LIBERTY UNIVERSITY

Liberty University Law Review

Volume 6 | Issue 1 Article 2

August 2011

The Constitutional Freedom to Listen

Peter J. Ferrara

Carlos S. Ramirez

THE CONSTITUTIONAL FREEDOM TO LISTEN

Peter J. Ferrara[*] *and Carlos S. Ramirez*[**]

I. INTRODUCTION

The freedom of speech guaranteed in the First Amendment[1] includes not only the freedom to speak, but also—as a necessary corollary—a constitutionally protected Freedom to Listen. In other words, where a freedom to speak is guaranteed, a freedom to choose what speech to receive is also secured. As one court has put it, "Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech."[2]

A considerable body of legal precedent has recognized such a "Freedom to Listen" doctrine, though not explicitly in such terms. Moreover, such a doctrine has been studied only scarcely and is mentioned rarely in literature or legal scholarship. We fill that void below through an examination of the relevant precedent and through an examination of the cases that have developed the Freedom to Listen doctrine. In so doing, we discuss the fundamentals of speech—namely, the necessary existence of a speaker, an audience, and content. We then examine the legal status of the marketplace of ideas, and the role that listening—or choosing not to listen—plays in public debate, political speech, and the public's receipt of information.

---

* Peter Ferrara is the General Counsel for the American Civil Rights Union (ACRU). He graduated from Harvard College, *magna cum laude*, in 1976 and Harvard Law School, *cum laude*, in 1979. He is a member of the District of Columbia and U.S. Supreme Court Bars. He served as a Senior Staff Member in the White House Office of Policy Development from 1981-1983 and as Associate Deputy Attorney General of the U.S. from 1991-1993. He has authored several books and publications dealing with economics and the law.

** Carlos Ramirez graduated from American University in 2006 with a B.A. and from Drexel University in 2009 with a J.D. He is a former intern and legal researcher with the American Civil Rights Union. He is currently on Active Duty with the U.S. Army JAG Corps. Prior to his time with the ACRU and the U.S. Army, he served as a summer clerk to Judge Richard B. Klein of the Superior Court of Pennsylvania and as a student intern with the Philadelphia District Attorney's Office. He is admitted to the bar of the Commonwealth of Pennsylvania and the United States Court of Appeals for the Armed Forces.

1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

2. U.S. West, Inc. v. FCC, 182 F.3d 1224, 1232 (10th Cir. 1999).

Finally, we examine the role that the Freedom to Listen plays in government action in a variety of regulatory scenarios, including radio and television broadcasting, the Internet, and the political speech of private groups. Through this examination, we have concluded—as we hope our readers will—that the Freedom to Listen is a necessary and binding part of First Amendment jurisprudence because it serves to prevent government interference with public debate and protects the public from any form of censorship.

II. LEGAL FOUNDATION OF THE FREEDOM TO LISTEN

The term "Freedom to Listen" is the name we give to the protections provided by the First Amendment—the right of a person to receive speech.[3] The following section details where the legal foundations of the Freedom to Listen lie, and how this doctrine has evolved over the years into its current state.

---

3. *See* U.S. CONST. amend. I; *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Com'n of Cal., 475 U.S. 1, 8 (1986) (stating that the constitutional guarantee of free speech serves significant societal interests that are wholly apart from a speaker's interest in self-expression, and that it protects the public's interest in receiving information); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (holding that the freedom of expression includes the right to receive as well as the right to communicate ideas); Willis v. Town of Marshall, 426 F.3d 251, 259-60 (4th Cir. 2005) (stating that the First Amendment protects the right to receive the speech of others); De la O v. Hous. Auth. of El Paso, 417 F.3d 495, 502 (5th Cir. 2005) (stating that the right to receive information is as equally protected under the First Amendment as the right to convey it); Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1151 (9th Cir. 2004) (stating that the First Amendment embraces the right to distribute literature, and necessarily protects the right to receive it and that the right to receive publications is a fundamental right); Rossignol v. Voorhaar, 316 F.3d 516, 522 (4th Cir. 2003) (stating that the First Amendment protects both a speaker's right to communicate information and ideas to a broad audience and the intended recipient's right to receive the information and ideas); Banks v. Wolfe Cnty. Bd. of Educ. 330 F.3d 888, 896 (6th Cir. 2003) ("[T]he First Amendment is concerned not only with a speaker's interest in speaking, but also with the public's interest in receiving information.") (citation omitted); Neinast v. Bd. of Trs. of Columbus Metro. Library, 346 F.3d 585, 591 (6th Cir. 2003) (stating that the First Amendment protects the right to receive information); Kreimer v. Bureau of Police, 958 F.2d 1242, 1251 (3d Cir. 1992) (stating that the speech component of the First Amendment includes freedom to receive speech); Johnson v. Cnty. of L.A. Fire Dep't, 865 F. Supp. 1430, 1438 (C.D. Cal. 1994) (stating that the freedom of expression includes the right to receive as well as the right to communicate ideas).

A. Parties Relevant to the Freedom of Speech

As obvious as it sounds, few analysts consider that for speech to occur, several elements must be present: a speaker, a listener, and content. Without these elements, speech cannot be effective.[4] That is, a person with something to say, but no one to hear it, cannot be a speaker—just as a person without something to hear cannot be a listener. With these elements in mind, courts recognize that the citizen is entitled to seek out a message that appeals to him or her without government restriction.[5] This protection from government interference or control is centered on the proposition that speech is the vehicle through which citizens express their beliefs, the mechanism through which citizens learn new information to influence and test those beliefs, and the sole manner to bring those beliefs to bear on government; therefore, the citizen must be free to choose what speech to accept, adhere to, reject, ignore, or respond to, without fearing the specter of censorship.[6]

Awareness that speech involves a party to listen to and receive that speech, as well as the party speaking, led to recognition of the Freedom to Listen in the late 1960s in *Stanley v. Georgia*.[7] In *Stanley*, the police searched the Georgia home of Robert Eli Stanley, a suspected and previously convicted bookmaker, based on a federal warrant to seize betting paraphernalia.[8] They found none, but instead seized three reels of pornographic material from a desk drawer in an upstairs bedroom, and later charged Mr. Stanley with the possession of obscene materials, a crime under Georgia law.[9] The Supreme Court of Georgia upheld the conviction.[10]

---

4. *See U.S. West.*, 182 F.3d at 1232; *Banks*, 330 F.3d at 896.

5. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000). The Court said that

> [i]t is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

Id.

6. *Id.*

7. *See Stanley*, 394 U.S. at 564.

8. *Id.* at 558.

9. *Id.*

10. *Id.* at 559.

The United States Supreme Court unanimously overturned that decision and invalidated all state laws forbidding the private possession of obscene materials.[11] In holding that the First and Fourteenth Amendments do not permit a state to prohibit the mere possession of obscene material, the Court stated that the First Amendment's freedom of speech and press protect the right to receive information and ideas regardless of their social worth.[12] Going further, Justice Marshall, writing for a unanimous court, stated that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[13] With those powerful words, Justice Marshall set the stage for the further understanding of what the First Amendment protects.

B. The Marketplace of Ideas

The concept of the "marketplace of ideas" is often attributed to Justice Oliver Wendell Holmes Jr.'s dissenting opinion in *Abrams v. United States*.[14] The concept provides a rationale for freedom of expression based on an analogy to economic competition in a free market, where all products are free to compete, and the consumers choose which products will prevail. In the free expression of a "marketplace of ideas," the truth or the best policy arises out of the competition of alternative ideas in free public debate,

---

11. *Id.*

12. *Id.* at 564 ("It is now well established that the Constitution protects the right to receive information and ideas," and the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.").

13. *Id.* at 565. In the same paragraph, Justice Marshall further notes that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*

14. *See* Abrams v. United States, 250 U.S. 616, 630 (1919). While Justice Holmes did not use the term "marketplace of ideas," he implied the idea in his dissenting opinion:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. (Holmes, J., dissenting).

with the listening public free to determine the truth out of that clash of ideas. The "marketplace of ideas" is now recognized as an important component of democracy. The Freedom to Listen is inherent in this concept of the marketplace of ideas, as is the freedom of speech. Just as a commercial marketplace includes both sellers and buyers, the marketplace of ideas includes both speakers and listeners. The First Amendment's protection of public debate provides an environment for both speakers and listeners to engage in this free and transparent public discourse.[15] Society's interests in enjoying a transparent debate and in receiving information without government interference are paramount and are protected in conjunction with the speaker's interest in self-expression.[16] Thus, the Constitution goes further than merely protecting speech from government inhibition and works to secure a citizen's right to unfettered access to the speech of others.[17]

The First Amendment, therefore, necessarily protects the listener's right to receive information without fear of government intrusion or censorship.[18] As stated before, without a listener, there can be no speech; thus, the First Amendment's protection afforded to the recipient of information is as paramount to its functionality as the protection afforded the speaker.[19]

---

15. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) ("[T]he First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open . . . .'") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

16. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986). The Court said,

> The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.

Id. (citations omitted).

17. *See* Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1151 (9th Cir. 2004) ("The First Amendment 'embraces the right to distribute literature, and necessarily protects the right to receive it.'") (citing Martin v. City of Struthers, 319 U.S. 141, 143 (1943)); *see also Stanley*, 394 U.S. at 564 (1969) (stating that the First Amendment protects the right to receive literature).

18. *See Stanley*, 394 U.S. at 564-65; *see also* Neinast v. Bd. of Trs. of Columbus Metro. Library, 346 F.3d 585, 591 (6th Cir. 2003) (stating that The First Amendment protects the right to receive information) (citation omitted).

19. *See* U.S. West., Inc. v. FCC, 182 F.3d 1224, 1232 (10th Cir. 1999) (citation omitted).

Consequently, the First Amendment concerns not only the freedom of the speaker to speak, but also the freedom of the audience to hear or see the expression.[20] As Justice Marshall so poignantly pointed out in *Stanley v. Georgia*, our constitutional system stands firmly against the thought of giving the government any control over the thoughts of men's minds; therefore, the state has no business telling a man what books to read and what information to receive.[21] With that unanimous statement of unmistakable clarity from the Supreme Court, it can only be concluded that the First Amendment offers unfettered protection to the citizen's right to receive information.[22]

C. Political Speech

The field of political speech provides the most crucial area of the law for the First Amendment's firm protections of both speakers and listeners.[23] The most significant case exploring the nature of the Freedom to Listen in the context of political speech is *Buckley v. Valeo*,[24] where the Court explored the constitutionality of the Federal Election Campaign Act of 1971.[25] In a *per curiam* opinion, the Court upheld federal limits on campaign contributions by individuals,[26] but expanded the nature of First Amendment protections for the recipients of speech.[27]

The *Buckley* Court found that regulation of federal campaign expenditures involves the most fundamental First Amendment protection.[28] In discussing this proposition, the Court stated that the ability to discuss political issues and the qualifications of candidates is paramount, and that

---

20. *See* Banks *v.* Wolfe Cnty. Bd. of Educ., 330 F.3d 888, 896 (6th Cir. 2003) (citation omitted).

21. *See Stanley*, 394 U.S. at 565.

22. *See* De la O v. Hous. Auth. of El Paso, 417 F.3d 495, 502 (5th Cir. 2005) ("[T]he right to receive information is as equally protected as is the right to convey it.") (citation omitted).

23. *See infra* notes 24-32 and accompanying text.

24. Buckley v. Valeo, 424 U.S. 1 (1976).

25. *Id.* at 6.

26. While we refrain from adding any more drops to the vast sea of opinion and analysis regarding *Buckley*, we note that we do not endorse the holding of the case. However, since the *Buckley* decision is seminal in the development of the Freedom to Listen, as evidenced by the decisions cited in note 31 *infra*, we discuss it here.

27. *See Buckley*, 424 U.S. at 30-32.

28. *Id.* at 14 (citation omitted).

the ability to engage in free and unfettered debate is important in the political process.[29] The Court said,

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 (1957). . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'[30]

Some or all of this statement—underscoring the importance of such debate—has been cited since in many First Amendment cases.[31]

---

29. *Id.* at 14. The Court also said,

> Although First Amendment protections are not confined to "the exposition of ideas," Winters v. New York, 333 U.S. 507, 510 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates. . . ." Mills v. Alabama, 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Id.

30. *Id.* at 14-15.

31. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 781 (2002) ("'[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges."); Rossignol v. Voorhaar, 316 F.3d 516, 521-22 (4th Cir. 2003) ("'Discussion of public issues' and 'debate on the qualifications of candidates' for public office have always been 'integral to the operation of the system of government established by our Constitution' . . . [a]nd 'it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.' The First Amendment therefore 'affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas,' since 'in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates

A discussion cannot exist without more than one speaker, more than one listener, and the ability for the development of debate through the logical progression of an argument. In the "debate over the qualifications of candidates," challenges to the candidates' records must be brought to the public's attention so that the public has the ability to question, and the candidates have the opportunity to respond. It is here that the Freedom to Listen protects the public from censorship.

Where a speaker wishes to address the qualifications of a candidate for office but is muted by government power, the greater offense to the First Amendment lies not in the speaker's silence, but in the fact that the public is being denied the opportunity to assess the validity of the speaker's message and to debate the merits of the candidate in light of the information the speaker wishes to convey. As the Court said in *Buckley*, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."[32]

---

for office is essential. It is for that reason that the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' In suppressing criticism of their official conduct and fitness for office on the very day that voters were heading to the polls, defendants did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart."); Ariz. Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1008 (9th Cir. 2003) ("The First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'"); Perry v. Bartlett, 231 F.3d 155, 160 (4th Cir. 2000) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"); Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1247 n.2 (11th Cir. 2000) ("[P]olitical speech is entitled to the 'broadest protection.'"); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 968 (8th Cir. 1999) ("Discussion of public issues and debate on the qualifications of candidates are integral to . . . our Constitution."); Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . ."). Internal citations have been omitted in all of these quotes.

32. *See Buckley*, 424 U.S. at 14-15.

D. Other Precedents

Another important case in the development of the Freedom to Listen doctrine is *United States v. Playboy Entertainment Group, Inc.*[33] That case involved a federal statute concerning cable TV operators who provided channels primarily dedicated to sexually-oriented programming.[34] The statute required operators either to fully scramble or otherwise fully block those channels to non-subscribers, or to limit the transmission of those channels to hours when children are unlikely to be viewing—set by regulation as between 10:00 PM and 6:00 AM.[35]

But the scrambling technology at the time was subject to "signal bleed," which unreliably allowed video or audio portions of the programming to be heard to varying degrees at different times.[36] To avoid fines under the law, most cable operators chose the time channeling option, whereby transmission of sexually-oriented channels was limited to between 10:00 PM and 6:00 AM, thus precluding transmission of such channels for two-thirds of the day.[37] The evidence showed that thirty percent to fifty percent of sexually-oriented adult programming was viewed by households before 10:00 PM.[38]

In *Playboy*, the producers of the Playboy Channel claimed the regulation violated their First Amendment rights.[39] The Court agreed on the grounds that the state interest in protecting minors from such programming could be achieved by the less-restrictive alternative of providing households with complete channel-blocking devices free of charge, with adequate notice of that option.[40] The Court required this less-restrictive alternative because "adults have a constitutional right to view" the Playboy Channel and other non-obscene, sexually-oriented adult programming.[41] Justice Kennedy elaborated on this right for the majority, saying that

> [i]t is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we

33. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000).

34. *Id.* at 806.

35. *Id.*

36. *Id.*

37. *Id.* at 806-07.

38. Playboy Entm't Grp., Inc. v. United States, 30 F. Supp. 2d 702, 718 (D. Del. 1998).

39. *Playboy*, 529 U.S. at 807.

40. *Id.* at 816, 824-26.

41. *Id.* at 811.

> bring those beliefs to bear on government and society. It is through speech that our personalities are formed and expressed. *The citizen is entitled to seek out or reject certain ideas and influences without Government interference or control.*[42]

He further added that

> [t]he Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.[43]

What Kennedy espoused is the Freedom to Listen doctrine.

Similarly, *Board of Education v. Pico*[44] involved the removal of books from high school and junior high school libraries that were deemed "anti-American, anti-Christian, and anti-Sem[i]tic, and just plain filthy[.]"[45] A plurality upheld a trial court's ruling, saying that the right to receive information

> is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them. . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."[46]

The doctrine was also applied in *Clement v. California Department of Corrections*.[47] In *Clement*, a California prison inmate challenged a prison rule prohibiting inmates from receiving mail containing material downloaded from the Internet.[48] The court noted that "[p]risoners are not

---

42. *Id.* at 817 (emphasis added).

43. *Id.* at 818.

44. Bd. of Educ., Island Trees Union Free Sch. Dist., No. 26 v. Pico, 457 U.S. 853 (1982).

45. *Id.* at 857.

46. *Id.* at 867 (emphasis added).

47. Clement v. Cal. Dep't of Corr., 364 F.3d 1148 (9th Cir. 2004).

48. *Id.* at 1150.

allowed to access the internet directly, so Clement asserts that the policies effectively prevent inmates from accessing information that is available only on the [I]nternet," and that "many legal materials are readily accessible only on the [I]nternet."[49] The Court struck down the restriction, saying, "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."[50] The court also said, "The First Amendment 'embraces the right to distribute literature, and necessarily protects the right to receive it.'"[51]

In another precedent case, the Los Angeles County Fire Department, as part of its sexual harassment policy, prohibited county firemen from possession of sexually-oriented magazines—such as Playboy—in county firehouses.[52] A fire captain sued, claiming the restriction violated his First Amendment rights.[53] The court agreed and struck down the restriction, recognizing the Freedom to Listen doctrine by saying,

> Defendants argue that, because plaintiff is seeking to merely read rather than communicate ideas, his First Amendment rights are entitled to a lesser degree of weight. The Court must reject this argument as contrary to the fundamental principle of First Amendment law that freedom of expression includes the right to receive as well as the right to communicate ideas.[54]

The court added,

> It is a fundamental principle of First Amendment law that the government cannot regulate material in order to prevent the readers from developing certain ideas. Such regulations are attempts at altering the reader's viewpoint, and as such are the most disfavored of all regulations touching upon the First Amendment. . . .
>
> Defendants are, of course, free to proscribe offensive behavior or language which may result from the "sex-role stereotyping." But, defendants may not proscribe the

49. *Id.* at 1151.

50. *Id.* at 1151 (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965)).

51. *Id.* (quoting Martin v. City of Struthers, 319 U.S. 141, 143 (1943)).

52. Johnson v. Cnty. of L.A. Fire Dep't, 865 F. Supp. 1430, 1434 (C.D. Cal. 1994).

53. *Id.*

54. *Id.* at 1438 (citation omitted).

> communication of "sex-role stereotyping" simply because defendants disagree with the message.[55]

The Fourth Circuit provided an instructive precedent in *Rossignol v. Voorhar*.[56] Plaintiff Kenneth Rossignol owned a local newspaper that was highly critical of the County Sheriff and his operation of the local police department.[57] In the early pre-dawn hours of Election Day, sheriff's deputies rode throughout the county to purchase all the copies of Rossignol's paper to prevent Election Day readers from seeing what he had to say about the candidates, including the County Sheriff and his political allies.[58]

The court held that the defendants' conspiracy constituted an unconstitutional prior restraint on the plaintiff's freedom of speech, and also recognized a Freedom to Listen when it said,

> The First Amendment is about more than a publisher's right to cover his costs. Indeed, it protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas. Liberty of circulation is as important to freedom of the press "as liberty of publishing; indeed, without the circulation, the publication would be of little value."[59]

In *Kreimer v. Bureau of Police*, a homeless man was excluded from a public library on the grounds he was misbehaving in violation of library regulations.[60] While the court upheld the regulations as protecting the library use of others, it recognized the Freedom to Listen doctrine in saying that the Freedom of Speech "embraces the right to distribute literature . . . and *necessarily protects the right to receive it*," and "a right to receive information founded under the First Amendment is implicated in this case."[61] The court added,

> Justice Brennan's oft-quoted remark in *Lamont* now constitutes the hallmark of the right to receive information: "[t]he

---

55. *Id.* at 1441 (citations omitted).
56. Ressignol v. Voohar, 316 F.3d 516 (4th Cir. 2003).
57. *Id.* at 519.
58. *Id.* at 519-20.
59. *Id.* at 522 (citations omitted).
60. Kreimer v. Bureau of Police, 958 F.2d 1242, 1247 (3d Cir. 1992).
61. *Id.* at 1251, 1260.

> dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them . . . [for][i]t would be a barren marketplace of ideas that had only sellers and no buyers."[62]

The court concluded,

> Our review of the Supreme Court's decisions confirms that the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas.[63]

---

62. *Id.* at 1252.

63. *Id.* at 1255; *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. . . . In [previous] cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed.") (citations omitted); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767, 783 (1978) (concerning a case where the Court invalidated a state prohibition on speech by corporations aimed at influencing the outcome of a state referendum because it limited the access of the public to information and ideas, saying, "[T]he First Amendment . . . afford[s] the public access to discussion, debate, and the dissemination of information and ideas."); Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) ("[T]he state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without these peripheral rights the specific rights would be less secure.") (citation omitted); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating that the First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it") (citation omitted); Willis v. Town of Marshall, 426 F.3d 251, 260 (4th Cir. 2005) ("Because the musical performances at the [Town community center] involved protected expression, it follows that [Plaintiff] Willis herself had a First Amendment right to listen to them. . . . [W]here there is a protected right of speech, there is likewise a protected right to receive the speech.") (citation omitted); De La O v. Hous. Auth. of El Paso, 417 F.3d 495, 502 (5th Cir. 2005) ("[T]he right to receive information is as equally protected as is the right to convey it.") (citation omitted); Neinast v. Bd. of Trs. of Columbus Metro. Library, 346 F.3d 585 (6th Cir. 2003) ("The First Amendment protects the right to receive information.") (citation omitted); Banks v. Wolf Cnty. Bd. of Educ., 330 F.3d 888, 896 (6th Cir. 2003) ("'The First Amendment is concerned not only with a speaker's interest in speaking, but also with the public's interest in receiving information.'" (quoting Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1, 131 F.3d 564, 573 (6th Cir. 1997))); Conant v.

III. APPLICATIONS

Now that we have examined the legal foundations for the Freedom to Listen, we next discuss how it should be applied to current First Amendment issues.

A. Regulation of Broadcast Content

The Federal Communications Commission's (FCC) old, so-called "Fairness Doctrine" required radio and TV stations to provide free broadcast time for opposing views on major, controversial issues contrary to views a station had previously chosen to broadcast or allow the target of a station's criticism to reply. While the Supreme Court upheld the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*,[64] the FCC repealed the policy in the 1980s.[65] Recently, however, members of Congress and self-proclaimed "media watchdogs" have begun advocating reinstatement of the Fairness Doctrine via legislation, regulation, or by implementation of "localism" initiatives.[66]

In *Red Lion*, talk show host Billy James Hargis criticized the book, *Goldwater: Extremist of the Right*, by Fred J. Cook, on his daily Christian Crusade radio broadcast on WGCB in Red Lion, Pennsylvania.[67] Mr. Cook sued arguing that the FCC's Fairness Doctrine entitled him to free air time to respond to Hargis's show.[68] The radio station argued that the Fairness Doctrine regulations were an unconstitutional infringement of freedom of speech.[69]

The Court upheld the Fairness Doctrine 8-0, citing a Senate report that concluded that such regulation was justified due to the limited spectrum of the public airwaves.[70] Writing for the Court, Justice Byron White stated:

Walters, 309 F.3d 629, 643 (9th Cir. 2002) ("The right to hear and the right to speak are flip sides of the same coin."); U.S. West, Inc. v. FCC, 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech.") (citation omitted).

64. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969).

65. *See* Syracuse Peace Council, 2 FCC Rcd. 5043, 5057-58 (1987).

66. *See* Broad. Localism, 23 FCC Rcd. 1324, 1397 (2008) (issuing the statement of Chairman Martin).

67. *Red Lion*, 395 U.S. at 389-90 (citations omitted).

68. *Id.* at 371-73.

69. *Id.* at 392-93.

70. S. REP. NO. 86-562, at 7 (1959).

> A license permits broadcasting, but the lisensee [sic] has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . .
>
> . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[71]

The Court warned that if the doctrine ever restrained speech, then its constitutionality should be reconsidered.[72]

The Court, however, has found similar laws unconstitutional when applied to newspapers, where there is no technical limit on the number of possible newspapers. In *Miami Herald Publishing Co. v. Tornillo*, Chief Justice Warren Burger, writing for a unanimous court, said that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"[73]

Later cases weakened the constitutional foundations for the Fairness Doctrine. In *FCC v. League of Women Voters of California*, the Supreme Court ruled that Congress could not forbid editorials by non-profit stations that received grants from the Corporation for Public Broadcasting.[74] The Court's 5-4 majority opinion, authored by Justice William J. Brennan Jr., stated that while many now considered that expanding sources of communication had made the Fairness Doctrine's limits unnecessary, "We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[75] After noting that the FCC—out of fear that its rules might be "chilling speech"—was considering repealing the Fairness Doctrine's rules on editorials and personal attacks, the Court added,

> Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course. As we recognized in Red Lion,

---

71. *See Red Lion*, 395 U.S. at 389.

72. *See id.* at 390.

73. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974).

74. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984).

75. *Id.* at 376 n.11.

> however, were it to be shown by the Commission that the fairness doctrine "[has] the net effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case.[76]

In the FCC ruling that led to *Telecommunications Research and Action Center v. FCC*, the FCC held that teletext was a new technology that created a high demand for a limited resource, and thus should not be subjected to the Fairness Doctrine.[77] The Telecommunications Research and Action Center (TRAC) and the Media Access Project (MAP) argued that teletext transmissions should be regulated like any other over-air communications technology and should be subject to the Fairness Doctrine.[78] In 1986, the United States Court of Appeals for the District of Columbia Circuit concluded that the Fairness Doctrine was applicable to teletext, but that the FCC was not required to apply it.[79] In a 1987 case, *Meredith Corp. v. FCC*, two other judges on the same court concluded that Congress did not mandate the Fairness Doctrine and that the FCC did not have to continue to enforce it.[80]

In August 1987, the FCC abolished the Fairness Doctrine by a 4-0 vote in the *Syracuse Peace Council* decision.[81] The FCC stated that the government's intrusion into the content of programming occasioned by the enforcement of the Fairness Doctrine restricted the journalistic freedom of broadcasters and actually "inhibit[ed] the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists."[82] The FCC suggested further that, due to the many media voices in the marketplace, the Fairness Doctrine should be deemed unconstitutional.[83] The United States Court of Appeals for the District of Columbia Circuit upheld this landmark ruling in February 1989.[84] Two years previously, in

---

76. *Id.* at 380 n.12 (citation omitted).
77. Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 503 (D.C. Cir. 1986).
78. *Id.* at 505.
79. *Id.* at 517-18.
80. *See* Meredith Corp. v. FCC, 809 F.2d 863, 873 n.11 (D.C. Cir. 1987).
81. *See* Syracuse Peace Council, 2 FCC Rcd. 5043, 5043 (1987).
82. *Id.* at 5050-51 (internal quotation marks omitted).
83. *Id.* at 5051-52.
84. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989).

June 1987, Congress attempted to mandate the Fairness Doctrine by statute, but President Ronald Reagan vetoed the legislation.[85]

If the Fairness Doctrine ever comes before the Court again, then it should be found unconstitutional. First, both experience and analysis show that the regulation does restrain or reduce speech. Political talk-radio programming flourished after repeal of the Fairness Doctrine, including national programs with tens of millions of daily listeners. Indeed, such political talk radio likely saved AM radio stations from economic extinction, as music formats migrated to the FM stations better suited to such broadcasts.

Radio stations operate in a market where programming decisions are based on maximizing advertising revenue and the projected number of listeners. Regulation requiring airtime for alternative and opposing views would remove the focus on such maximization. Consequently, stations would lose control over their own programming and suffer loss of revenues. This would lead them to avoid talk-radio formats and may drive many stations out of business altogether. Either result effectively restrains or chills speech and should be considered unconstitutional. The Supreme Court recognized precisely this effect in the case of newspapers in *Miami Herald Publishing Co. v. Tornillo*.[86] Additionally, the FCC recognized this same effect on radio stations as part of its reasoning for repealing the Fairness Doctrine.[87] In *Red Lion*, the Court itself recognized that if the Fairness Doctrine could later be shown to restrain speech, it would be unconstitutional.[88]

Second, *Red Lion* is now outdated because of the sweeping, revolutionary, technological advances since that Court's analysis based on the technology of the 1960s. We now have satellite radio unlimited by radio spectrum constraints. Radio broadcasts are also now available over the Internet. Hundreds of government-financed National Public Radio stations now provide an alternative of views on the Left as compared to the views on the Right that have been most successful in commercial broadcast markets. The Fairness Doctrine also covered television, though it was rarely applied in that context. Today, cable and satellite television provide hundreds of TV stations to almost all American homes.

---

85. *See* The Fairness in Broadcasting Act of 1987, S. 742 & H.R. 1934, 100th Cong. (1987).

86. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

87. Syracuse Peace Council, 2 FCC Rcd. 5043, 5052 (1987).

88. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969).

The limitations of the radio and TV broadcast spectrum were the whole basis of the *Red Lion* decision upholding the Fairness Doctrine. Where those limitations do not apply, as in newspaper publishing, the Court has found the Fairness Doctrine's limitations to be unconstitutional invasions of freedom of speech for the reasons previously discussed.[89] Given modern radio and TV broadcast technology, that same analysis of the Fairness Doctrine should now apply to radio and television broadcasts as well.

Third, the listeners and viewers of radio and TV broadcasts have Freedom to Listen constitutional rights that are relevant here as well. The competitive marketplace broadcasts the programming that listeners and viewers want because of the fundamental incentives driving stations to maximize ratings and advertising revenues. Fairness Doctrine regulation forces stations to depart from the programming viewers and listeners favor, which violates the First Amendment's Freedom to Listen. If favored programs or stations are driven off of the air, then that is an obvious unconstitutional violation of the Freedom to Listen. It is the public who will suffer the detriment of being unable to receive the information its preferred radio content provides, therefore, it is the public that will be unable to participate in the marketplace of ideas. Consequently, the First Amendment's protection of the Freedom to Listen is implicated, and the Fairness Doctrine would necessarily create an unjustifiable restriction.

Moreover, political talk radio involves core political speech, which should receive the maximum protection of the First Amendment. If the Court can protect the freedom of an individual to possess obscenity and pornography in such cases as *Stanley v. Georgia*[90] and *U.S. v. Playboy*,[91] then it should be even more willing to protect the Freedom to Listen to the political talk radio consumers may choose. To the extent that the Fairness Doctrine might apply to religious broadcasts, the Freedom to Listen constitutionally protects the freedom of listeners to enjoy their favored religious broadcasts without being burdened with opposing religious viewpoints that they do not want to hear or to suffer the loss of such programming altogether because of the burdens of Fairness Doctrine regulation.

The Freedom to Listen also protects audiences from the perverse results of localism regulations that may effectively reestablish the Fairness Doctrine by another name. The FCC has long required broadcast licensees to serve

---

89. *See,* e.*g.*, *Miami Herald*, 418 U.S. at 258.

90. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

91. United States v. Playboy Entm't Grp., 529 U.S. 803, 826-27 (2000).

the needs and interests of their local communities, based on the statutory language of the original 1934 Communications Act itself. Such localism regulation could be used to condemn nationally-syndicated, political talk radio shows in favor of locally-produced shows with hometown talk show hosts. Or, it could be used to challenge a station's programming on the basis of the preferences of a localism committee of local, political activists.

Radio and TV stations, however, are in the business of serving the needs and interests of their local communities. Such service is exactly what they do in their attempts to maximize ratings and, hence, advertising revenue. In other words, the competitive marketplace inherently drives stations to serve the needs and interests of their local communities. If FCC regulations drive high-rating, nationally-syndicated programming off of the air in favor of local shows, then the regulation would violate the audience's constitutionally-protected Freedom to Listen. Similarly, displacing the programming that the broad audience in the local community prefers in favor of the preferences of a select committee of local activists would also unconstitutionally violate the audience's Freedom to Listen.

B. The Internet

The Internet currently enjoys unfettered freedom of expression. It is consequently the perfect marketplace of ideas, with literally millions of websites competing to communicate. The idea that the government can improve this by regulation, such as requiring websites to include contrary views or links to websites providing opposing viewpoints, is hopelessly elitist. How can the government possibly know what to include among supposed opposing viewpoints or even keep track of all the websites expressing such views? Would Christian websites be required to include links to Muslim sites and Muslim sites to include links to Jewish sites, and would all of these be required to include links to pornographic sites and vice versa?

All such regulation would violate the constitutionally-protected freedom of speech of the website sponsors to communicate what they want and only what they want. It would also violate what we have called the Freedom to Listen, which in this context would be the freedom of Internet users to choose the content they want to view. Such regulation could cause website providers to close their websites to resist the government's dictation of what they can communicate, resulting in a loss to Internet users as well as the website providers. Alternatively, it may just interfere with what the users want to see and learn, exposing them to sites and views they may want to avoid.

On the Internet today, users are perfectly free to choose what to research and view. Government regulation cannot add to this freedom. It can only impose restrictions on that freedom, which would serve as precedents for still harsher restrictions.

C. Campaign Finance

The recent Supreme Court case of *Citizens United v. FEC* provides an important current example of how the Freedom to Listen doctrine can be applied in the area of campaign finance.[92] Citizens United was a non-profit, 501(c)(4) corporation founded in 1988 by individuals who wanted to communicate and advance their particular ideological viewpoint to the general public.[93] Funding for the corporation was raised predominantly from individuals across the country that shared and wanted to advance the organization's ideological message.[94] A small portion of its funding came from for-profit corporations.[95]

Citizens United produced movies advancing its ideological message on the War on Terror, illegal immigration, the United Nations, and religion in public life.[96] Movie theaters across the country showcased these movies, and national retail chains sold the DVD versions.[97] One of these movies, *Rediscovering God in America*, ranked as the top-selling, historical documentary on Amazon.com for a short period.[98]

In 2008, Citizens United produced *Hillary: The Movie* ("Movie"), a feature-length (ninety minutes) documentary.[99] Financing for the production and advertising budgets came from the corporation's general treasury.[100] Individuals and other non-corporate donors contributed over $1 million specifically for the Movie.[101] Two contributions, however, totaling $2,000, came from for-profit corporations.[102]

---

92. Citizens United v. FEC, 130 S. Ct. 876 (2010).
93. Joint App. at 11a, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205).
94. *Citizens United*, 130 S. Ct. at 887.
95. *Id.*
96. Joint App., *supra* note 93, at 11a-12a.
97. *Id.* at 13a.
98. *Id.* at 12a.
99. *Citizens United*, 130 S. Ct. at 887.
100. Joint App., *supra* note 93, at 17a.
101. *Id.*
102. *Id.*

The Movie focused primarily on presenting the facts regarding five prominent episodes in Senator Clinton's life:

--Her role in the firing of the staff of the White House Travel Office, apparently to provide contract opportunities to associates. The Clinton Justice Department criminally prosecuted the fired office director who had thirty years of service, but the director was acquitted in full;

--Her role in official retaliation against a woman who accused President Clinton of sexual harassment;

--Her role in violations of federal campaign finance laws during her Senate campaign and her husband's presidential campaigns;

--Her sometimes inconsistent record and views on the issues of health care, job creation, and national security. With regard to the latter, the film focused on her shift from authorizing the Iraq War to opposing it once the Democratic presidential primaries began;

--President Clinton's pardon of a Puerto Rican independence activist who murdered four people and wounded fifty others in a 1975 terrorist bombing in New York City, while she was at the same time seeking endorsement from Puerto Rican community activists for her 2000 Senate campaign.

Communication of the above facts concerning the five controversies would have been an important contribution to the public debate in the 2008 election year. After all, the Movie communicated the intended ideological message to viewers that Hillary Clinton was not fit for the office of President.

Citizens United did not have any connection with any candidate, campaign, campaign committee, political committee, or political party.[103] Additionally, no aspect of the production or promotion of the Movie was coordinated with any such political entity.[104] Moreover, the Movie did not expressly advocate for the election or defeat of Hillary Clinton for any office or for the election or defeat of any other candidate.[105] It did not contain an appeal to vote for or against Hillary Clinton.[106]

The Movie was planned for release in January 2008, with complete promotional efforts: a website, broadcast advertising, a compendium book detailing the Movie, theaters booked for screenings, and DVDs for sale by

---

103. *Id.* at 14a.

104. *Id.*

105. *Id.* at 13a.

106. *Id.*

prominent retailers.[107] Citizens United also received an offer to make the Movie available to households subscribing to digital cable television through a service called Video on Demand.[108] The Movie would have been listed as one of many movie options on the service, under a heading covering political movies called *Elections '08*.[109] To view the Movie, the cable subscriber would have to specifically order it, and a compressed data electronic signal including the Movie would be sent to the subscriber's TV for viewing.[110]

But under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Movie was considered an "electioneering communication" because it mentioned a federal presidential candidate, and it would be broadcast during the 30-day period before the primaries, caucuses, and conventions occurring throughout 2008 and during the 60 days before the 2008 general election.[111] The broadcast ads for the Movie would also be electioneering communications for these same reasons.[112]

Consequently, the FEC took the position that broadcast of the Movie was prohibited under the BCRA until the conclusion of the 2008 election.[113] Moreover, even ads promoting the Movie would be subject to regulation requiring Citizens United to publicly disclose its donors, which would likely reduce the number of donors and the amounts donated.[114] Additionally, Citizens United would have been required to report the ads in FEC filings as campaign speech, even though they would not have been connected to any campaign. Lastly, Citizens United would have been required to include mandatory FEC disclaimers in the ads. [115]

The Movie could be seen only by viewers who sought it out, wanted to see it, and were willing to pay to do so, unlike a campaign ad broadcast on general TV networks.[116] To see the Movie in theaters, individual viewers would have to research where and when it was being shown, go to the theater, pay for it, and devote ninety minutes of time to watch it. If they

---

107. Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).

108. *Id.*

109. *Id.*

110. *Id.* at 888-89.

111. *Id.* at 888.

112. *Id.*

113. *Id.*

114. *See id.*

115. *See id.* at 888.

116. *Id.* at 887.

were going to watch it on DVD, they would have to research where they could buy it, go there, whether online or in a store, pay for it, and again choose to sit through it for ninety minutes. If they were going to watch it through Video on Demand, they would have to search through the Video on Demand list of available movies, select the Movie, pay an additional fee for it, and again choose to sit through it for ninety minutes to receive its message. The Movie would be broadcast only to an individual viewer's TV when the viewer specifically requested the signal bearing the Movie.

These were the only means for a viewer to watch the Movie, because it was to be distributed only through these three alternatives: theater screenings, DVD, and Video on Demand cable broadcasts. This was in stark contrast with the viewers of thirty and sixty second political ads on free broadcast TV or standard cable TV. Viewers of such ads do not choose to view them. Rather, the ads *interrupt* other broadcasts that the viewers have chosen to watch, and the viewers generally sit through the ads because they are short interruptions of the chosen broadcasts. The viewers also devote no significant time commitment to watch these short political ads. Broadcast of the Movie through the three means—theater screenings, DVD, and Video on Demand—is functionally indistinguishable from downloading video content from the Internet, which the District Court in *McConnell v. FEC* found to be a form of media completely different from television and radio advertising.[117]

Viewers of the Movie through these means hold their own constitutionally protected freedom of speech rights to watch and listen to the Movie under the Freedom to Listen doctrine. The words of Justice Marshall in *Stanley v. Georgia* would seem directly applicable to this situation: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[118] No more or less is involved when a viewer chooses to watch the Movie at home on DVD, through Video on Demand cable broadcasts, or in a movie theater.

There is no compelling state interest in restricting the freedom of speech rights of these viewers to watch and listen to the Movie and its speech. Courts have justified restrictions on campaign financing and speech on the basis of a compelling state interest in preventing corruption or the

117. *See* McConnell v. FEC, 251 F. Supp. 2d. 176, 571 (D.D.C. 2003).

118. Stanley v. Georgia, 394 U.S. 557, 565 (1969). Justice Marshall further notes in the same paragraph: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*

appearance of corruption.[119] There is no potential for such corruption, however, when individuals seek out, select, pay for, and commit themselves to watch the Movie, thereby receiving the information and facts conveyed in the Movie. By taking these steps, viewers are not buying influence with the Democratic presidential primary rivals of Hillary Clinton or with anyone else, but are merely seeking out and obtaining information they think is relevant to the political process, which is constitutionally protected conduct. When the broadcast or distribution of the Movie is limited to these viewers, prohibiting such broadcast or distribution would violate the free speech and Freedom to Listen rights of these viewers without justification.

Moreover, when the Movie broadcast is limited to those who are seeking out the message and information presented in the Movie, the potential for corruption is constrained sharply. The Movie's producer is communicating only to those who are already seeking out the message and information, rather than the general public, which is not nearly as likely to win influence or political favors in return. When the free speech rights of the viewers are weighed with the free speech rights of the producers in this situation, along with the more limited opportunity for corruption, the balance overwhelmingly favors freedom of speech, rather than a speculative interest in preventing corruption. The FEC would thus not have the constitutional authority to prohibit broadcast of the Movie through Video on Demand, theater screenings, or DVDs.

This conclusion is all the more certain because the Movie involves core political speech, which is the real focus of the First Amendment.[120] If the constitutionally protected Freedom to Listen was found paramount with regard to the admittedly obscene material in *Stanley v. Georgia*,[121] or to broadcasts of the Playboy Channel in *United States v. Playboy*,[122] then how much more obvious is its application to the Movie in *Citizens United*? This

---

119. Davis v. FEC, 128 S. Ct. 2759 (2008); FEC v. Wis. Right to Life, 127 S. Ct. 2652 (2007); McConnell v. FEC, 540 U.S. 93 (2003); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985); Buckley v. Valeo, 424 U.S. 1 (1976).

120. *E.g.*, FEC v. Wis. Right to Life, 127 S. Ct. 2652 (2007); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Boos v. Barry, 485 U.S. 312 (1988); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) ("NCPAC"); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976); Williams v. Rhodes, 393 U.S. 23 (1968).

121. *See Stanley*, 394 U.S. at 564.

122. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 826-27 (2000).

is the meaning of *Buckley* and its progeny.[123] We should not allow our First Amendment jurisprudence to collapse into the frivolous perversity of providing more constitutional protection to pornography than to core political speech.

The decision in *Citizens United*, however, was not based on these grounds.[124] The Court issued a broader, more sweeping statement on the meaning of free speech under the First Amendment, concluding it was all about freedom, with no role for the government's attempts to equalize speech.[125]

The Court did indicate support for what we have called the Freedom to Listen, saying, "The right of citizens to inquire, *to hear*, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[126]

The Court added further that "[t]he Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[127] Additionally, the Court said that, "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[128]

IV. CONCLUSION

The First Amendment protects more than the speaker's right to speak. It also protects the Freedom to Listen—that is, the right of an audience to choose what to listen to or watch. Government interference to prevent an audience's freedom of choice violates the Constitution, absent a compelling state interest. Recognizing this Freedom to Listen provides complete protection to freedom of expression.

Furthermore, it has important applications to campaign finance, broadcast regulation such as the Fairness Doctrine, Internet freedom, and other issues. The Freedom to Listen Doctrine protects the right of talk-

123. *See Buckley*, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.").

124. *See* Citizens United v. FEC, 130 S. Ct. 876, 917 (2010).

125. *Id.* at 899.

126. *Id.* at 898 (emphasis added).

127. *Id.* at 899.

128. *Id.*

radio audiences to listen to the shows they want to hear and is a further reason that the Fairness Doctrine would be unconstitutional today. Ratings earned in the competitive marketplace would be relevant evidence supporting a Freedom to Listen argument, providing additional constitutional protection against "localism" regulations giving effective veto power to local political activist to overrule the listening preferences of silent majority audiences.

The Freedom to Listen doctrine would also protect Internet users and their freedom to choose the website content they want to view. That would further protect websites from regulation imposing content on them they did not want to include, such as links to opposing views, which would negatively impact website viewers. The doctrine would also further protect political and campaign speech in contexts of audience choice where no corruption interest could possibly apply to justify restrictions on such speech or its funding.