Towards an Extension of the First Amendment: A Right of Acquisition

Michael R. Klein

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TOWARDS AN EXTENSION OF THE FIRST AMENDMENT: A RIGHT OF ACQUISITION

MICHAEL R. KLEINT

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I. AN INTRODUCTION

The guarantees of freedom of expression set forth in the First Amendment* are as basic to our concept of government as the form of the government itself. For unless ideas can be intelligently and freely exchanged, there can be no justification for adherence to a system which entrusts the citizen with the power of the ballot. Ignorance does not become wisdom merely by being multiplied.

Thus, it is of paramount importance to the society, as well as to the individual, that the nation be kept as free as is possible from inhibitions—small or large, obvious or covert, standard or unique—which may serve to delimit the citizen's ability to base his ballot upon a full, free and intelligent discussion.

Holmes described the system as a marketplace of ideas. The simile has particular significance for this article. The market system presumes a seller, but it also presumes a buyer as well as access to and from the

† Executive Editor, University of Miami Law Review; Student Instructor in Research and Writing for Freshmen.

* In an attempt to insure a comprehensive grasp of the area of this comment, the writer resorted to a number of treatises dealing with the general area of the first amendment. Among the most helpful were: CHAPPEE, FREE SPEECH IN THE UNITED STATES (1948); CHAPPEE, FREE SPEECH IN THE CONSTITUTION (1941); MEIKLEJOHN, POLITICAL FREEDOM (1st ed. 1960); MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1st ed. 1948); Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877 (1963). An interesting analysis was added by the publication, late in the preparation of the paper, of an article by Justice Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1 (1965).
FIRST AMENDMENT

market. Of the selling aspect of our marketplace of ideas, the Supreme Court has considered and determined much. As a result, there is today a defined, protectible interest against government action which inhibits expression—be it against the person of the expressor, the time or place of the expression, or the content of the expression.

Much less, however, has been decided about the protectible interests of the buyer, or for that matter, about the access to information which provides the basis of the expression. In both of these, the interest is in acquiring the basis for decision making. While there have been decisions discussing the nature or extent of this interest, they have been relatively few in number and limited in their treatment.

In the past two terms of the Supreme Court, however, the nature of that interest was thrice presented to the Court.\(^1\) It is the purpose of this article to examine each of those three cases: first, in the perspective of their respective areas; and second in relation to First Amendment theory.

After that analysis, the interest itself will be analyzed: first, as it was recognized prior to these three decisions; second, as it was affected by these three decisions; and finally, as it currently appears to exist as a feature of the First Amendment landscape.

II. THE TALE OF THREE CASES

A. The Right of International Travel

1. GENERAL HISTORICAL PERSPECTIVE

Of the three decisions which provide the springboard for this article, two of them, Apthecker v. Secretary of State,\(^2\) and Zemel v. Rusk,\(^3\) deal with a relatively modern area of constitutional concern—restriction upon international travel. The area is a modern one because the restrictions themselves are rather contemporary developments in American society.

Indeed, until the early twentieth century, the ingress and egress of American citizens was relatively unrestricted by any form of government action. The lack of restriction had its historical roots in early Anglo-Saxon tradition. The Magna Carta ostensibly deprived the King of the right to restrict the exit of his citizens from English soil,\(^4\) and it was thereafter

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4. Two specific clauses of the Magna Carta restricted the power of the king to restrict the right of Englishmen to enter or leave England. One, clause 41, extended a rather comprehensive system of such rights specifically to merchants. The other, clause 42, was more general in its apparent application:
   c. 42. It shall be lawful in the future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country
generally believed that the English citizen had a common law right to enter or leave his country at will.\(^6\)

There is little reason to believe that any other rule obtained in early American history. Our early post-constitutional history is relatively free of any evidence of restraint on internal or international travel by American citizens. Indeed, the Supreme Court had early declared that the right of an American citizen to travel among the several states was a constitutional right which was protectible against state infringement.\(^6\) Moreover, while it became customary for passports to be issued to an American citizen who desired to travel outside of the United States, the statutes authorizing their issuance were clearly and correctly interpreted to limit the effect of the passport to one of a request for courteous treatment in the contemplated nation of travel,\(^7\) rather than as a legal prerequisite to international travel. Subsequent actions, both legislative and administrative, have altered this position in the United States,\(^8\) but it is

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5. In the subsequent republication of the Magna Carta liberties by Henry III, after the death of King John, clause 41, supra note 4, was deleted. Later practices by the Kings, especially the imposition of the writ of \textit{ne exeat regnum}, serve to demonstrate that the right of travel could be restricted by an exercise of royal power. Yet these restrictions were few, and over the years their impositions were so rarely employed that it came to be believed that the Englishman was clothed with a common law right to travel freely to and from his country, "for whatever cause he pleaseth, without obtaining the King's leave...." 1 Bl. Comm. 265. For a more thorough historical analysis of the early English developments, see Note, \textit{Passports and Freedom of Travel}, 14 Geo. L.J. 63 (1962).

6. The right of a citizen to travel between the states was first declared by the Court in Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1897). We are all citizens of the United States and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. Quoting the dissent of Chief Justice Taney in \textit{The Passenger Cases}, 48 U.S. (7 How.) 283 (1849).

The nature of that right was subsequently defined as a "liberty" protected by the due process of law in William v. Fears, 179 U.S. 270, 279 (1900), but the Court subsequently chose to be less definitive when it expanded the characterization in Edwards v. California, 314 U.S. 160, 163 (1941):

Freedom of movement and of residence must be a fundamental right in a democratic State. Whether within the privileges and immunities clause of the Fourteenth Amendment or within the term liberty in the due process clause, it is a basic constitutional right, ....

7. Every statute authorizing the imposition of restraints on the travel of citizens outside of the United States has been related to, and justified upon, the existence of military conflict. For an early judicial analysis of the passport in a period prior to its becoming a legal prerequisite to international travel, see Urtetiqui v. D'Arbel, 34 U.S. (9 Pet.) 692 (1835). The statutes, and their respective wars are: \textit{War of 1812}, Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 199; \textit{World War I}, Act of May 22, 1918, ch. 81, § 2, 40 Stat. 559, made effective by a Presidential proclamation of emergency, 40 Stat. 1829 (1918), and terminated at the conclusion of hostilities by Joint Resolution on Mar. 31, 1921, ch. 136, 41 Stat. 1359; \textit{World War II}, Act of June 21, 1941, ch. 210, 55 Stat. 252.

8. In the Immigration and Nationality Act of 1952, the passport was made, in § 215 of that Act, a condition of lawful exit and entry during a state of "national emergency." 66 Stat. 190, 8 U.S.C. § 1185. The President was vested with the power to proclaim the
significant to note this provision in the Declaration of Human Rights, adopted by the General Assembly of the United Nations:

Everyone has the right to leave any country, including his own. 9

2. THE DEVELOPMENT OF RESTRICTIONS

It was not until 1856, that the Congress reacted to the increasing significance of international travel. This reaction came in the form of a delegation of authority to the Secretary of State over the issuance of passports. That delegation was delimited only by the qualification that it be exercised pursuant to “such rules as the President shall designate and prescribe for and on behalf of the United States...” 10

It is history that the passports authorized therein were, at the time, little more than a request for courtesy addressed to those nations to which the applicant proposed to travel. 11 This remained the case, with few exceptional instances, over the course of several re-delegations of that power and discretion. 12 Indeed, until 1952, the Secretary’s denial of a passport had no legal effect on the right of entry or exit of American citizens except for brief impositions of greater legal import during the course of both World Wars.

In 1952, the pressures of the Cold War led to the enactment of the Immigration and Nationality Act, which provided in section 215 that upon a proclamation of a state of “national emergency” by the President it would thereafter be unlawful for anyone to enter or leave the United States without a valid passport. 13

Early in the following year, President Truman proclaimed such a state of “national emergency.” 14 That proclamation has never been re-
scinded, and as a result the power vested in the Secretary of State to issue or restrict the issuance of passports is today the power to permit or restrict international travel.

3. JUDICIAL INVOLVEMENT

It is within this framework of legislative and executive activity that the Court has had to work its way. The constitutional ramifications of restraints on the right of an American citizen to travel outside of the United States are many in number and fraught with complexities. In view of the rather brief span of time during which these issues have become a matter for judicial involvement, the Court has more than adequately lent definition to those ramifications. Indeed, the whole width of the Court's opportunities for decision in this area can be measured by three major cases over a period of seven years.

The first case to place the major constitutional issues before the Court was Kent v. Dulles, in 1958. For a number of years prior to the Kent case, the State Department had employed a practice of refusing passports to various citizens on the basis of the political beliefs or associations of the particular applicant. Mr. Kent was such an applicant. The Secretary of State had determined that Kent was a Communist, and that he had shown "a consistent and prolonged adherence to the Communist Party line." Accordingly, his application for a passport was denied pursuant to section 51.135 of the regulations promulgated by the Secretary of State.

15. While a few previous cases dealt in one way or another with the privileges of passport and of travel, e.g., Urtetiqui v. D'Arbel, 34 U.S. (9 Pet.) 692 (1835); Perkins v. Elg, 307 U.S. 35 (1939); the issues there presented did not present for judicial scrutiny the nature of the right to travel, nor did they raise the questions relating to the passport as a legal prerequisite to international travel.

These more modern aspects were presented on occasion to the lower federal courts, and not without some significant effect. After a series of decisions, it became clear that the denial or issuance of passports was subject to the requirements of procedural due process. E.g., Boidin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956); Nathan v. Dulles, 129 F. Supp. 951 (D.D.C.), appeal dismissed, 225 F.2d 29 (D.C. Cir. 1955); and Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952). It was shortly after the Bauer decision that the State Department responded by the creation of the Board of Passport Appeals. Moreover, the protection of substantive due process was extended to the restriction of travel in Schactman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955) in an opinion which presaged much of the later action taken by the Supreme Court.


17. Dayton v. Dulles, 357 U.S. 144 (1958) was before the Court contemporaneously with Kent, but the issues were so similar that the Kent decision resolved the questions in both and as a result, Kent stands as the case of significance.

18. For an examination of those practices, see Comment, Passport Refusals for Political Reasons, 61 YALE L.J. 171 (1952). See also the discussion in CHAPEE, Freedom of Movement, THIRTEEN HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 162-213 (1956).


20. State Dep't Reg. 108.162, 17 Fed. Reg. 8013, issued Sept. 4, 1952: In order to promote the national interest by assuring that persons who support the world Communist movement, of which the Communist Party is an integral unit,
response to which the Secretary asserted that he had been vested with the authority for such denials by the repeated re-delegations of control over the issuance of passports to the executive branch.

The Secretary did not claim that he had been specifically directed or permitted to deny passports on the basis of the political beliefs of the applicant. He argued that the consistent re-delegations of general discretion implied this specific discretion because he had been exercising the discretion in that manner over a period spanning several legislative renewals of the power grants.\textsuperscript{21} Moreover, he bolstered his contentions with allegations that Congressional activity indicated Congress' knowledge and tacit approval of this practice.

The Court, in a five to four decision, rejected the claim of the Secretary, and held that the general legislative grants of discretion did "not delegate to the Secretary the kind of authority exercised here."\textsuperscript{22} By so declaring, the Court seemingly sidestepped the constitutional issues involved; however, the majority opinion, authored by Mr. Justice Douglas, devoted a considerable degree of attention to those issues.

Perhaps most significantly, the Court chose to characterize the constitutional status of the right of international travel by American citizens:

The right to travel is part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement is basic to our scheme of values.\textsuperscript{23}

The protection of the Fifth Amendment had been previously ascribed to travel by the lower federal courts,\textsuperscript{24} but the \textit{Kent} declaration lent significant effect to that extension of the due process umbrella.

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\textsuperscript{21} As previously discussed in note 7 supra, the legislation authorizing the Secretary of State to issue passports arose as early as 1815, with the first really significant legislation in 1856. That delegation of authority was continually, if sporadically, re-delegated up to this very date, and that necessarily includes the time of the \textit{Kent} determination. And, as the reader shall see, \textit{Kent} created no barrier for its further employment. However, all of these delegations were of a general nature, and, in the Court's view, the discretion exercised in \textit{Kent}'s circumstance had never been contemplated by that grant. "The key to that problem [speaking of the continuing re-delegation] is the manner in which the Secretary's discretion was exercised, not the bare fact that he had discretion." 357 U.S. at 125.

\textsuperscript{22} \textit{Id.} at 129.

\textsuperscript{23} \textit{Id.} at 125.

\textsuperscript{24} Procedural due process was initially extended in Bauer \textit{v.} Acheson, 106 F. Supp. 445 (D.D.C. 1952); substantive due process, in Schactman \textit{v.} Dulles, 225 F.2d 445 (D.C. Cir. 1955).
Perhaps as significant as that extension, however, was the absence of any clear First Amendment protection in the opinion of the Court. In its introductory language the Court had made it rather clear that it recognized the First Amendment implications of Kent's petition. Kent was being discriminated against because of his beliefs and his associations. Moreover, the Court was more than merely implicit in its recognition of the societal implications of precluding American citizens from travel abroad. Justice Douglas chose to substantiate the Court's characterization of travel as a protected liberty with a quotation from Professor Chafee:

[T]ravel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributed to sounder decisions at home.26

The presence of Professor Chafee's language in the opinion is certainly cause for comment. Having determined that Congress had not delegated the kind of authority exercised by the Secretary,26 it was quite unnecessary for Mr. Justice Douglas to have gone to this extent to justify the dictum that travel was a liberty within the contemplation of the due process clause of the Fifth Amendment. Moreover, Chafee's analysis of the ramifications and importance of international travel speaks far more strongly to interests of a First Amendment nature, than to those of the Fifth. Yet nowhere in the remainder of the Court's opinion is there any indication that the Court considered the proposition that there are significant interests of an expressional nature inherent in international travel. The quotation directly raised considerations of clearly First Amendment import, but the Court's own declarations are conspicuously devoid of any direct reference to those implications. Thus, in this sense, at the very least, the decision in Kent v. Dulles left the nation waiting for a really meaningful examination of the great constitutional issues involved in the area of international travel.

25. 357 U.S. at 126, citing CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 187 (1956).
26. The status of this added discussion was bitingly characterized as obiter dictum by the dissenters (Justices Clark, Burton, Harlan, and Whittaker):
   The majority's resolution of the authority question prevents it from reaching the constitutional issues raised by the petitioner. . . . In view of that, it would be inappropriate for me, as a dissenter, to consider these questions at this time. 357 U.S. at 143.
4. Apthecker: An Ignored Plea

In 1964, the Supreme Court met head on the issues it had avoided in Kent v. Dulles. That decision, in the case of Apthecker v. Secretary of State, is the first of the three cases with which this paper is primarily concerned.

In 1961, the government finally succeeded in bringing the American Communist Party within the registration requirements of the Subversives Activities Control Act of 1950. Section 6(b) of that Act made it unlawful for any member of a "registered" organization, to make application for, or use, or attempt to use a passport. Thus, in 1961, when the registration order became final, the State Department sent notices to known members of the American Communist Party notifying them, inter alia, that their passports had been revoked pursuant to the provisions of the Act.

Herbert Apthecker was, at the time, the chairman of the American Communist Party, as well as the editor of its theoretical organ, Political Affairs. After exhausting his administrative remedies, Apthecker sought, and was denied, declaratory and injunctive relief from the action of revocation. On direct appeal to the Supreme Court, he argued that section 6 was, on its face and as applied, "an unconstitutional deprivation of the liberty guaranteed in the Bill of Rights."

As may be indicated by that choice of language, Mr. Apthecker's challenge to the constitutionality of section 6 was sweepingly broad. He chose to level an attack which was not confined to the protection of due process established in Kent v. Dulles, and which was heavily laden with First Amendment overtones. The attack under the First Amendment was two pronged. The first prong struck at the basis for the Secretary's denial. It characterized the denial as a discrimination based upon, and thus destructive of, the freedom of beliefs and associations of the applicant. It was Apthecker's position that this discrimination amounted to a prior restraint upon the freedom of belief and expression in that it forced a citizen to abandon those freedoms as a prerequisite to obtaining a passport.

The Court coupled this argument with the due process protection, and declared that the provisions of section 6 were invalid on their face.

28. The order required to force registration by the Party was handed down by the Subversive Activities Control Board on October 20, 1961, 26 Fed. Reg. 9923, and had already been upheld as constitutional by the time of the Apthecker case in Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961).
30. Flynn v. Rusk, 219 F. Supp. 709 (1963). Flynn was a co-complainant with Apthecker, both in this lower court proceeding and in the appeal taken to the Supreme Court.
The language which the Court employed in announcing that decision is curious and peculiar in that it is a clear instance of intermingling traditionally First Amendment terminology with a holding that the Court itself characterized as falling under the Fifth Amendment due process clause:

In our view the foregoing considerations compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported by only a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition excludes plainly relevant considerations such as the individual’s knowledge, activity, commitments, and purposes in and places for travel. The section therefore is patently not a regulation “narrowly drawn to prevent the supposed evil,” cf. Cantwell v. Connecticut, 310 U.S., at 307, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, NAACP v. Button, 371 U.S., at 438.82

But appellant’s First Amendment contentions went beyond an attack directed at the basis of denial of his passport. His attack was also directed at the restriction on his travel. In his original complaint the appellant had alleged that his purposes in going abroad included the acquisition of knowledge and observations which would be reflected in his teaching and writing upon his return to the United States.83 In his brief to the Court he pressed this purpose as an independent First Amendment argument:

[T]he section also deprives appellants of the opportunity to study conditions abroad and to form opinions on the basis of what they see and hear. The situation is the same as if appellants were prohibited from going to lectures or reading books. Appellants are being denied the First Amendment “right to hear” in contravention of the Amendment’s function of facilitating self-government by insuring to the people unfettered access to information and ideas....

The vice of section 6 is compounded by the fact that its prohibition of foreign travel constitutes, as in the present case, a prior restraint on the exercise of First Amendment rights.84

The response of the government to this argument was twofold. First

32. Id. at 514.
33. The same basic argument had been presented by Mr. Kent. Indeed, it was probably with this argument in mind that Justice Douglas chose to incorporate the views of Professor Chafee in his opinion in Kent, supra note 25 and accompanying text.
34. The entire record on appeal including the briefs of both parties are recorded on microfilm on file in the Baron de Hirsch Meyer Law Library at the University of Miami School of Law. Hereinafter, the material therefrom will be cited as Brief of (name of party) (page number of the record). Brief of Apthecker 14.
the government argued that "The decided cases hold unanimously that liberty to travel abroad is protected by the substantive due process clause of the Fifth Amendment, not the First Amendment." Second, and more responsive to the appellant's argument, the government argued against the recognition of any protectible First Amendment right in acquiring access to information. Its contention was simply that to recognize such an interest in this case would be to open a Pandora's box that it would be difficult, if not impossible to close.

The Court chose, almost completely, to ignore this First Amendment plea raised by Apthecker. The only language in the entire opinion which appears to speak to the First Amendment ramifications of travel was presented as a part of the Court's explanation of its refusal to determine the validity of section 6 "as applied." "[F]reedom of travel is a constitutional liberty closely related to rights of free speech and association."

The absence of any verbalized consideration is especially noteworthy once one remembers that the same basic contention had been before the Court in the Kent case. Indeed, it was to this aspect of international travel that Justice Douglas directed both his attention and Professor Chafee's statement in the Kent case. In Apthecker, Justice Douglas concurred in a separate opinion, approving the result and reasoning of the majority, but adding a few comments of his own about the paramount importance of freedom of movement to a free society. In fine, his analysis was that short of the circumstance of active war, or some independent power to detain as a criminal sanction, the right of an American citizen to travel within or outside his country should be unrestricted. Absent, however, from the expressions of Justice Douglas, was anything amounting to or calling for the recognition of a protectible First Amendment interest arising out of international travel. It remained for another case and another day for the Court to respond directly to the First Amendment

35. Brief of Secretary of State 55-56.
36. In the words of the Brief: Moreover, under appellant's argument, it would be difficult, indeed, to conceive of any activities that could not be said to provide access to information or to a particular forum for expression of beliefs. For example, deprival of a security clearance, it could be argued, would conflict with the First Amendment because knowledge of classified materials would permit a citizen to express more ably his views about the issues of the day; refusal to permit an individual personal contact with the President or a judge or to appear before Congress, would, it could be contended, directly restrict a citizen's free expression of ideas. In short, section 6 imposes only indirect, peripheral restrictions on appellant's First Amendment rights. Id. at 56.
37. Apthecker v. Secretary of State, supra note 31, at 517.
38. Supra note 25 and accompanying text.
39. Certainly he came close enough! Consider this excerpt from p. 520 of the dissent: Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society. Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged, . . . only illegal conduct being within the purview of crime in the constitutional sense. (Citations omitted.)
ramifications of restraints upon the capacity of the citizen to acquire information through his travels.

5. Zemel: OUTRIGHT REJECTION

By 1965, Kent had already made it clear that the executive branch itself had no independent power over the control of exit from and entry into the United States. Apthecker had added to the definition of the area by spelling out the Court's distaste for the exercise of the delegated authority possessed by the executive in a manner which discriminated against one on the basis of his beliefs or associations. These decisions left two questions open: first, could Congress more narrowly draw a statute under which the passport could be precluded to one on the basis of his politics? This question remains open. The second was whether there might be a protectible First Amendment interest in free travel outside the United States which could act as a limitation upon the power of the Congress to enact even non-discriminatory legislation which would restrict the right of travel. The second question is the basic question to which this article responds. The Court had its first opportunity to do so in Zemel v. Rusk, the second case of our primary concern.

Mr. Zemel, like Messrs. Kent and Apthecker, ran into problems when he attempted to travel. Unlike those gentlemen, the record did not indicate any Communist affiliation on Zemel's part. Indeed, the matter of his political affiliations had nothing to do with his difficulties. Mr. Zemel ran into problems because of his proposed destination—Cuba.

When the Congress authorized the President to establish continuing rules and regulations guiding the Secretary of State in his exercise of discretion over passport issuances, the President implemented that delegation with an Executive Order which declared, inter alia,

The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

40. The Court refused to determine the possibility of such a statute sustaining a "valid as applied" test, choosing instead, because of heavy First Amendment overtones, they declined to require Apthecker to "assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting [his] travel." 378 U.S. at 517. Previously, this refusal to test the statute "as applied" had been a procedure reserved to First Amendment cases. E.g., NAACP v. Button, 371 U.S. 415 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940).

41. 381 U.S. 1 (1965).


Those enumerated alternatives are all directed at a type of travel prohibitions termed "area restrictions." This particular grant of discretion remains in effect today, and provided the basis for restriction placed upon travel to Cuba, ordered by the Secretary of State in 1961.

The order of the Secretary, however, had significantly more effect in 1961 than it would have had in 1856, when Congress first authorized the delegation of authority. In 1856, passports were mere conveniences, but by 1961 the provisions of Section 215 of the Immigration and Nationality Act of 1952 had been activated by the proclamation of a state of national emergency. This proclamation had made a passport a legal prerequisite to lawful international travel. Combined with the Secretary's declaration of the area restriction, the legislation and the proclamation set the stage for the case of Zemel v. Rusk.

In late 1962, Mr. Zemel, an American citizen and holder of an otherwise valid passport, applied to the State Department for the validation of his passport for travel to Cuba. His application was denied under the terms of the existing regulations, which limited such validations solely to those cases specifically determined by the Secretary of State to be in the "best interests of the United States, such as newsmen or businessmen with previously established business interests." Zemel was not a newspaperman, nor did he have business interests in Cuba; his interests were of a different nature.

In his original correspondence, as in his complaint and appeal, Zemel had declared that his reason for wanting to go to Cuba was "to satisfy my curiosity about the state of affairs in Cuba, and to make me a better informed citizen." According to the Secretary of State, this did not meet the previously prescribed standards for such travel. But by this approach Zemel once again placed before the Court the question—what is the extent of a protectible First Amendment interest in the freedom of acquisition of information which is relevant to the exercise of the protected freedoms of expressions?

The Court chose to reach, rather than ignore, this question in Zemel. It did so despite a challenge to the intent of Congress to authorize such "area restrictions" which was based upon the same conflicting conten-
tions as the similar challenge in *Kent v. Dulles.* Distinguishing these area restrictions from the personal restriction placed before it in *Kent,* the Court found more evidence to support the contentions of the Secretary than it had chosen to find there.

Having thus disposed of the objection to the imposition of the area restriction, the Court turned its attention to the due process challenge and found it lacking. Its analysis in this regard was heavily colored by an apparent concern over the foreign policy overtones of these restrictions. The history of these impositions was felt to be highly reflective of their significance to the conduct of foreign policy. Added to this concern was the legislation calling upon the President to "use such means, not amounting to acts of war, as he may think necessary and proper to secure the release of an American citizen unjustly deprived of his liberty by a foreign government." Such an incident might well develop out of travel to Cuba, reasoned the Court, and thus it concluded its consideration of the due process objection by declaring

that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.

Only when finished with all of these other questions, did the Court turn its attention to the First Amendment argument of Mr. Zemel. The significance of its conclusions in this regard are of such vital importance that they are here set out in full:

Appellant also asserts that the Secretary's refusal to validate his passport for travel to Cuba denies him rights guaranteed by the First Amendment. His claim is different from that which was raised in *Kent v. Dulles,* *supra,* and *Apthecker v. Secretary of State,* *supra,* for the refusal to validate appellant's passport does not result from any expression or association on his part; appellant is not being forced to choose between membership in an organization and freedom to travel. Appellant's allegation is, rather, that the "travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at firsthand

50. This writer has been unable to convince himself that the matter was dictated more by compelling weight of history than by a simple matter of choice.

51. The area restriction undoubtedly does have a far more substantial historical foundation than did the Communist discrimination presented in the *Kent* case. Area restrictions have been imposed, for whatever reasons, in almost every instance of armed conflict which occurred during the course of our nation's history. Often it was employed when the United States was not even a combatant. The Court's opinion contains a rather thorough presentation of these instances. 381 U.S. at —, 85 S. Ct. at 1276-1278. But this writer questions whether there was not sufficient evidence to have objectively sustained the government's contentions in *Kent.*


53. 381 U.S. at —, 85 S. Ct. at 1280.
with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies.” We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

This position was not announced without opposition from Mr. Justice Douglas, author of the majority opinion in *Kent* and of a specially concurring opinion in *Apthecker*. In *Kent*, it will be recalled, the Justice spoke in terms which indicated consideration of First Amendment interests, if they did not speak to the Amendment directly. In *Apthecker*, he still skirted the edge of the First Amendment. In *Zemel*, Justice Douglas chose to be more explicative.

Referring to *Kent v. Dulles*, as an opinion which “reflected a judgment as to peripheral rights of the citizen under the First Amendment,” the Justice spoke directly to that periphery:

The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without those contacts, First Amendment rights suffer.

To Mr. Justice Douglas, the majority was declaring the American society immature, for it permitted an administrative official to determine for the citizenry where they may go, and thus to a substantial extent, what they should see, hear and know. While his high regard for this pre-expressional value of travel expressly admitted of some limitation, i.e., war or pestilence, he contended that the denial of the freedom of travel

54. *Id. at —*, 85 S. Ct. at 1280-1281. The Court's response to this question is strikingly similar to the government's response to this same argument made by Apthecker, that response appearing in the *Brief of Secretary of State* at 56, *supra* note 36.
55. *Id. at —*, 85 S. Ct. at 1284.
56. *Id. at —*, 85 S. Ct. at 1284.
to certain areas on grounds other than these should be declared violative of the principle that governmental regulations may not "sweep unnecessarily broadly and thereby invade the area of protected freedoms."^{57}

The opinion of Mr. Justice Douglas was, however, a dissent, and there has been no subsequent determination made by the Court in the area of travel restrictions since the *Zemel* case. Yet, there remains much food for thought in the expressions of Mr. Douglas. The conclusion of this article will direct itself to those thoughts. Before coming to that discussion, however, there remains one additional case, in another area of the law, for examination.

**B. The Right to Receive the Mail**

1. **GENERAL HISTORICAL PERSPECTIVE**

The last of the three cases of principle attention is *Lamont v. Postmaster General*,^{58} which, as may be indicated by the case name, was concerned with the constitutionality of an exercise of postal power by the Postmaster General. In fine, the petition which was presented to the Court placed in issue the constitutionality of the detention by the Postmaster of communist political propaganda addressed to the petitioner. As in the previous discussion of the passport restriction cases, a general historical analysis of this area is an important prerequisite to an understanding of the issues.

Federal involvement in the carriage of the mails was one early extension of the government into a previously private sector of activity. The power to legislate in this area was specifically allocated to the Congress as one of its enumerated powers.^{59} But as with all of the Congressional powers, enumerated or implied, the exercise of that power is subject to the limitations set forth elsewhere in the Constitution.

It must be recognized at the outset that the postal power admits of at least two aspects. There is, of course, the power to enter the area at all. This was never in question; the Constitution was too explicit. The problems arose out of the second aspect, the *implicit* "police" power to regulate that over which the Constitution delegated authority.

Congressional exercise of this power to police the mails is similarly subject to a dichotomy. It is one thing to regulate the materials going

^{57}. *Id.* at —, 85 S. Ct. at 1286, citing NAACP v. Alabama, 377 U.S. 288, 307 (1964). Moreover, he more lucidly characterized the interest as one of clear First Amendment import, indeed, free speech import, although he did qualify that characterization by declaring the rights as "at the periphery of the First Amendment, rather than at its core, largely because travel is, of course, more than speech: it is speech brigaded with conduct." *Id.* at —, 85 S. Ct. at 1286.

^{58}. 381 U.S. 301 (1965).

^{59}. "The Congress Shall have Power . . . to establish Post Offices and post Roads." U.S. CONST., art. 1, § 8, cl. 7.
through the mail as to their size, classifications, or potential danger they present to the physical welfare of the postal employees handling the mail. It is quite another matter to regulate the mail as to moral, political, or other societal considerations which touch upon the substance of the communication. Again, there has been little in the way of controversy with the first type of regulation. The bulk of the constitutional challenges have been directed at the Congressional and administrative exercises of the second type of policing power. The remainder of this section will concern itself with this second type of power, the regulations placed upon the content of the communications. Thus where "police power" is subsequently spoken of, it is with reference to this type of power.

The first comprehensive regulations of this nature were enacted in the mid-1860's and written into the first comprehensive postal code in 1872. The approach taken by these initial statutes was to declare both obscene and fraudulent communications "non-mailable matter," thereby making it unlawful for someone to use the mails to transmit such matter.

The first challenge to these provisions was placed before the Court in the case of *Ex parte Jackson* in 1878. Counsel for the petitioner, who had been convicted of sending lotteries through the mails, argued before the Court along these lines:

> Our proposition, broadly stated is this, that Congress has no power to prohibit the transmission of intelligence, public or private, through the mails; and any statute which distinguishes mailable from unmailable matter merely by the nature of the intelligence offered for transmission is an unconstitutional enactment.

While the Court did sustain the constitutionality of the statute in question, it chose to accompany that determination with a clearly delineated policy to govern the procedures which could be constitutionally employed to enforce any legitimate exercise of this type of postal power.

At the outset, the Court made it clear that it would remain consistent with the common law prohibition against prior restraints, and thus would only sustain a statute aimed at punishing a past violation. Moreover,

62. 96 U.S. 727 (1878).
63. As reported in the Rose edition of 24 L. Ed. 877 (1878).
64. "The [postal] power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried, necessarily involves the right to determine what shall be excluded." *Ex parte Jackson*, 96 U.S. 727, 729 (1878).
the enforcement procedures could not encompass an effective prior restraint by the implementation of abusive methods of detection of the violations.

Sealed letters, declared the Court, were of a sufficiently private and personal nature as to fall under the umbrella of the Fourth Amendment guarantee against unreasonable searches and seizures.\(^5\) Thus, in order to investigate sealed letters for violations of the non-mailable provisions, the postal department would first have to obtain a warrant to search the particular letter in question. In order to do that, the authorities would have to establish *probable cause*.

The other half of the dichotomy dealt with open, usually printed matter. The Court set forth the rules governing their examination in these terms:

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, 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.\(^6\)

The statement leaves open little in the way of conjecture as to the applicability of the First Amendment as a limitation on the police postal power. And, while the language itself seems directly to invoke only the freedom of the press aspect of the First Amendment, there seems to be little reason to suspect that the direct invocation of that particular aspect was intended indirectly to suggest inapplicability of any other.

The dichotomies set forth in the *Jackson* decision provided a rather long lasting basis for problem analysis. In the years and cases which followed, there was little in the way of really significant deviation in problem solving. Indeed two latter challenges to these same lottery statutes which swiftly followed the *Jackson* case added little more than a strengthening of the postal police power in that area.\(^7\)

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65. "The right of the people to be secure in their persons, houses, *papers* and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const., amend. IV. (Emphasis added.)

66. *Id.* at 733. (Emphasis added.)

67. *In re Rapier*, 143 U.S. 110 (1892); Public Clearing House v. Coyne, 194 U.S. 497 (1904). The *Public Clearing House* decision does give, however, an interesting insight into the Court's view of the role played by the postal service at that stage of our nation's history. We find no difficulty in sustaining the constitutionality of these sections. The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not thousands, of years the transmission of private letters was either entrusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration.

It is not however a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice are; but it is a public function assumed and established by the Congress for the
For that matter, there is little of any significance to our discussion in the bulk of the cases which subsequently challenged those exercises of the postal police power which were aimed at restricting the use of the mails on moral grounds. There have been, to be sure, evaluations of certain niceties of the exercise, such as the extent to which the Court will review an adjudication made by the Postmaster General,

or the degree to which the gradations of privileged "classes" of mails may be utilized to give latitude to the police power,

but little of any First Amendment significance developed in the later cases.

... and ... operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress. The legislative body in thus establishing a postal service may annex such conditions as it chooses. Id. at 506.

Compare the above view with the modern perspective set forth in Roth v. United States, 354 U.S. 476, 504 n.5 (1957):

The hoary dogma of Ex parte Jackson, 96 U.S. 727, ... and Public Clearing House v. Coyne, 194 U.S. 497, ... that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting in Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 430-433, ... Holmes, J., dissenting in Leach v. Carlile, 258 U.S. 138, 140, ...; Cates v. Haderlein, 342 U.S. 804, ... reversing 7 Cir., 189 F.2d 369; Door v. Donaldson, 90 U.S. App. D.C. 188, 195 F.2d 764.


In this regard the earlier cases established the view under which review was limited to ascertaining whether the determination of the Postmaster General was supported by "substantial evidence" in the record. There is some question, however, as to whether this view still obtains generally. In the Manual Enterprises decision the Court, presented with an obscenity statute, reviewed the record de novo and established that at least as regards the "obscenity" cases, the matter is one for the determination of the Supreme Court in each instance. Whether this same de novo consideration will be employed in other areas of postal regulation remains to be seen. On the one hand we have the knowledge that the obscenity matter is relatively peculiar in this respect; but on the other hand we have the rather broad language employed by the Court in that decision, as it quoted from Justice Holmes, dissenting, in Milwaukee Publishing:

The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) as quoted in Manual Enterprises v. Day, 370 U.S. 478, 499 (1962).

69. E.g., Milwaukee Pub. Co. v. Burleson, 255 U.S. 407 (1921); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); Speiser v. Randall, 357 U.S. 513, 518 (1958). Generally speaking, the classification of mail as to types andcommensurate rates is an effective tool. The difficulty of determination in this particular area stems not only from the indirectness of the tool, but from its ramifications on opposing interests of society as well. Consider this admonition by Mr. Justice Frankfurter, concurring in Hannegan, supra at 159:

It seems to me important to confine discussion in this case because its radiations touch, on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether in the world of matter or the mind. While one may entirely agree with Mr. Justice Holmes in Leach v. Carlile, 258 U.S. 138, 140, as to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned, one confronts an entirely different set of questions in considering the basis on which the Government may grant or withhold subsidies through low postal rates, and huge subsidies, if one is to judge by the glimpse afforded by the present case.

70. E.g., Donaldson v. Read Magazine, 333 U.S. 178 (1948); and cases cited in notes 68 and 69, supra.
There was, however, one development of considerable import for our discussion which was brought out in the early fraud, lottery and obscenity cases. When the Congress had characterized these several types of matter as "non-mailable," the assumption enunciated by the Court in *Jackson* was that the effect of a violation of these provisions was conviction after, and as a result of, the violation and not that of a prior restraint. The Postmaster General apparently developed a different view. When he chose to implement this viewpoint, an interesting question arose as to the nature of the interest which he invaded. An answer to this question will be reexamined as part of the historical development of the right to acquisition of a communication.

2. RESTRAINT AGAINST POLITICAL COMMUNICATIONS

The outbreak of military conflict in the early twentieth century led the Congress into a more thoughtful examination of the postal power as a potential means of defending against resistance to the war effort. As a result, in 1917, Congress chose to include among the provisions of the Espionage Act, a section providing for the withdrawal of the privilege of participation in lower cost, second-class mailing rates from those publications which had attempted to publish matter which the Congress felt might be inimical to the war effort. The financial effect of this

71. See text at 129 *supra*.
72. The "nature of the interest invaded" is here used to describe that which is the precise subject matter of this paper. It is sincerely felt that little would be accomplished by a major discussion of the point at this stage of the paper.
73. It is interesting, in this regard, to note that the first attempt to enact a regulation of the subject matter of communication through the mail was initiated by President Jackson, and was directed at certain abolitionist propaganda—thus a politically motivated attempt.
74. Titled the National Defense Law of June 15, 1917, 40 Stat. 217. The specific provision in point was Title XII of the Act, *infra* note 75.
75. The Congress was rather inclusive in its description of those things which would be inimical to the war effort:

   Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, . . . and whoever, when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language
withdrawal was practically equivalent to placing the publication in the non-mailable classification. Indeed, the statute did extend the power to do just that to the particular issues containing such matter.\textsuperscript{76}

These provisions were swiftly brought before the Court in the \textit{Milwaukee Free Press} case. The case arose when the Postmaster General determined, after an investigation, that the newspaper in question had, over a period of time, published matter which the Espionage Act had characterized as non-mailable.\textsuperscript{77} Pursuant to that determination, he chose to implement the provisions of the Act by removing the newspaper from the list of those entitled to the second-class mailing rate.

The Court determined that the conclusion of the Postmaster was supported by substantial evidence in the record, and sustained the prospective removal without a great deal of apparent concern over any possible First Amendment ramifications of either his action or the judicial determination.\textsuperscript{78} This disregard was more than adequately subjected to attack by Justice Brandeis, who was joined in dissent by Justice Holmes.\textsuperscript{79} Their analysis of the issues is an outstanding example of clarity and today is generally recognized as the more acceptable approach.\textsuperscript{80}

The subtlety of the device employed to punish the newspaper was not acceptable to the minds of Justices Holmes and Brandeis. It did not impress them that the newspaper could use the mails if it would only

\begin{footnotes}
\item[77] \textsuperscript{255} U.S. at 412.
Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages violation of the [draft] laws as it exists. The Constitution was adopted to preserve our Government, not to serve as a screen for those who while claiming its privileges seek to destroy it.
\item[79] \textit{Id.} at 423-431.
\item[80] \textit{E.g.}, see discussion from \textit{Roth v. United States}, as presented in note 67 \textit{supra}.
\end{footnotes}
pay the higher postage rate. Their response to the device was direct and crushing.

In other words, the postal power, like all other powers is subject to the limitations of the Bill of Rights. . . . Congress may not through its postal power put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This Court also stated in Ex parte Jackson, that, “Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation the publication will be of little value.” It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third-class mail and also other means of transportation are open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. “The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.” Cummings v. Missouri, 4 Wall. 277, 325.81

Yet despite the piercing language and analysis of the dissenters, they were dissenters nonetheless. Prior to the Lamont decision in 1965, the rule of the Milwaukee Press case was still to some degree in effect. Briefly summarized, the holding of the Milwaukee Press case was significant in these respects:

1. It sustained the power of the Congress to extend its postal police power into the area of political expression, without effective First Amendment restriction.
2. It sustained the exercise of that power by the Postmaster-General, and limited its review of his determination of the statute’s applicability to a test of “substantial evidence,”82
3. It sustained the use of a prospective restraint on this type of political expression, thus overruling the preclusion of prior restraints announced in the Jackson case.

With such an endorsement, it is not surprising that the intervening years has seen a further exercise of the police power in the area of political communications by both the Congress and the Postal Department.83 The extensiveness of those efforts played no small part in the determination of the issues in Lamont v. Postmaster.84

82. See discussion note 68 supra.
83. A thorough examination of the more modern developments in governmental control over political matter sent through the mails is presented in Schwartz, The Mail Must Not Go Through—Propaganda and Pornography, 11 U.C.L.A. L. Rev. 805 (1964) to which the Court referred in its decision in Lamont, our chief case under examination. For other interesting accounts of the early and modern history of such regulations see Deutch, Freedom of the Press and of the Mails, 35 Mich. L. Rev. 703 (1938); Note, Government Exclusion of Foreign Political Propaganda, 68 Harv. L. Rev. 1393 (1955).
84. 381 U.S. 301 (1965).
3. Lamont: A Respite From Rejection

In 1962, the Congress added a rider to the Postal Service and Federal Employees Salary Act which gave specific statutory authorization to a practice already effectuated by both the Postal and Customs departments. The provision authorized the Postmaster General to detain mail matter, other than sealed letters, which originated outside of the United States and was addressed to someone inside the United States, if the Secretary of the Treasury determined that such mailed matter was "communist political propaganda."

In 1963, a copy of the Peking Review #12 which had been addressed to Dr. Corliss Lamont was detained pursuant to the 1962 provision and the rules and regulations promulgated by the Treasury Department to enforce that provision. Those rules called for the notification of the recipient that mailed matter addressed to him was being detained because it had been classified as communist political propaganda. The notification included a postcard, which called for an indication of the addressee's intentions regarding the detained matter.

The addressee was offered several alternatives. He could disregard the whole affair, in which case the matter would be destroyed. He could indicate that he did not wish to receive such matter then or ever in the future, in which case that intention would be respected and administered. He could indicate that he would like to receive this particular matter.

87. The Postmaster was to be guided in this determination by the definition of Communist political propaganda set forth in § 1(j) of the Foreign Agents Registration Act of 1938, 52 Stat. 631, 22 U.S.C. § 611(j):
The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.
88. Just as an interesting sidelight, it is noteworthy that Dr. Lamont is among those to whom the Secretary of State had denied a passport prior to the Kent case. For a discussion of his problems in that regard, see Comment, Passport Refusals for Political Reasons, 61 YALE L.J. 171, 177 (1952). This is the same Professor Corliss Lamont who became a cause célèbre when he refused to co-operate with the McCarthy Committee in the early 1950's. That story is the subject of a book. WITTENBERG, THE LAMONT CASE (1957).
89. The precise procedures employed were fully set forth in the lower court's opinion. Lamont v. Postmaster General, 229 F. Supp. 913, 915-16 (S.D.N.Y. 1964).
and he might even choose to indicate that he would like to receive all such matter in the future. By electing either of these two latter alternatives, he would get the mail, and the Post Office officials would place his name on a list of other persons with similar reading habits.

Dr. Corliss Lamont chose another alternative, not offered to him. He instituted suit to enjoin the enforcement of the provision in question, challenging it as an infringement of his rights under the First Amendment. The postal department responded by a series of maneuvers intended to moot his plea, but the cause was nonetheless placed before the Supreme Court for its determination in May of 1965.

The opinion is highly noteworthy, not only for the extent to which it brought the postal regulations into the perspective of modern constitutional concepts, but for the degree to which it affirmatively responded to a request for a protectible First Amendment interest in the acquisition of information.

Mr. Justice Douglas was, significantly, the author of the majority opinion. His primary contention was that the act was invalid because it required a prior affirmative act for the exercise of a First Amendment right. Pointing to a series of cases in which such prior affirmative obligations had been similarly stricken, the Justice saw little difficulty applying the principle to the right of the addressee to receive the Peking Review:

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.

Yet, strangely enough, Justice Douglas, who in his prior opinions, had so clearly related the right of travel to the First Amendment, was curiously imprecise as to the basis for characterizing the addressee's right as a First Amendment right. His verbalized attention to the ques-

90. *Id.*
91. Upon notice of his suit, the Postmaster informed him that they regarded the institution of the litigation as an indication of his intention to receive the mail, and were forwarding it to him. Upon that set of circumstances, the District Court declared the issues moot, and dismissed his complaint. *Ibid.* A similar complaint was filed by a Mr. Heilberg in California, but the District Court there refused to give the same effect to the manipulations of the Postal Department, and upon the merits, held the practice unconstitutional. *Heilberg v. Fixa,* 236 F. Supp. 405 (N.D. Cal. 1964). The decision in the *Lamont* case was an appeal of both of these cases.
93. The reader will recall Mr. Justice Douglas' opinions in the travel cases.
tion was brief. The limited language, directing itself to this characterization, seemed to be based upon the idea that a communication of ideas was already in progress once the *Peking Review* was mailed.

In this perspective, the detention was an abridgement of a protectible expression, already in progress.

Mr. Justice Brennan's concurring views were more explicit.

[T]he addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment "necessarily protects the right to receive it." Martin v. Struthers, 319 U.S. 141, 143. Since the decisions today uphold this contention, I join the Court's opinion.

To Mr. Justice Brennan, the matter was one of access to publications, and if there was to be a meaningful interpretation of the Bill of Rights, it must necessarily be extended so as to encompass the rights to receive the protected expressions.

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.

Yet regardless of who verbalized the concept, one thing becomes clear. The argument that had been ignored in *Apthecker* and rejected in *Zemel* had been used as the ratio decendi in *Lamont*. There was a protectible First Amendment interest in the receipt of expressions. From such a flow of cases, more questions than answers arise.

### III. The Nature of the Interest

#### A. An Introduction

The First Amendment guarantee of the freedom of expression has been a part of the American governmental structure since the beginning of our existence under the Constitution. It was an addendum of critical import for the democratic form of government. As Alexander Meiklejohn stated:

The principle of freedom of speech springs from the necessity 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. . . .

Free men need the truth as they need nothing else.
Reading this eloquent truism in the perspective of these three recent decisions invokes a series of questions each of which requires a response.

First, to what extent, if any, did previous decisions recognize the interests raised in these three cases? Second, to what extent, if any, did these cases affect these prior holdings? Third, what can be said of the import of these cases for those, who as students, practitioners or as interested citizens, attempt to evaluate the status of our protection under the First Amendment?

Before turning to the response to our triparte query, it would be well to define more clearly the interest under consideration. In one sense, the arguments of Messrs. Apthecker, Zemel and Lamont are a unity. Each of them called for an extension of the protected area of the First Amendment; each argued that there is a protectible interest in the acquisition of expression. But the attempt to summarize their arguments into a single one must end there. Once the examination extends into analysis of the nature of the particular methods, or into the stage of, or justification for the acquisition, it becomes readily apparent that their contentions are clearly capable of being distinguished, each from the other.

Mr. Lamont asked only that he be allowed passively to receive the communication, unfettered by prior restraints in the form of administrative impositions of a prior affirmative act. Mr. Apthecker asked that he be allowed to travel abroad both for the purpose of communicating while abroad and for the purpose of making observations which would provide him with a basis for future communications in the United States. Mr. Zemel asked only that he be allowed to travel abroad to acquire a basis for determining his position on certain political questions relating to the conduct of our relations with Cuba.

Thus it becomes apparent that the First Amendment aspects of these three cases are at once similar and dissimilar. If a term were to be ascribed to the ensuing analysis of both the substance of each and its relation to the others, it would be that the analysis will necessarily be interwoven.

**B. The Prior Extent of Recognition**

While it is probably true that the *Lamont* opinion was the first specifically to rest its decision upon a clear recognition of a protectible First Amendment interest in the receipt of expression, it is nevertheless a fact that a handful of prior decisions contained language which suggested the existence of such an interest.

As far back as 1923, Justices Holmes and Brandeis, dissenting in the postal regulation case of *Leach v. Carlile*, suggested in dissent and dicta
that the addressee of detained mail might have an interest to assert against the Postmaster arising out of the detention.\textsuperscript{101} That such a recognition did not arise earlier in judicial history may be explained by the recent comment of Justice Brennan that, "the Supreme Court's concern with the true significance of the first amendment has been primarily confined to the last fifty years. That is not a long time in the history of constitutional interpretation . . . ."\textsuperscript{102} Moreover, even the most forceful advocate of the recognition of first amendment interests of the nature asserted here would be hard pressed to deny that the recognition could be effected by anything less than a significant extension of the existing interpretation of the language of the First Amendment, and that such an extension would not arise out of the usual First Amendment fact pattern.

This is not to say that prior to the utterance of any protectible expression there are not efforts on the part of the communicator whereby he attempts to secure the information which will form the foundation for his expression. Nor does it mean that there is not an intended recipient of every expression. What this does mean is that the cases are rare and unusual which do not present a direct, assertable interest on the part of one expressing himself which provide adequate protection for the free flow of the expression. So long as the existent, recognized interests are adequate to protect those expressions, just so long will the Court refrain from needlessly extending their interpretations. And there is much to support the view that the need had not been adequately demonstrated prior to these past two terms of the Court.\textsuperscript{108}

In partial illustration, it should be noted that, as in the \textit{Leach} case, all of the language in previous decisions had only been directed at the type of abuse against which Lamont complained; none, however, saw fit to extend even tacit recognition to the types of interest which Apthecker and Zemel asserted.

In \textit{Meyer v. Nebraska},\textsuperscript{104} for instance, the Court considered as one of the factors in its ratio decendi, the deprival of the "opportunities of pupils to acquire knowledge . . . ."\textsuperscript{105} But that opportunity was not the active search for, or procuring of, information; it was rather the passive receipt of knowledge in the characteristic teacher-pupil relationship. The

\begin{itemize}
\item \textsuperscript{101} 258 U.S. 138, 141 (1922). See discussion note 72 supra.
\item \textsuperscript{102} Brennan, \textit{The Supreme Court and the Meiklejohn Interpretation of the First Amendment}, 79 Harv. L. Rev. 1 (1965).
\item \textsuperscript{103} Even the commentators who had called for a judicial response to this problem were not fully assured of the Court's inclination to significantly alter its prior doctrines in order to frame a remedy. E.g., Note, \textit{Government Exclusion of Foreign Political Propaganda}, 68 Harv. L. Rev. 1393 (1955). The great barrier was that there was no recognized right of receipt prior to \textit{Lamont}, and the doctrine was generally followed that one party would not be heard to assert the constitutional rights of another. \textit{Ibid.} But see Barrows v. Jackson, 346 U.S. 249, 257 (1953).
\item \textsuperscript{104} 262 U.S. 390 (1923).
\item \textsuperscript{105} \textit{Ibid.} at 401.
\end{itemize}
subsequent instances of such language have been even more clearly confined to the passive receipt asserted by Lamont rather than active procurement which Zemel and Apthecker asserted.

Such was clearly the case in *Martin v. Struthers.* The Court declared that the freedom of the press encompasses not only the right to circulate, but "necessarily protects the right to receive it." Easily as clear was the declaration in *Thomas v. Collins,* which held a prior registration requirement placed upon a labor organizer, was a "restriction upon Thomas' right to speak and the right of the workers to hear what he had to say." Still another example, and the last instance of this sort of consideration prior to the Lamont decision was the weighing of interests presented in the opinion of the Court in *Marsh v. Alabama.*

In *Marsh,* it will be recalled, the restraint on expression was contended to be private, rather than public. After characterizing the company-town as sufficiently public to be within the contemplation of the Fourteenth Amendment, the Court amplified that analysis with this language which touched upon the nature of the societal interest which might be invaded were such towns not so characterized:

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and county. Just as all other citizens, they must make decisions which affect the welfare of the 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.

Thus, if a summary is to be made of the language in decisions prior to these past two terms of the Supreme Court, it is that there was verbal, if not decisional, recognition of some sort of a protectible First Amendment interest on the part of an intended recipient of a protectible expression. The summary is susceptible of even more definitive analysis. There can be little doubt but that the decisions themselves provided a clearer basis for the recognition of the right of passive unfettered receipt, as asserted by Mr. Lamont, than they did for the recognition of the active acquisition of pre-expressional information, as asserted by Messrs. Apthecker and Zemel. More will be said of this rather ephemeral dichotomy in the concluding remarks.

106. 319 U.S. 141 (1943).
107. Id. at 143.
109. Id. at 534. (Emphasis added.)
C. The Affect of these Three Cases

Placed in that historical perspective, at least one of the three decisions was relatively predictable. In *Lamont v. Postmaster General*, the Court made unequivocal what had been suggestion and dicta in a number of earlier decisions by restining its decision upon the existence of a protectible First Amendment interest in the unfettered receipt of protectible expressions. Yet, the fact that this decision was not altogether novel does not dictate that its import is to be casually regarded. The importance of *Lamont* to the protection of the freedom of expression is at least twofold. There is, of course, the highly significant elevation of the right to receive a communication to the status of a decisional holding. The other point of significance is the effect of the extension of this new substantive right.

Prior to the *Lamont* decision, the invasion of a protectible expression could be contested only by the person who was doing the expressing: the speaker, the publisher and the organizer. The person on the receiving end of these expressions was precluded from challenging the invasion. He had no standing to do so, and the well-settled rule was, and is, that one person will not be heard to assert the constitutional objections of another.

*Lamont* significantly alters this. By recognizing an assertible interest in the recipient of the expression, the Court has substantially altered the number of parties who can contest the alleged invasion, and have thereby afforded greater assurance that those invasions will be subject to attack. Thus, unless subsequent decisions significantly limit the effect of the *Lamont* holding, every subsequent invasion of the freedom of expression will be open to attack from two classes of citizens—the expressor and the recipient.

As previously indicated, however, the extension effected by *Lamont* was preceded by two other decisions which refused to extend the effective scope of the freedom of expression to the acquisition of pre-expressional information. Thus one cannot read the *Lamont* extension other than in light of the limitations expressed by *Zemel* and *Apthecker*. Read together, the three cases outline a somewhat limited, perhaps confusingly limited, extension of the scope of the protection afforded the individual and society by the provisions of the First Amendment. The state of confusion arises out of alternative constructions one can place upon the opinions in the two travel cases.

112. Two articles, written well before the *Lamont* decision, had proposed as one of several solutions to the dilemma of the addressee who was without standing to contest an invasion of the First Amendment under the existent construction of that Amendment, that he be granted a First Amendment interest of his own to assert. See Note, *Government Exclusion of Foreign Political Propaganda*, 68 Harv. L. Rev. 1393, 1405 (1952); Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A.L. Rev. 805, 824 (1964).
It is, on the one hand, quite possible to construe narrowly the two travel cases by rationalizing them as examples of the Court's persistent deference to the executive branch in areas touching upon the conduct of foreign affairs. But in the view of this writer, this perspective is unfortunately less than fully justified. The breadth of the language with which the Court announced its refusal is inconsistent with that limited perspective. Yet even if such a viewpoint could be otherwise justified, the opinion would be no more satisfactory. The characterization of travel as a Fifth Amendment liberty, totally devoid of any First Amendment significance is a characterization totally devoid of any appreciation of the apparent societal interests in allowing our citizens to travel outside the United States. And the Court, in Kent v. Dulles, had already paid at least lip service to those societal considerations.

It would not be unduly repetitious to here re-focus our attention upon the competing interest in First Amendment perspective of freedom of travel. We have said that the First Amendment is protective of both the individual interest and the societal interest. At least as far as international travel to secure information is concerned, that statement is substantially a platitude. The interest is overwhelmingly societal; so much so that any decision which would weigh the rights of the claimant as if they were purely or predominately individual could be characterized as shortsighted.

Consider Zemel. Even assuming that the Court should have defined a First Amendment interest, it could not have properly restricted its weighing test to his individual interest. To the extent that it is an interest devoid of reference to his role as a voter, it is not really a First Amendment interest. And to the extent that it does have a referent in the role of Zemel as a citizen, that is clearly a societal interest. Zemel's interest in

113. The Court has long deferred to the executive as a matter of its considered view of the exigencies in the conduct of foreign affairs. See United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-322 (1936). It is not the suggestion of this writer that that view should be totally abandoned. Rather, the assertion is that the foreign policy power, like all power under the Constitution, must necessarily be subject to those limitations as are consistent with the preservation of the democratic concept. This comment presents the thesis that the right of acquisition of information should be one such limitation.
115. Consider this analysis presented by Professor Chafee in Free Speech in the Constitution (1941) at 33:

The First Amendment protects two kinds of interests in free speech. There is the individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a societal interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. This social interest is especially important in wartime. Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support and a wide difference of opinion as to its objects. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished.
resolving his own convictions about United States policy as regards Cuba was coextensive with his desire for a governmental policy congruent with his conviction. That remains true regardless of whether or not he, as Apthecker, intended to express himself on the basis of his observations upon his return to the United States. From the electorate's standpoint, the interests to be afforded protection were the process of prior thought and subsequent expression, evidenced at the polls or in debates. All those interests are replete with the societal overtones of the First Amendment.

Yet the societal implications are even more extensive than may have been made apparent by the preceding extrapolation from Zemel's experience. If the State Department had the authority to restrict Zemel from going to a given area, then what is to stop its assertion of that same power to exclude any other American from any other area? Certainly, nothing in the opinion suggests any possible basis for a limitation on this power. And that power could prove to be a highly effective prior restraint on the free flow of information. A restraint of this kind can only serve to heighten the extent to which public opinion in the critical area of foreign policy can be molded by a government directed flow of information.

It is no answer at all to respond, as the Court impliedly responded, that the newspapers are adequate guardians of the free flow of accurate information. It is the function of the American press to stimulate, but not to replace the responsibilities of the electorate itself.

The concept of representative government was never intended to effect representation before choice; its object is representation after choice. Thus, it is only after a full, free, intelligent debate that the American citizen can legitimately delegate any of his responsibility to another. No man and no official may compel one to cast a ballot or make a choice of policy for another. Why then, should it be deemed any more acceptable to tolerate a system which forces the same citizen with the same responsibility of choice to rely upon another for the information which is the basis of that choice? Yet that is clearly the practical effect of a power to prohibit travel outside of the United States. Freedom of discussion is already too greatly inhibited by forces beyond the control of the law to tolerate an exercise of power which further inhibits that vital aspect of our democratic society.

Nor can the determination in these cases be justified by a contention that something different in the way of public participation is called for in the area of foreign policy. This contention may be valid, but if so, its validity is that the need for a full and intelligent public consideration in the affairs of war and peace are far more critical than in any other aspect of modern society. But even this analysis would be inadequate were attention not focused further upon the extent to which the Court, in these decisions, shut the door on any hope for the rectification of this urgent need.
Discomfort with the Zemel and Apthecker opinions arises not because the Court did or did not preclude these two citizens from traveling as they wished. In the broad sense, these results were relatively insignificant. The aspect of these opinions which this writer bemoans is that the Court refused to find any First Amendment interest on the part of a citizen who wishes to explore for himself the policy forum of an American governmental decision.

If the Court had recognized an interest under the First Amendment, and then determined that it was outweighed by an overwhelming governmental interest, the discomfort would have been substantially alleviated. But it chose not to do so, and therein lies the really disturbing problem. For by refusing to recognize that interest, the entire perspective of the Justices was misdirected. It was misdirected in that it called for the resolution of the issue of participation in decision making by the same standard as if the issue was one of contract rights or farm legislation.\(^\text{116}\) It precludes the Court from taking the necessary overview of the societal interests. The total question becomes whether it was a reasonable exercise of the government's authority to restrict the activity of the complainant; and the test is really one of any conceivable reasonable basis.

Thus viewed, the impact of these three decisions on previously existing law, and upon hopes for the future is at once constructive and yet restrictive. While, for the first time, a person may now successfully protest the imposition of a requirement of affirmative action as a prerequisite to the passive receipt of a communication, there is no commensurate relief available for the person who wishes to take affirmative action, but is precluded from the acquisition by governmental restraints. In the area of participation in the responsibilities of communication, the Court has decreed that the more meek shall inherit the worth of the First Amendment.

D. What of the Future?

It is the basic democratic thesis that the government operate only by consent of the governed. More particularly, what is called for is active

\(^{116}\) Consider, for example, the Court's own language in Thomas v. Collins, 323 U.S. 519, 530 (1945), as it compared the standard of the due process clause to that of the First Amendment:

[The rational connection between the remedy provided for and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds will not suffice . . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, and the narrowest range for restriction.

Certainly it is no answer at all for the Court to attempt to intermingle the two standards as it did in Apthecker, see note 32 supra, and accompanying text. Such an approach first ignores, and then pays token homage to the position of the First Amendment. It is thereby all the more invidious in its affect. For it might delude the reader, and perhaps the Court itself, into the conclusion that the jealous standard of the First Amendment had been satisfied.
participation by the populace in the decision making processes of the government. Where acquiescence replaces that participation, potential tyranny cannot be far behind. Unfortunately, a multitude of factors, personal and public, have substantially precluded or diminished active participation by the American electorate in the vital and everyday determinations of our government. It is with a fearful eye on the implications of that reality that this article is written.

It is certainly beyond the scope of this paper to analyze the innumerable factors which have contributed to this degeneration of participation. They are far too numerous, far too involved. Instead, the remainder of this article will be confined to an analysis of the three decisions, discussed supra, as they represent a frustration, by the Supreme Court, of one potentially positive response to this truly disturbing and troublesome problem of our time.

The problem, once again, is the degree to which the increasing supervision of the government over the flow of information can effectively preclude a basis for effective public debate of important issues. This particular problem, as well as a good number of others which are not considered here, were fully discussed by Professor Emerson of Yale in a recent article dealing with the First Amendment in modern American society. Consider these observations:

Large scale and pervasive government, operating on a new order of magnitude and function, poses greater and more subtle threats to individual rights. . . . The exercise of authority in many areas, imposing social controls which are acceptable in themselves, tends in actual operation also to circumscribe freedom of expression. Perhaps most important, the danger of distorting legitimate powers for illegitimate purposes has become acute. . . .

Finally, the evolution of modern society has meant greater participation by the government itself in political expression. Widespread resort to direct coercion by the state is compatible neither with a democratic society nor, in the long run, with technological society. Modern government strives to achieve unity and control more by the manipulation of public attitudes and opinion than by direct application of official sanctions. Hence, as the area of its control has expanded, the state's interest in affirmative measures of education, persuasion, and manipulation has correspondingly increased. Such activities by the state raise obvious problems for a system of free expression. . . .

118. Id. at 901-902.
All these developments have placed upon law and judicial institutions a greater responsibility for the maintenance of a system of freedom of expression.\textsuperscript{119}

This writer parts with Professor Emerson, however, in his views as to the part that constitutional concepts can play in adjusting to these new challenges. In the professor's view, the executive and political branches are the chief source of remedy. "This is not an area where the courts, applying first amendment doctrine, can be of much assistance."\textsuperscript{120}

In the view of this writer, a substantial role can be played by the First Amendment, and the courts, if the Supreme Court will deign to recede from its perspective in \textit{Zemel} and recognize a protectible First Amendment right to the acquisition of information.

It will be recalled that \textit{Lamont} did grant recognition to one aspect of this right when it established a protectible First Amendment interest in the recipient of a communication.\textsuperscript{121} It must be recognized, however, that even standing alone, this passive receipt is a strategically different interest than the active acquisition of information.

Mr. Apthecker had asked the Court for the recognition of a First Amendment interest in acquisition of an active nature. His particular plea was to extend recognition to that interest in the form of the observations which he intended to make while abroad.\textsuperscript{122} His argument was that to preclude him from travel was to preclude him from making the observations, and that to preclude him from making those observations was to limit, in the manner of a prior restraint, his competence to exercise his freedom of expression upon his return. The Court ignored this plea.

Mr. Zemel's contentions were basically a cross between the two. The First Amendment interest which he asserted did not expressly relate to any intention to discuss his observations upon his return from Cuba. He asserted his right as the mere receipt of information, through observations, relative to his understanding and evaluation of United States policy toward Cuba.\textsuperscript{123} Having determined that the receipt of information was a protectible interest in \textit{Lamont}, the Court nonetheless expressly rejected Mr. Zemel's contention on the ground that:

[While] the Secretary's refusal to validate passports to Cuba renders less than wholly free the flow of information concerning

\textsuperscript{119} Id. at 903.
\textsuperscript{120} Id. at 954. This particular language was specifically directed at the problem of secrecy in government. Furthermore, Professor Emerson is not absolutely opposed to the principle of judicial participation in the attempt to find solutions to these problems as the text, \textit{infra}, might imply. He does, however, appear to place his primary faith in the legislative and executive branches, as opposed to the judiciary. Therein lies the point of this writer's departure from the professor's perspective.
\textsuperscript{121} See text accompanying notes 97 & 98 supra.
\textsuperscript{122} See text accompanying notes 33 & 34 supra.
\textsuperscript{123} See text accompanying notes 49 & 54 supra.
that country... we cannot accept the contention of the appellant that it is a First Amendment right which is involved.... The right to speak and publish does not carry with it the unrestrained right to gather information. 124

The declaration was certainly ill-advised. Quite aside from any historically phrased declaration that the First Amendment "does" or "does not" carry with it such a right, the urgent needs of contemporary America clearly called for a different result.

The Court would justify its decision on the "unrestrained" potential of the right to acquire information. This justification is difficult to accept. It was not urged by Mr. Zemel, nor is it urged here, that the right of acquisition be unrestrained. No right ever recognized by the Constitution or the Court has ever been totally unrestrained. Indeed, it is perhaps the greatest continuing talent of the Court, that it has wisely incorporated essential limitations into each of our critical rights while still preserving the essence of each. Appreciation of this wisdom necessarily calls for a question. Why could not these same talents be utilized to incorporate any needed limitations on this critically needed aspect of the freedom of expression? It is inconsistent to recognize the capacity of the Court in the expressive side of the First Amendment, and thereafter accept the proposition that it would be unable to adequately restrain the acquisitive side of that same amendment.

It is equally difficult to accept the view that the refusal of the Court to recognize such a First Amendment interest is of little practical effect. The objection of the Court itself seems to be directed to the fear that the effect would be too great. Indeed, a wisely administered "right to acquire information" could well provide a basis for the long awaited balancing of the public interest in knowing versus the governmental interest in secrecy. Most important, however, a wisely administered "right to acquire information" might well be the urgently needed starting point for a revitalization of public participation in the decision making process of democratic government.

Alexander Meiklejohn expressed the urgency so very eloquently when he declared, "Free men need the truth as they need nothing else." 125

The truth to which Meiklejohn referred is the truth to which the First Amendment speaks. It was never intended to be government directed "truth," calculated to invoke support for its policies and disdain for its critics. Truth in the Meiklejohn sense, in the First Amendment sense, is the basis for, and the goal of, a full, free and intelligent exchange of ideas. It is the "stuff" democracy must be made of, and the extension of the First Amendment toward a recognition of a right to acquire information might well be one assurance of that "stuff" which we so critically need.