact equality, by whatever standard equality may be measured. That kind of system could be instituted only by means of complete government control, a contradiction in terms. Majority views will always command the greater prominence. All that can be expected is that dissenting or unorthodox views have a *substantial* opportunity to be heard; it is not essential that they be as loud or as pervasive as

---

stitutional standards for permissible wiretapping and electronic surveillance by government authorities).

[35] 423 U.S. 362 (1976).

the majority views. It is not easy to say, however, where or how the balance should be struck.

One solution, vigorously urged by Professor Jerome Barron and others, is that the government should make broad provision, by constitutional interpretation or by legislation, for a compulsory right of access to the mass media.[36] As far as the printed press is concerned, it is hard to see how this could be accomplished, except perhaps for a limited right of reply in libel cases, without creating an intolerable amount of government control. The Supreme Court has apparently reached this conclusion, and *Miami Herald Publishing Co. v. Tornillo*[37] seems to preclude such action. Access to radio and television, however, is a different problem. At this point it need only be noted that different treatment between the print and the electronic media is justified, but only by reason of a scarcity of facilities in the latter area. As long as the channels available for broadcasting are limited (a fact now being disputed), the government must make some determination as to when and under what circumstances those desiring to speak may have the opportunity to do so. If a licensee is awarded the exclusive right to operate the facility, he can and should be required to give access to other speakers. If and when the scarcity is eliminated, however, the constitutional right to use the electronic medium would be the same as that to use the print medium. Economic disparities between those seeking to use the media would not constitute valid grounds for government interposition.

Within this legal context, then, what solutions are available? Those that have offered the most promise include the following:

(1) *Use of the antitrust laws to break up media monopolies and use of FCC regulations to achieve a wider diversity in the ownership of broadcasting stations.* No serious question of constitutional power is involved here. But the practical results so far have been minute, and there is not much hope of improvement. The amount of capital needed to operate a newspaper or run a broadcasting station is sufficiently high to preclude most individuals or groups seeking to present an alternative to the conventional viewpoint.

(2) *The fairness doctrine.* The fairness doctrine requires broadcasting stations to present programs on important con-

---

[36] *See* J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[37] 418 U.S. 241 (1974).

troversial issues and to provide for the representation of various viewpoints with respect to such issues. FCC regulations embodying the doctrine were upheld in *Red Lion Broadcasting Co. v. FCC*.[38] The doctrine has always been vigorously attacked by the broadcasting industry, and recently, forceful opposition has spread to other quarters. Moreover, serious administrative difficulties have been encountered. Few find the fairness doctrine to be very effective. On the other hand, it is preferable to nothing and in my judgment should be continued.

(3) *Right of access to the electronic media.* Provision for access to radio and television can take several forms. The most promising is a requirement of free time for political candidates. Another method is to compel broadcasting stations to accept paid political advertisements on the same general basis as commercial advertisements. Beyond this point the methods for providing access cannot be formulated in such objective terms, and they become more complex in administration. Nevertheless, if the will to go forward is present, there is no reason why greater diversity on the air could not be achieved. Although the Supreme Court held in *Columbia Broadcasting System v. Democratic National Committee*[39] that neither the first amendment nor the existing Federal Communications Act[40] required broadcasting stations to accept political advertisements, it did not hold that legislation to provide that or other forms of access would violate the constitutional rights of the broadcasters. On the contrary, the *Red Lion* decision, declaring that the broadcasting licensee is in effect a trustee or public agent, would seem to make clear that the constitutional path is open.

(4) *Cable television.* By far the most promising line of attack upon the monopoly problem in the electronic media lies in the development of cable television. By making available an almost unlimited number of channels to every household reached by telephone lines, cable television has the potential of eliminating most or all of the scarcity factor from this form of communication. The result could be a major breakthrough in the expansion of access to the electronic media. Whether cable television will actually open up the electronic media, or merely reinforce the present monopoly, depends upon the way its development is

[38] 395 U.S. 367 (1969).
[39] 412 U.S. 94 (1973).
[40] Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970).

regulated. At the present time the issue remains unresolved.

(5) *Expansion of the poor person's media.* The right of assembly and petition was an important feature of the system of freedom of expression in colonial times. Meetings, marches, and demonstrations were a major method of protest in the eighteenth century. Sometimes these assemblies were violent, as was the Boston Tea Party. Similarly, political pamphleteering played a prominent role. All of these methods, together with additions and refinements, remain available today for those who do not have the financial resources to reach an audience through the mass media. They were crucial to the civil rights movement, to the Viet Nam war opposition, and to similar political efforts of recent years. And they are likely to continue to be crucial in the coming decades. The legal support for these alternative modes of communication ought to be clarified and strengthened. Unfortunately, this has not been the direction of court decisions. The law of symbolic speech, the cases attempting to separate speech from action where assemblies have become unruly, and the rules pertaining to licensing and injunctions, all impose qualifications upon freedom of expression in this area. Recently the Supreme Court began to set serious limitations upon the place where first amendment rights may be exercised, as it did in the shopping center cases.[41] Thus, at the very time when use of the poor person's media is becoming even more critical to the effective functioning of the system, the courts are tending to circumscribe rather than expand rights to expression in that area.

(6) *Public subsidies.* Public subsidies provide a direct, affirmative way to diminish the monopoly of the mass media and increase diversity. They entail obvious problems, some of which will be mentioned at a later point.

C. *The Right To Know*

The colonists were fully aware of the importance in a democratic society of the right to know. A statement of James Madison is still one of the most relevant: "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

[41] Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

their own Governors, must arm themselves with the power which knowledge gives."[42]

Modern conditions have accentuated rather than diminished the significance of the right to know. Development of constitutional and legislative support for this basic right has become one of the most urgent tasks of our generation.

The Supreme Court has recognized in a number of cases that the first amendment embodies a constitutional guarantee of the right to know.[43] Yet it has never clarified the right or pressed it toward its logical borders. On the contrary, in some cases it has ignored the right to know or severely limited its application.[44]

In a number of areas the development of a constitutional right to know would play a significant role in the system of freedom of expression. In some situations the government attempts to interfere directly with the right to know, as when it imposes sanctions on reading or receiving certain materials. Here the right to know should be afforded full protection. In other situations the speaker, who is normally the party most likely to seek vindication of the right to free expression, may not be in a position to assert that right, and the listener or reader may find it necessary to defend the right of expression by invoking the constitutional right to know. From a procedural point of view the right to know may give standing to the recipients or potential recipients of the communication. The principles of the right to know may be applicable when the government exercises a monopoly or near monopoly over an area of expression, as in the field of elementary education, or attempts to allocate scarce facilities, as in the case of radio and television licensing. The most significant application of the right to know, however, lies in its potential role in increasing the amount of information available to the citizenry from the government. In my judgment nothing would advance the cause of democracy more than for the courts to establish the basic doctrine that government information is public information and that, aside from a few very precise and narrow exceptions, every citizen has a constitutional right to obtain all such information. Government secrecy is es-

---

[42] Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

[43] Such a right was implied, though not elucidated, in New York Times Co. v. United States, 403 U.S. 713 (1971), the so-called *Pentagon Papers* case. *See generally* H. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); R. LISTON, THE RIGHT TO KNOW (1973).

[44] *See* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

sentially in conflict with the underlying premises of the first amendment.

Apart from constitutional interpretation, the right to know may be implemented by legislation or by executive practice. Federal and state freedom of information laws and sunshine laws have already opened up much government information that was formerly withheld from the public.[45] Indeed, the enactment of these laws constitutes one of the most significant advances in the system of freedom of expression in the last decade. Although there is still much progress to be made, I believe we should consider this development as a major accomplishment.

D. *Affirmative Government Action*

Like other institutions in our society, the system of freedom of expression does not function in precisely the way the colonists intended. As we have grown older, bigger, and more complex, the system has developed flaws, distortions, and malfunctionings. In such a situation the citizenry, acting through the government, is normally called upon to make adjustments and lend support. In the case of freedom of expression, however, such intervention by government entails unusual risks. The paradox of looking to government for regulation of a system that, by definition, is immune from government control presents one of the most difficult problems of our age.

Yet we cannot assume that the problem is beyond solution. As we move inevitably toward a more collective society, we cannot retain the proper balance between individual rights and collective responsibility without mastering this dilemma. In some ways it must be considered the coming issue of our times.

Ultimately it is necessary to develop a set of basic principles that will permeate our society and control our practices. Some slight movement in that direction can be discerned. In creating the Office of Economic Opportunity we established and gave government support to some institutions that used the right to freedom of expression, thus enhanced, to attack the government and oppose its policies. The OEO is no longer with us, but the Legal Services Corporation carries on the tradition to some extent. And the government does award research grants or funds

[45] *See* 5 U.S.C. § 552 (1970 & Supp. 1974). An example of a state freedom of information law patterned after the federal model is N.Y. PUB. OFFICERS §§ 85 (McKinney Supp. 1976).

to universities and other institutions that, as understood in advance, may not adhere to official positions or desires. The Supreme Court has taken an important step in approving public subsidies in presidential election campaigns.[46] We must explore other possibilities and gradually move forward in this area.

IV. Facilitating Social Change

The operation of the system of freedom of expression in resolving social conflict and facilitating social change has had mixed results. This function has, of course, been affected by the same factors at work in connection with the function of permitting political participation.

On the whole, our society has certainly been an open one in which we have attempted to solve our problems through discussion rather than force. In the main we have done so, although force or threat of force has hastened some of the resolutions. There have been times, however, when the channels for discussion of radical or even unorthodox alternatives have been virtually closed off, as during the McCarthy period. And the failure surely damaged our efforts to deal with the issues facing us in the cold war and particularly during the Viet Nam war. Moreover, the distortions of the system by reason of the one-dimensional impact of the mass media have undoubtedly slowed our recognition, and our solutions, of many of the problems caused by business practices that failed to recognize the social costs involved. Our delay in working out an answer to some of our environmental problems and our groping for a solution to the energy problem, particularly nuclear energy, are examples of this impact.

In addition we cannot close our eyes to the fact that the use of the system of freedom of expression to effectuate social change was under the most severe pressure in our history during the Watergate period. It is some measure of the strength of the system among our leadership and among citizens as a whole that we survived the Watergate challenge.

In general, the system is now functioning in greater accordance with its basic purposes. We are not entitled to be overly optimistic, but there is a real chance that we can use it to solve our problems in a rational and peaceful way.

---

[46] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

V. PERSONAL SELF-FULFILLMENT

The function of the system of freedom of expression in allowing personal fulfillment has, in my judgment, been substantially realized at a certain level. Every person has extensive rights to speak, write, create works of art, or otherwise express himself or herself in similar ways. Whether that person can find an audience is, of course, another matter. Every person also has full rights to read, listen, observe, or otherwise receive communications. Again, there is no assurance that material of interest to him or her will be available. The right to form or hold beliefs is absolute, or nearly so. Thus, while there are many forces in our society that exert a repressive influence on the individual personality, the mandate of the first amendment does provide a foundation from which realization of human potential can begin.

The important and interesting question is whether the first amendment can be utilized to a greater degree in encouraging this development. To be sure, no one would suggest that the first amendment by itself could produce a liberated society, either in terms of Herbert Marcuse or Charles Reich, or in any other meaningful terms.[47] But it might be interpreted to embrace a wider area than it does now.

This broader range of the first amendment would protect forms of expression that are not so clearly related to verbal expression and that tend to involve more the relation of the individual to the collective rather than the individual in an isolated capacity. In this respect development of a wider scope for the first amendment would be akin to the development of the right to privacy. It would be responsive to the same needs, namely to encourage and protect areas of life that are threatened with domination by the growth of collective power. It would, in short, attempt to draw a more sensitive line between the rights and obligations of the person as an individual and as a member of the collective—between what the good society would regard as the private and the public spheres of life.

For example, the first amendment might be interpreted to forbid governmental interference with expression of the individual personality as shown through one's life style—one's clothing, hair style, appearance, mode of living, sexual preferences, career or lack of career. Or it might impose limitations on

[47] *See generally* H. MARCUSE, EROS AND CIVILIZATION (1966); H. MARCUSE, ONE-DIMENSIONAL MAN (1964); C. REICH, THE GREENING OF AMERICA (1970).

state paternalism, as in the requirement to use crash helmets, or in restrictions on the right to choose one's style of death. Or greater protection might be extended to rights of conscience—individual positions held not only as a result of religious convictions but out of intense moral or ethical feeling.

To put the first amendment to such uses would undoubtedly carry us far beyond what the colonists specifically had in mind. And, of all the justices who have sat upon the Supreme Court only Mr. Justice Douglas and, to a somewhat lesser degree, Mr. Justice Thurgood Marshall would appear to have had any place in their philosophy for such an extension of the first amendment.[48] Moreover, there are enormous difficulties in working out the appropriate doctrines. It would be hard to separate expression from action in this context. Nor would it be easy to decide just when the rights of the individual ended and those of the collective began. The formulation of reasonably precise, workable rules would be hazardous. Yet these issues seem to me worth serious attention. It may be that the system of freedom of expression should begin to grow in this direction.

VI. Administration and Procedure

One more set of problems remains to be noted. The extent to which the substantive rights set forth in the first amendment serve the interests the colonists had in mind depends upon rules and practices relating to their administration and enforcement. These are matters that affect not only the first amendment but the entire Bill of Rights and, indeed, all protections for the individual to be found in our constitutional scheme. They cannot be discussed here, but I must point out that the trend of decisions in the Supreme Court in this area has given rise to very serious concern. Recent rulings on standing, class actions, attorney's fees, federal jurisdiction, remedies, and similar matters have had the result of making the federal courts less available and less effective for the vindication of first amendment rights. The problems of the federal courts that are given as justification for this development should not be ignored. But the solution of

[48] *See Symposium, In Honor of Mr. Justice Douglas*, 74 COLUM. L. REV. 341, 356-57 (1974). *See also* Freeman v. Almon Flake, 405 U.S. 1032 (1972) (Douglas, J., dissenting from denial of certiorari). For the views of Mr. Justice Marshall, see Kelley v. Johnson, 425 U.S. 238, 251 (1976) (dissenting opinion); Procunier v. Martinez, 416 U.S. 396, 427 (1974) (concurring opinion); Village of Belle Terre v. Boraas, 416 U.S. 1, 15-17 (1974) (dissenting opinion).

these problems need not and must not forego adequate enforcement of longstanding rights guaranteed by the Federal Constitution.

VII. Conclusion

In establishing the political and legal basis for a system of freedom of expression the colonists were both daring and optimistic. They were willing to try an experiment that, in its full ramifications, was unprecedented. They were eager to make the attempt because they believed in progress; because they believed that mankind could learn from its mistakes, innovate, and gradually move forward; and because they believed that, ultimately, rationality, liberation, and peace would prevail. On the whole I believe that history has so far justified their expectations and their hopes. The system of freedom of expression, both in its theory and in its practices, has slowly matured. Today, despite all its defects, it represents a remarkable achievement. Whether it will continue to grow and adapt to new circumstances, or lose its vitality and be abandoned, depends upon whether we, like the colonists, are daring and have faith in our capacity for progress.