The Public Domain and a Right of Access: Affect upon the Broadcast Media

Donald D. Moss

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THE PUBLIC DOMAIN AND A RIGHT OF ACCESS: AFFECT UPON THE BROADCAST MEDIA

I

In Red Lion Broadcasting Company v. Federal Communications Commission and its companion case, United States v. Radio Television News Directors Association, the Supreme Court of the United States considered a broad doctrine promulgated by the Federal Communications Commission (FCC) which required a broadcast licensee to afford a "reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance." Specifically, the Court upheld regulations formulated by the FCC that implemented this broad fairness doctrine where an individual is personally attacked or where a political editorial is broadcast. This was the first case in which the Supreme Court considered the statutory basis and constitutionality of the fairness doctrine and the attendant FCC regulations. The fairness doctrine, as expressed in Red Lion, requires that a broadcaster present discussion of public issues and that each side receive fair and equal coverage.

The Radio Act of 1927 was the initial Congressional affirmation of its power to regulate the broadcasting media. This Act required radio stations to allot equal time to opposing political candidates and the doctrine was subsequently extended by the Federal Radio Commission in Great Lakes Broadcasting Company v. Federal Radio Commission, where it was stated:

In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, . . . the principle applies not only to addresses by political candidates but to all dis-

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1 395 U.S. 367 (1969). The two Court of Appeals cases are reported at: Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967); Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968).
3 395 U.S. at 400-01.
4 Id. at 369.
6 Id.

The initial concept of a fairness doctrine certainly had its beginning in this [Radio] Act, which first required that radio stations allot for campaign purposes equal time to opposing political candidates. Two years later, the Federal Radio Commission extended the coverage of this statutory provision to all discussions of issues of importance to the public, Great Lake Broadcasting Company v. Federal Radio Commission . . . .
The broadcast media in 1934 was the subject of renewed Congressional attention which resulted in the creation of the FCC. The provisions of the Radio Act of 1927 concerning political candidates were encompassed within Section 315 of the Communications Act of 1934.

The magnitude of the power delegated to the FCC was demonstrated in In re The Mayflower Broadcasting Corp. A broadcaster, who had for over a year (up to September, 1938) broadcast editorials urging election of various candidates or supporting one side of a public controversy, applied for a license renewal. Though the FCC decision referred to the concept of a fairness doctrine, the broadcaster's "obligation of presenting all sides of important public questions, fairly, objectively and without bias," the Commission stated that "the broadcaster cannot be an advocate."

In reluctantly granting the renewal the Commission relied on the fact that the licensee by affidavit had pledged himself not to editorialize in the future, and that he had not editorialized since September, 1938. But it also lent considerable weight to the lack of other acceptable applications for the frequency and the attendant loss of service to the public if the present application were denied.

Although not specifically prohibiting editorializing, the basis for the renewal did leave open the question whether a licensee could within his obligation of operating within the "public interest" express editorial opinions of his own on matters of public concern. The FCC, recognizing that manifest difficulties inhered in the fairness doctrine, conducted hearings to provide more specific guidelines which resulted in the 1949 Report of Commission in the Matter of Editorializing by Broadcast Licensees. The FCC described "editorialization" as

the use of radio facilities by the licensees thereof for the expression of the opinions and ideas of the licensee on the various controversial and significant issues of interest to the members of the general public afforded radio (or television) service by the particular station.

The Commission further declared a right of licensees to editorialize, at the

10 8 F.C.C. 333 (1940).
11 Id. at 340.
12 Cf. Applicability of the Fairness Doctrine, supra note 2, at 10426, Appendix B, entitled "The History of the Fairness Doctrine" where it is stated: in Mayflower Broadcasting Corp. [it was] stated . . . : 'In brief, the broadcaster cannot be an advocate.' This statement was widely accepted as an outright prohibition of broadcast editorializing, and, in view of the reaction to such policy, the Commission . . . initiated [the 1947 proceedings].
13 The obligation is imposed by 47 U.S.C. §§ 307(a), (d), and 309(a) (1964).
14 13 F.C.C. 1246 (1949).
15 Id. at 1252.
same time recognizing an obligation to present all sides of opinion in the
discussion of public issues.

The Report and its requirements were not beyond attack even at that
eyearly date. Commissioner Jones, in a separate opinion, stated that any de-
cision permitting a licensee to editorialize required a reversal of Mayflower
"which fully and completely suppressed and prohibited the licensee from
speaking in the future over his facilities in behalf of any cause." In
agreeing that the Mayflower rule should be changed, he argued that condi-
tioning editorializing by the fairness doctrine was a restraint violating the
First Amendment as it restrained the licensee in his freedoms of speech and
press. The majority of the Commission countered:

The freedom of speech protected against governmental abridgement by the first
amendment does not extend any privilege to government licensees of means of
public communications to exclude the expression of opinions and ideas with which
they are in disagreement. We believe, on the contrary, that a requirement that
broadcast licensees utilize their franchises in a manner in which the listening
public may be assured of hearing varying opinions on the paramount issues facing
the American people is within both the spirit and letter of the first amendment.

Thus the Commission recognized a duty in the licensee to afford "a reason-
able opportunity for the presentation of all responsible
positions" and to
take a "conscious and positive role in bringing about balanced presentation
of the opposing viewpoints."

The Report was also significant because the Commission commented upon
the broadcasting of personal attacks. They stated that "elementary consid-
erations of fairness may dictate that time be allocated to a person or group
which has been specifically attacked over the station, where otherwise no
such obligation would exist." For the first time a suggestion that the fair-
ness doctrine encompassed protections of a personally attacked individual or
group, enforced by an allocation of time, was officially recognized.

Congress in 1959 amended Section 315 of the Communications Act of
1934. Exempting certain news programs from the equal time require-
ment for political candidates, a proviso stated:

Nothing in the foregoing . . . shall be construed as relieving broadcasters, in
connection with the presentation of newscasts, news interviews, news documentaries,
and on-the-spot coverage of news events, from the obligation imposed upon them
under this [Act] to operate in the public interest and to afford reasonable oppor-

16 Id. at 1259.
17 Id. at 1256.
18 Id. at 1250.
19 Id. at 1251. "Conscious and positive role" was described in terms that:
The Commission has consequently recognized the necessity for licensees to devote
a reasonable percentage of their broadcast time to the presentation of news and
programs devoted to the consideration and discussion of public issues of interest
in the community served by the particular station. Id. at 1249.
20 Id. at 1252.
tunity for the discussion of conflicting views on issues of public importance.\textsuperscript{22}

(emphasis added.)

This proviso served as a foundation for the judicial determination in \textit{Red Lion} that Section 315 is a statutory basis for the fairness doctrine.\textsuperscript{23}

The Commission in 1963 sent to all licensees a public notice of its specific procedures required to implement the personal attack segments of the fairness doctrine. These procedures required that:

When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response.\textsuperscript{24}

A later public notice commonly known as the "Fairness Primer" refined and restated the applicable rules in more explicit detail.\textsuperscript{25}

On November 27, 1964, radio station WGCB in Red Lion, Pennsylvania, whose licensee is Red Lion Broadcasting Co., presented \textit{The Christian Crusade}, a fifteen minute sponsored program featuring Reverend Billy James Hargis. Reverend Hargis discussed the 1964 Presidential election with attention to a book entitled \textit{Goldwater—Extremist on the Right} authored by Fred J. Cook. Reverend Hargis alleged:

Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and Newsweek Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to the New York District Attorney . . . . [N]ow this is the man who wrote the book to smear and destroy Barry Goldwater . . . .\textsuperscript{26}

Cook wrote to WGCB stating that if such an attack had been made, he requested free time to reply. In response WGCB furnished Cook with its rate card.\textsuperscript{27}

A further exchange of letters between Cook and WGCB followed with the station holding to its position that Cook should pay for any air time. Cook then filed a complaint with the FCC resulting in an exchange of letters between Red Lion and the FCC. Red Lion thereupon modified its stand and indicated that it would grant Cook free time but only if he advised Red Lion that he was unable to pay. In referring Red Lion to the

\begin{itemize}
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} 395 U.S. at 380-82.
  \item \textsuperscript{24} 25 \textsc{Pike & Fischer Radio Reg.} 1899, 1900 (1963). The Pike and Fischer Radio Regulation series is an unofficial compilation of FCC public notices, public letters, letters directed to specific licensees in relation to specific disputes, and other general statements by the FCC.
  \item \textsuperscript{25} \textit{Applicability of the Fairness Doctrine, supra} note 2. The "Fairness Primer" is a statement in digest form of the past rulings in specific cases by the FCC where the fairness doctrine was at issue.
  \item \textsuperscript{26} 395 U.S. 367, 371 n.2 (1969).
  \item \textsuperscript{27} \textit{Red Lion Broadcasting Co. v. FCC}, 381 F.2d 908, 911 (D.C. Cir. 1967).
\end{itemize}
"Fairness Primer" and to the licensee’s obligation contained therein, the FCC commented:

The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear . . . . [He is] also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis.28

The burden was on Red Lion to find sponsorship, and if they could not, Cook was to receive free time regardless of his ability to pay.29 Red Lion petitioned the United States Court of Appeals for the District of Columbia to review the order of the FCC.30

Upholding the order, the court determined that Section 315 of the Communications Act of 1934, as amended in 1959,31 adopted the fairness doctrine and was a proper delegation of Congress’ legislative function. The pivotal issue was framed by the court:

Does the Fairness Doctrine impair free speech in violation of the first amendment by imposing a prior restraint upon the expression of views, arguments and opinions by petitioners, as well as by all other owners of radio stations, and upon those who pay for the use of such facilities?32

The court answered that licensees “are not required to submit any broadcast material to the Commission . . . prior to broadcast. It is obvious that there is involved in this case no censorship which constitutes prior or previous restraint.”33 Petitioner contended that fear of punishment (a denial of their ultimate renewal application) constitutes a de facto restraint upon the exercise of their free speech guarantees. The court rejected any basis for such fear because “the remedial provisions of title 47 U.S.C, the Administrative Procedure Act, and the accessibility of the courts guarantee petitioners full redress from any illegal, arbitrary or capricious conduct on the part of the Commission.”34 The court concluded that:

28 Id. at 913. A full recitation of the interchanged letters is contained at 911-15.
29 Id. at 915.
30 Id. at 908. At first the petition was dismissed for want of a reviewable order. On second application the court granted appeal to the petitioner who convinced the court that the FCC rule which permitted it to issue a declaratory ruling was justified by the Administrative Procedure Act, 5 U.S.C. §§ 1001-11 (1964). Though the FCC did not comply with all requirements for an adjudicative proceeding, the petitioner had adopted the FCC’s position that this was a reviewable order thus waiving any objection petitioner might have had. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 372 n.3 (1969).
32 381 F.2d 908, 927 (D.C. Cir. 1967).
33 Id. at 929. This statement by the court is conclusionary and non-responsive. Even if a licensee is not required to submit any broadcast material to the FCC, the fact that a licensee must comply with the mandates of the fairness doctrine or be faced, as was Red Lion Broadcasting Co., with revocation of their license for non-compliance certainly can restrain the licensee in his choice of broadcast material.
34 Id. It remains to be seen if this is an adequate answer. It is difficult to deter-
There is no abrogation of the petitioners' free speech right. On the contrary, I find that the conduct of the petitioners absent the remedial procedures afforded the complainant Cook would, in fact, constitute a serious abridgement of his free speech rights.\textsuperscript{35}

Shortly after the \textit{Red Lion} decision, the FCC, attempting to make the personal attack and political editorial rules of the fairness doctrine more precise, published regulations essentially providing that where an individual or group is personally attacked the licensee is required to notify them of such attack, provide them with a tape or script of the attack, and offer an opportunity to respond. Exempted from the requirements are attacks on foreign groups or public figures, or attacks made by legally qualified candidates, their authorized spokesmen or associates, and attacks made during bona fide newscasts, news interviews and on-the-spot coverage of bona fide news events including commentary or analysis. The political editorial rules require that a licensee who in an editorial endorses or opposes a legally qualified candidate must within twenty-four hours transmit a script or tape of the editorial with an offer of a reasonable opportunity to respond to the other candidates.\textsuperscript{36}

\begin{footnotesize}
\begin{enumerate}
\item The regulations (47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679, which are all identical) as amended read:
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\item Personal attacks; political editorials.
\begin{enumerate}
\item When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
\item The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign . . . ; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) . . . shall be applicable to editorials of the licensee.)
\item Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification
\end{enumerate}
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\end{footnotesize}
Shortly after the FCC promulgated its regulations there came the inevitable challenge in *Radio Television News Directors Association v. United States.* The Association (RTNDA) in seeking review of the regulations vigorously asserted that the regulations imposed unconstitutional burdens on their freedom of the press protected by the First Amendment. RTNDA also challenged the fairness doctrine itself on the same constitutional ground. The court relied on *New York Times Company v. Sullivan* and concluded that the impact of that decision upon the facts of this case was that the freedom of the press to disseminate views on issues of public importance must be protected from the imposition of unreasonable burdens by governmental action.

In accepting RTNDA's contention, the court further noted that inhibition "from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply" is analogous to the *New York Times* inhibition from a possible damages award for libel. In contradistinction to the District of Columbia Court of Appeals, the Seventh Circuit found the rules to be vague as well as constituting an unconstitutional abridgment of the freedom of the press.

II

The United States Supreme Court granted certiorari to *Red Lion* and RTNDA as consolidated cases. A unanimous Court (Justice Douglas not sitting) resolved the conflict between the circuits by affirming *Red Lion* and reversing RTNDA. Justice White wrote the opinion for the Court.

Initially the Court concluded that the FCC possessed the statutory au-

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The court distinguished the Court of Appeals' decision in *Red Lion* by stating, in effect, that *Red Lion* only upheld the constitutionality of the fairness doctrine. The court clarified that it was not prepared to declare the fairness doctrine unconstitutional. But, it would refute the *Red Lion* decision inasmuch as its effect was to uphold the personal attack rules. *Id.* at 1017-18. In conclusion the court stated that it need not determine whether 47 U.S.C. § 315(a) (1964) authorized promulgation of the personal attack and political editorial rules, since they hold that such rules violate the First Amendment guarantees of freedom of speech and press. *Id.* at 1021.

authority to promulgate regulations regarding standards of fairness in the broadcast media.\textsuperscript{48} Apparently authority was predicated upon either of two statutory grounds. The broader authorization was derived from a mandate to the FCC to promulgate such regulations “as public convenience, interest, or necessity requires.”\textsuperscript{44} However, the opinion indicates that a more specific authorization accrues from the proviso contained in the 1959 Amendment of Section 315 of the Communications Act of 1934.\textsuperscript{46} Nothing in the Section, according to the proviso, shall be construed as excepting licensees “from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” (emphasis added.)\textsuperscript{49} This Amendment was accepted by the Court as Congressional approval of the fairness doctrine. Congress’ affirmative action was interpreted as a reinforcement of its longstanding acquiescence to the Commission’s construction of “public interest”.\textsuperscript{47}

The Court concluded that the personal attack and political editorializing rules were an authorized part of the fairness doctrine,\textsuperscript{48} reasoning that Congress’ non-responsiveness to the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees\textsuperscript{40} could be equated with approval. In describing suggested rules the Report stated “elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked.”\textsuperscript{50} Although not construing the 1959 Amendment as a ratification of every FCC pronouncement, the Court added that it would be a misconstruction to hold that it did not authorize these personal attack and political editorializing regulations.\textsuperscript{51}

Public interest demands that the regulations be enforced by the “equal time” provisions, rather than leaving the response with the station which has made the attack or editorial.\textsuperscript{52} Congress had specifically provided that a broadcaster who grants time to a political candidate must provide equal time to his opponents.\textsuperscript{53} The Court stated:

It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.\textsuperscript{54}

\textsuperscript{43} Id. at 375-86.

\textsuperscript{44} Id. at 379 quoting from 47 U.S.C. § 303 and § 303(r).

\textsuperscript{45} Id. at 380. The amendment is found at 47 U.S.C. § 315 (1964).

\textsuperscript{46} 395 U.S. at 380, quoting from 47 U.S.C. § 315(a) (1964).

\textsuperscript{47} 395 U.S. at 381-82.

\textsuperscript{48} Id. at 385.

\textsuperscript{49} 13 F.C.C. 1246 (1949).

\textsuperscript{50} Id. at 1252.

\textsuperscript{51} 395 U.S. at 385-86.

\textsuperscript{52} Id. at 385.

\textsuperscript{53} Id. See 47 U.S.C. § 315 (1964).

\textsuperscript{54} 395 U.S. at 385. However, the political candidate “equal time” requirement of 47 U.S.C. § 315 (1964) does not require free “equal time”. The FCC in Red Lion had ordered free air time to the personally attacked individual. The Court did not discuss how 47 U.S.C. § 315 (1964) could so authorize free “equal time”.}
These findings required the Court to discuss the First Amendment arguments.

The broadcasters contended that the fairness doctrine and the personal attack and political editorializing regulations violated their First Amendment rights. In dismissing this contention the Court noted that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."  

Drawing an analogy to the restriction of sound amplification equipment, the Court pointed out that the broadcast media does fall within the ambit of First Amendment protections. However, this protection is not absolute. It declared:

Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. (emphasis added.)  

Since the number of radio frequencies is technologically limited, only a few individuals can command control of this power, and:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish . . . . as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.

Justice White observed that there is nothing which would prevent the government from assigning more than one licensee to a frequency. Although not disclaiming the applicability of the First Amendment to public broadcasters, he stressed that "It is the rights of the viewers and listeners not the right of the broadcasters, which is paramount."

In the instant case, the Supreme Court has lent new dimension and context to the traditional First Amendment questions which were raised by the licensee's counsel. Contained within the opinion is language, as above, which suggests that the broadcasters' rights are at least subordinated to the public's, if indeed, their First Amendment rights are distinct from

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65 Id. at 386.
66 Id.
67 Id. at 387.
68 Id. at 388-89.
69 Id. at 389.
70 Id. at 389-90. Vice President Agnew in his stinging attack on broadcast licensees, Nov. 13, 1969, before the Mid-West Regional Republican Committee at Des Moines, Iowa, found cause to quote this passage from the opinion. He prefaced his comments with the observation Now a virtual monopoly of a whole medium of communication is not something that democratic people should blindly ignore. And we are not going to cut off our television sets and listen to the phonograph just because the airways belong to the networks. They don't. They belong to the people. N.Y. Times, Nov. 14, 1969, at 24, col. 5.
the public's. To this end the Court suggested that:

the people as a whole retain their interest in free speech by radio and their collective
right to have the medium function consistently with the ends and purposes of the
First Amendment. (emphasis added.)61

The licensees framed the issue in terms of their First Amendment rights.62

The Court, however, seems to have reflected upon the underlying source
of their rights and to have viewed the broadcaster as a conduit for the
public's First Amendment rights. An analogy can be drawn to a master/
servant or a stockholder/proxy relationship wherein a broadcaster conceivably stands in the shoes of the public and represents those rights that belong to the public. The Court approached an articulation of this concept with the following language indicating that the broadcaster's obligation is:

to share his frequency with others and to conduct himself as a proxy or fiduciary
with the obligation to present those views and voices which are representative of
his community and which would otherwise, by necessity, be barred from the
airwaves. (emphasis added.)63

Future litigants in this area might well be advised to take cognizance of this
method of analysis in structuring their arguments.64

Perhaps fearful of boldly adopting a novel position emasculating broad-
casters' independent First Amendment rights, the Court retreated to a more
limited setting which accorded it the opportunity to refine the issue accord-
ingly: Whose First Amendment freedoms will prevail, those of the broad-
casters or the public.65 A determination was reached by weighing the relative

61 395 U.S. at 390.
62 Respondent's (RTNDA) Brief for Certiorari at 28, Red Lion Broadcasting
Co. v. FCC, 395 U.S. 367 (1969). Petitioner in its brief stated:

[Licensees] are subjected to a burden or penalty, consisting of the expense in-
volved in locating the subject of the personal attack, furnishing him with a script,
recording or summary of the broadcast, and thereafter granting him free time in
which to reply—time which otherwise might be allocated to a paying sponsor. Petitioner's (Red Lion) Brief for Certiorari at 22, Red Lion Broadcasting Co.
63 395 U.S. at 389.
64 This is not to suggest that the broadcaster is totally deprived of First Amendment
protections. The FCC has power to insist upon discussion of controversial issues but
no power to initiate discussion of a particular area. If such an attempt were made by
the FCC, the broadcaster would stand upon his own First Amendment guarantees.
This should suggest a close investigation, by counsel, of the foundation of the rights
of the broadcaster as inferred in Red Lion. The position of the licensee might well be
only a standing to assert the rights of others as he meets the requirements as set out in
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). Indeed, without un-
precedented action by the FCC the standing to assert the rights of others may well
be the broadcaster's only position.
65 This does not undermine the conceptualization of the broadcaster's proxy position
discussed above. This was the question as presented to the Court. The Court, by its
decision, added weight to the above concept through its discussion. As a result of the
structure of the questions, it might be suggested that the Court decided two issues.
First, the regulations are not unconstitutional, and second, as a prerequisite to the
first, the broadcaster had only those rights that flow from the "public interest". If this
power of each in relation to the limited availability of broadcast frequencies. Justice White stated that without the disputed FCC regulations:

station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. (emphasis added.)

Summarily rejecting the broadcaster's contention that the regulations were so vague as to be impossible to discern, the Court presented its holding based upon three factors:

In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional. (emphasis added.)

As discussed above, the government's role changes the status of the favored licensee from individual to representative. As a prelude to the limited holding, the Court also held:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. (emphasis added.)

Such language furthers the suggestion that the broadcaster must appear before the Court as an advocate of the public.

The Court, however, was not without other theories on which it could have reached the First Amendment problem. Reliance could have been placed, for example, on the underlying rationale of contracts of adhesion. Positing their decision upon "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views", the Court has implicitly recognized that freedom of speech includes the ability of the individual to be free to express himself.

In an anthology of cases, a similar rationale has been applied to freedom of contract. In a factual setting where two parties enter into a contract

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6 395 U.S. at 392.
67 Id. at 395-96.
68 Id. at 400-01.
69 Id. at 394.
70 For a thorough analytical consideration of this judicial phenomenon see Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629 (1943).
71 395 U.S. at 400.
72 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), is the leading case. There, a disclaimer of tort liability found in virtually all contracts for
and one party possesses such a powerful bargaining position such that the other party is unable to bargain for the terms of the contract, courts have refused to enforce the terms of the contract. Those courts implicitly recognized that freedom of contract includes the ability of the individual to be free to bargain. As early as 1942, a dissenting Justice Frankfurter postulated this rationale which underlies that which is generally referred to as the doctrine of "contracts of adhesion". In a freedom of expression or contract case, where the power of one party is so disproportionate in relation to the other party's ability to be free to either express himself or to contract, the court could theoretically reach a decision based upon the rationale that the party must be able to express himself or contract.

The sale of new automobiles (in fact, the Automobile Manufacturers Ass'n used a uniform disclaimer) was held unenforceable due to the disproportionate bargaining positions and the inability of the consumer to bargain at all. The theory of adhesion was mentioned in an earlier case, Raulet v. Northwestern Nat'l Ins. Co., 157 Cal. 213, 107 P. 292 (1910), and in Bekken v. Equitable Life Assur. Soc'y of United States, 70 N.D. 122, 293 N.W. 200 (1940); also Justice Frankfurter's dissenting opinion in United States v. Bethlehem Steel Corp., 315 U.S. 289, 327-28 (1942) (contracts between shipbuilder and United States during World War I). Following Kessler's article the doctrine received more attention; see Justice Frank's dissent in Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955) (provision in ticket for passage that action against Cunard must be commenced within one year from end of voyage); Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (patient's release of hospital negligence liability found adhesive); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (warranty disclaimer held adhesive); Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962) (air flight insurance issued from vending machine which limited coverage to scheduled airlines only, and insured used non-scheduled, held clause of adhesion); Neal v. State Farm Ins. Cos., 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961) (an employment contract was referred to as a contract of adhesion).


In the broadcast media the licensee possesses a typically powerful position vastly unequal to the complaining individual in relation to freedom of expression. This is similar to the powerful position that an insurance company or automobile manufacturer possesses in relation to the ability of an individual to bargain. See Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962) and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). In contracts of adhesion cases it was recognized that to permit adhesion by the powerful corporation would be to permit the corporation to make its own private contract law without the individual having any ability to share in that law-making process. See generally Llewellyn, What Price Contract?—An Essay in Perspective, 40 YALE L.J. 704 (1931), and Oldfather, Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking, 16 KAN. L. REV. 303 (1968). As expressed by Kessler, "Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appear-
Recognizing a right of access to the broadcast media as essential to an individual's constitutional guarantees did not need, perhaps, for its foundation, the contract of adhesion rationale because the government was involved. The government's power to regulate the broadcasting industry in order to protect the public's interest was again upheld by the Court: the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. *The ruling and regulations at issue here do not go quite so far.* (emphasis added.)

It is important to note that the Court does not accept the regulations at issue as representative of the outer limits of the government's power. Rather, it states that regulations are well within the ambit of Congress' power to protect an individual's constitutional guarantees in relation to the broadcast media. While not approving of every past FCC application of the regulations, the Court did allude to both the government's role and the underlying rationale of the contracts of adhesion theory to uphold the constitutionality of the regulations and their specific application in this case. If the Court did not uphold the regulations, it was stated that broadcasters would have "unfettered power to make time available only to the highest bidders . . . and to permit on the air only those with whom they agree." (emphasis added.) The Court's approach indicates that the contracts of adhesion rationale might well have been implemented if government's role was absent.

The Comment suggests an administrative solution to contracts of adhesion similar to that involved in Israel. Compare this to the role of the FCC in the question of
Pursuant to the "power" considerations discussed above, might it be argued that the print media is similarly characterized (but for government's role) so as to fall within the contracts of adhesion rationale? Nor would the prospect of a legislative, administrative or judicial assent to a right of access to respond to a newspaper attack constitute a novel approach. Professor Chafee, writing in 1947 for the Commission on Freedom of the Press, stated:

as an alternative to the present remedy for libel, we recommend legislation by which the injured party might obtain a retraction or a restatement of the facts by the offender or an opportunity to reply. (emphasis added.)

The relation between libel and a right of access is well illustrated in New York Times Company v. Sullivan. Both Red Lion Broadcasting Company and RTNDA strongly relied on this case to support their position. They argued that "uninhibited, robust, and wide-open" debate requires that licensees be free from the burden of these FCC regulations. RTNDA maintained that: "The 'personal attacks' of which the Commission seeks to lay hold are the same kind of criticism of public figures that New York Times held to be constitutionally privileged." However, New York Times did not hold that criticism of public figures is an absolute constitutional privilege. It is constitutionally privileged only to the extent that a showing of "actual malice" is required to recover damages for the libelous criticism.

the ability of an individual to gain access to the media. It might be suggested that the role of the FCC is to offset the adhesive position of the licensee versus the individual.


Id. at 801.


New York Times required a showing that the libel was committed with "actual malice" which was defined as "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 254, 280 (1964). Justice Black, with whom Justice Douglas concurred, stated that "'malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove." Id. at 293.
The Court of Appeals in RTNDA accepted RTNDA’s argument. The Court of Appeals in Red Lion rejected a similar argument. The Supreme Court was austerely silent in their decision of the companion cases concerning the affect of New York Times. And it was precisely the non-responsiveness to this case that caused the opinion to be something less than lucid.

RTNDA argued that its case was not distinguishable from New York Times notwithstanding the different remedies being sought, a right of access in the instant case and damages in New York Times. But RTNDA expressed this merely as a conclusion whereas the remedy sought did constitute a clear difference between the two cases.

In New York Times the Court was faced with determining whether one party’s (the publisher’s) freedoms of speech and press should be restricted in order that a personally attacked individual could be awarded $500,000 damages. Awarding such damages for libel, which was contained in a political advertisement, certainly would cause the publisher to censor advertisements submitted to his newspaper and consequently restrict the publisher’s freedom of press. Unlike Red Lion, there were no intersecting freedoms of speech and press of the personally attacked individual against which restricting the publisher’s freedoms could be counter-balanced. The Commissioner from Alabama, Sullivan, in New York Times, sought $500,000, not that his freedoms of speech and press be protected by permitting him equal time to rebut.

Secondly, New York Times would support, at most, a showing of “actual malice” as a catalyst for the application of the personal attack or political editorial regulations. New York Times did not eliminate the cause of action for libel. A fortiori reliance on that case would not support eliminating the FCC’s power to grant a right of access. However, in light of

86 Radio Television News Directors Ass’n v. United States, 400 F.2d 1002, 1011-13 (7th Cir. 1968).
87 Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 929-30 (D.C. Cir. 1967).
88 Though the case was cited, it was in reference to a separate concept. See 395 U.S. 367, 390 (1969).
90 Alternatively, publishers might seek to extract either an exaggerated fee or a guarantee from an advertiser. If this failed or if it is the publisher’s own attack, he will have to consider the possibility of the extra cost. That extra cost, to a publisher who is dollar conscious, could lead him to censor such attacks.
91 “Alabama law denies a public officer recovery of punitive damages in a libel action . . . unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914.” New York Times Co. v. Sullivan, 376 U.S. 254, 261 (1964). Thus, Sullivan sought a retraction as a precondition to seeking punitive damages. The Times refused to retract. In the libel action, Sullivan did not seek retraction which clearly would have been an attempt to assert his First Amendment guarantees. Rather, he sought damages.
the holding in Red Lion, that the personally attacked individual or victim of a political editorial has a First Amendment guarantee to access, the finding of "actual malice" is unnecessary. In New York Times, restriction of the publisher's rights was offset by burdening the personally attacked individual with showing that the libel occurred with "actual malice". In Red Lion the freedoms of speech and press of the individual offset restriction of the licensee's rights.

No less an authority on mass communications than Jerome Barron has commented upon the New York Times case in relationship to a general right of access.92 Pointing out that the New York Times decision might reduce the likelihood of a retraction, he mentioned that the failure of courts to require publishing a reply ignored a device commonly used in other countries. He champions the theory that a right of reply should be mandatory, if a court, as it did in New York Times, immunizes the press from financial attack:

If financial immunization by the Supreme Court is necessary to ensure a courageous press, the public officials who fall prey to such judicially reinforced lions should at least have the right to respond or to demand retraction in the pages of the newspapers which have published charges against them. The opportunity for counterattack ought to be at the very heart of a constitutional theory which supposedly is concerned with providing an outlet for individuals who 'wish to exercise their freedom of speech even though they are not members of the press.'93

Barron has offered conclusions similar to Chafee's although he has come closer to adopting the contracts of adhesion rationale. Commenting on the void left by the New York Times decision he pointed out:

What the Court has done is to magnify the power of one of the participants in the communications process with apparently no thought of imposing on newspapers concomitant responsibilities to assure that the new protection will actually enlarge and protect opportunities for expression.94

This is an application of the contracts of adhesion rationale to the newspaper industry. The decision in Red Lion can only accelerate this approach in future debate and thought about a responsive and responsible role of the American print media vis-à-vis the First Amendment rights of the "non-press".

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93 Barron, Access to the Press—A New First Amendment Right, supra note 92, at 1658.
94 Id. at 1658-59.
Red Lion enforced a remedy of access to a broadcasting frequency. The Court stated its rationale for such a remedy:

prevalence of [technological] scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views. . . .95

In a closing footnote to its decision the Court stated that the existence of economic scarcity as a factor for upholding the fairness doctrine and the regulations need not be considered because it found scarcity based upon technological limitations.96 However, Justice White does suggest that if there were no technological scarcity, there still would be ample reason to uphold a right of access.

Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. (emphasis added.)97

Consequently, the Court's rationale in the future may not be limited to either economic or technological grounds, nor at government's involvement in allocating frequencies; rather, it may be directed to the power of the broadcaster. The Court's concern is: Can the broadcaster limit access?

Scarcity, as the term is used by the Court, appears to be synonymous with non-availability. The reason for the scarcity is stated to be technology. Since there are only so many frequencies over which a limited number of licensees can broadcast, not all may use the medium.

Both scarcity (non-availability) and government involvement contribute to a licensee's powerful position. It is this power position coupled with "the legitimate claims of those unable without governmental assistance to gain access . . . for expression of their views"98 that requires a right of access remedy.

Does the print media possess this same position of power in relation to the ability of an individual to gain access?99 Though the government takes

95 395 U.S. at 400.
96 Id. at 401 n.28.
97 Id. at 400.
98 Id.
99 Prof. Jerome Barron in writing about the United States Court of Appeal decision in Red Lion Broadcasting Co. stated that:
The Red Lion determination that the duty of the broadcaster to furnish an unpaid reply to a personal attack was not violative of the first amendment is an important step in the evolution of a constitutional theory that will be sensitive to the unanticipated power which the marriage of technology and capital has placed in the relatively few hands which dominate mass communications. Barron, An Emerging First Amendment Right of Access to the Media?, 37 Geo. Wash. L. Rev. 487, 506 (1969). Id.

In writing of the possible effect to be gained by a Supreme Court consideration of this case, he went on to state:

Perhaps when Red Lion is finally reviewed by the Supreme Court the centrality of the concept of access to the problem of protecting freedom of expression will
no direct part in allocating who can print, economic factors demonstrate that a similar scarcity exists in the print media.\textsuperscript{100} The power position of the newspaper publisher, in terms of power over access, is no less than the power position of those who control broadcast media. In fact, American cities frequently support more broadcast stations than newspapers,\textsuperscript{101} and this is equally applicable to rural areas.\textsuperscript{102} In terms of scarcity, newspapers are often less available than broadcast stations. And, in terms of ability to obtain access, it is perhaps as difficult to develop a newspaper as it is to obtain a broadcast license and the necessary facilities.\textsuperscript{103} The foregoing strongly suggests that the "adhesion" or "power" rationale might be imposed on newspapers in order to generate a right of access.

If society, through its legal machinery, recognizes this power position of newspapers and responds with a "right of access", questions arise as to the effect upon newspaper content. Allegations that this response would force self-censorship would be raised as they were in \textit{Red Lion}.\textsuperscript{104} The Court, in answering this contention as applied to broadcasters, found no such abuse under the regulations and rulings in the past.\textsuperscript{105} The Court noted that "such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the

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\textsuperscript{100} There may be indirect roles such as taxation.

\textsuperscript{101} For instance, Chicago in 1967 had 13 daily newspapers and 79 broadcasting stations (32 AM, 39 FM, and 8 TV); Detroit had 5 daily newspapers and 41 broadcasting stations (12 AM, 23 FM, and 6 TV). Respondent's (RTNDA) Brief for Certiorari at 47 n.40, \textit{Red Lion Broadcasting Co. v. FCC}, 395 U.S. 367 (1969).


\textsuperscript{103} It seems untenable to state that since it is possible for one to develop a newspaper without application to the government for a license, one's freedom of expression is protected in the print media without a right of access. How long would it have taken Sullivan to develop a newspaper comparable to the New York Times?

\textsuperscript{104} 395 U.S. at 392-93. The Supreme Court has recognized the monumental influence that both broadcast and print media possess. \textit{Cf. Sheppard v. Maxwell}, 384 U.S. 333 (1966), and \textit{Estes v. Texas}, 381 U.S. 532 (1965), where news coverage denied the accuseds due process of law. \textit{See also Citizen Publishing Co. v. United States}, 394 U.S. 131 (1969). The Court found a violation of the Sherman Act where the only two daily newspapers in Tucson, Arizona had an operating agreement which included price fixing, profit pooling, and market control.

\textsuperscript{105} 395 U.S. at 393.

doctrine would be stifled.”\textsuperscript{106} Declaring that “there will be time enough to reconsider the constitutional implications”,\textsuperscript{107} if this effect is shown in the future, the Court also relied upon the power of the FCC to insist that licensees give adequate attention to public issues.\textsuperscript{108}

But the Court in its summary discussion of this area failed to examine in any depth the dollar motivation of a licensee.\textsuperscript{109} The broadcaster would visualize the sanction of free time as a violation of its general business ethic and his natural reaction to the regulations would seem to result in an effort to avoid their application by self-censorship.

Without the regulations, self-censorship is not foreign to a broadcaster. He most likely has used this device in response to audience criticism, discord with a sponsor, low ratings, as well as his own personal taste.\textsuperscript{110} Except for the last mentioned possibility these devices will be employed to optimize profit. The regulations serve to compound the broadcaster’s dilemma. If he will censor a program from the airwaves because of low ratings, how can he permit a prime time personal attack or political editorial when the result might cause a loss of an equal amount of prime time in the future?\textsuperscript{111}

For the above reasons it is suggested that the regulations might tend to reward blandness in the broadcasting industry.\textsuperscript{112} However, there are

\begin{footnotes}
\item[106] Id.
\item[107] Id.
\item[108] Id.
\item[109] Cf. N. Minow, Equal Time, The Private Broadcaster and The Public Interest 49 (1964), where he stated that the broadcast industry returned 19.2\% on their investment in 1960. Mr. Minow was Chairman of the FCC during President Kennedy’s administration. The licensee seeking a profit no more wants to give free air time that would otherwise be paid for, than does any other businessman want to give away free that which earns him profit.
\item[110] See Barron, In Defense of “Fairness”: A First Amendment Rationale for Broadcasting’s “Fairness” Doctrine, 37 U. Colo. L. Rev. 31, 47 (1964), where he stated:

Individual instances of the [broadcast] industry acting as censor are fairly common and are found particularly in regard to programming considered to be ‘entertainment’ . . . .

In the accompanying footnote to this statement, Prof. Barron states: “The industry itself sometimes acts as censor and makes programming decisions of great consequence on the basis of slight adverse public criticism.” Id. at 47 n.68, citing House Comm. on Interstate and Foreign Commerce, Report to Television Network Procurement, H.R. Rep. No. 281, 88th Cong., 1st Sess. 370 (1963). An overt example of licensee censorship might be The Smothers Brothers Comedy Hour.

\item[111] The censorial effect of “equal time” regulations can be seen in the Nixon-Kennedy debates where suspension by Congress of the “equal time” requirement [47 U.S.C. § 317 (1964)] was required in order that the debate take place. See 74 Stat. 554 (1960).
\item[112] Cf. N. Minow, supra note 108, at 52, where he suggested to broadcasters that they sit down in front of [their] television set[s] when [their] station goes on the air.
\end{footnotes}
three mitigating factors that might serve to eliminate blandness. First, the licensee himself might determine that it is his duty to present controversial issues, or secondly his audience may force such a determination upon him. Finally, the FCC has the power to require licensee presentation of controversial issues.113

Blandness can result from an unequal enforcement of the regulations so that the "equal time" regulations are given more weight than the requirement for presentation of issues of public importance. If this occurs a void will be created by the FCC which will not be filled by the broadcasting networks. Since the licensee is generally considered to be a businessman, the answer would appear to lie solely with the FCC.

This might suggest a more active role by the FCC in the broadcasting industry. A circle is started when the broadcaster, as an example, presents a program in favor of government sponsored birth control. The FCC then enforces the fairness doctrine to allow a religious organization to reply to the views previously expressed. This is granted, free, by the broadcaster. He now refrains from such controversial subjects until the FCC requires him to present such programs, which, when done, involves a new request for free time to reply.114 The FCC then would become the

113 Licenses are granted by the FCC provided that the “public convenience, interest, or necessity will be served” thereby. 47 U.S.C. §§ 307(a), 309(a) (1964). Renewal every three years is based on the same criteria. 47 U.S.C. § 307(d) (1964). The FCC may revoke a license “because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a licensee . . . .” 47 U.S.C. § 312(a)(2) (1964). Also, any willful or repeated violation of any rule or regulation of the FCC is grounds for revocation. 47 U.S.C. § 312(a)(4) (1964). The FCC can issue cease and desist orders, 47 U.S.C. § 312(b) (1964); and they can seek mandamus through the United States Attorney General in any United States District Court to have licensees comply with provisions of the Communications Act. 47 U.S.C. § 401(a) (1964). Violation of the Act and of FCC regulations can also result in penalty fines and/or incarceration. 47 U.S.C. §§ 501, 502 (1964).

114 Cf. the following cases. The Business Executives Move for Vietnam Peace (BEM) has filed a complaint with the FCC that all-news radio station WTOP has refused to accept paid one-minute announcements attacking United States participation in the Vietnam War. Another complaint, filed by an attorney for three groups, San Francisco Women for Peace, the G.I. Ass'n, and the Resistance, states that no commercial broadcaster in the San Francisco Bay area will air as public service announcements (presumably free) responses to military recruiting announcements. L.A. Times, Feb. 23, 1970, § 1, at 13, col. 1. These cases present several questions: Who is the proper representative for the contradicting or opposing views? If the FCC requires the stations carry the messages, isn't this tantamount to FCC programming which ultimately results in FCC censorship in that the licensee can't program that particular air time as he sees fit? Isn't this censorship in violation of 47 U.S.C. § 326 (1964) which states that "Nothing . . . shall be understood or construed to give the Commission the power of censorship . . . ."
programmer of the nation’s airwaves, at least so far as controversial subjects are concerned.\textsuperscript{116}

The Supreme Court, however, gave consideration to a statement made by the President of C.B.S. who was on record as stating:

we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation.\textsuperscript{116}

It was the observation of the Court that the industry “and in particular the networks, have taken pains to present controversial issues in the past,”\textsuperscript{117} and viewed the statement of C.B.S. as a signal that this would continue in the future. Not only was there no guarantee that this statement is a general policy position of C.B.S., there was no assurance that the other networks would follow the lead.

The Court perhaps should have investigated how much of this “covering of controversial issues as a public service” was programmed at prime time with no sponsor, because this is the effect the regulations might have upon programming. There would be no problem if large corporations, in search of a public image, continue to sponsor such examinations of “controversial issues”. But since sponsors seek public acceptance they might demand a certain middle of the road approach to the issue at its inception.\textsuperscript{118} Will sponsors be willing to underwrite a reply conceived and directed by one over whom they had no financial control? If sponsors, or their advertising agencies, answer in the negative, the burden will be fully placed upon the FCC to maintain the required standards.

But is the Commission itself the proper public organ to maintain the required standards? All would agree that nationwide distribution of visual and vocal ideas should not be in the complete control of three men representing three corporations.\textsuperscript{119} The use of the FCC for relief might, however, only compound the problem. The Commission has seven members, all appointed by the President and consented to by the Senate, who are responsible for the enforcement of the regulations.\textsuperscript{120} Congress has dictated that “[n]ot more than four members of the Commission shall be members of

\textsuperscript{115} Again, wouldn’t this seem to be prohibited by 47 U.S.C. § 326 (1964) as set out above in note 114?
\textsuperscript{116} 395 U.S. at 393 n.19, quoting address by F. Stanton, \textit{Sigma Delta Chi} National Convention, Atlanta, Ga., Nov. 21, 1968.
\textsuperscript{117} \textit{Id.} at 393.
\textsuperscript{118} The sponsors in a desire to sell their products might seek to appeal to everyone without offending anyone. This would tend toward presentation of non-controversial subjects.
\textsuperscript{119} Vice President Spiro Agnew suggested this in his Nov. 13, 1969 speech \textit{supra} note 60.
\textsuperscript{120} 47 U.S.C. § 154(a) and (j) (1964).
the same political party." Realizing that there is inherent in this command, as well as the regulations, the concept that issues and debate can always be broken down into two camps, Congress may, as well, have created a less acceptable control than exists in the present oligopoly.

Rather than three competing powers, the FCC represents only one of two competing controls, the head of the Democratic or Republican parties. Although Congress has staggered the appointments, one per year for a seven year term, a President at the end of his first term can have completely controlled the Commission. This could be used as a tool for the repression of ideas and debate by the appointment of four members willing to interpret and enforce regulations in a biased manner.

However, the problem of bias is not an exclusive property of the government. Vice President Agnew in a biting attack against the broadcast media before the Mid-West Regional Republican Committee suggested that the power of the networks rivals that of local and federal government combined. Complaining that "the American People would rightly not tolerate this concentration of power in Government", he suggested no remedy:

Now I want to make myself perfectly clear. I'm not asking for Government censorship or any other kind of censorship. I'm asking whether a form of censorship already exists when the news that 40 million Americans receive each night is determined by a handful of men responsible only to their corporate employers.

This confusion over the proper remedy to a recognized problem con-

122 This assumes that, as the political structure of the United States presently exists, the President of the United States would be either a Democrat or a Republican.
124 Id.
125 Id. at col. 5. Dr. Frank Stanton, President of C.B.S., in response to the Nov. 13, 1969 attack by Vice President Agnew stated:

We do not believe, . . . that this unprecedented attempt by the Vice President of the United States to intimidate a news medium which depends for its existence upon Government licenses represents legitimate criticism. Id. at 24, col. 6-7.

And Julian Goodman, President of N.B.C., responded by calling the Vice President's speech an "appeal to prejudice". Id. at 24, col. 8. He went on to state that "evidently he would prefer a different kind of television reporting—one that would be subservient to whatever political group was in authority at the time." Id.

However, Steven McCormick, Vice President of the Mutual Broadcasting Company, reportedly merely saw the Vice President's speech as a "call for fairness, balance, responsibility and accuracy in news presentation." Id. at 25, col. 1.

A recent editorial in The New Yorker, Feb. 28, 1970, referred to this speech and subsequent speeches by the Vice President as "The government's campaign against the press". Id. at 29. The editorial stated that the press has moved toward compliance with the Vice President's demands contained within his speeches. It is stated that "The new 'fairness'—i.e., 'fairness' to the Administration—has become indistinguishable from fear of the Administration. In hundreds of tiny ways, news coverage now seems to reflect an eagerness to please the people in positions of power." Id. Then it is declared that "The eagerness for uncontroversial issues is keen." Id. at 30.
cedes the difficult, if not insurmountable problems inherent in any outside regulation of the presentation of viewpoints. If a "right of access" is granted to the public against newspapers the problem of a practical remedy would be far more complex. Not only would the practical problems of enforcement present government with similar problems as found in the broadcasting medium, constitutional concepts would have to be revalued.

III

It takes little imagination to assume that the role of the press in the late 1700's was vastly different from the newspaper of today. The role of government and its ability for, and history of, censorship and press control was paramount in the minds of the authors of the Constitution. Broadcasting, alternatively, having but recent historical roots and coupled with a natural scarcity of outlets, allowed government a freer hand in control without unduly arousing its citizens. This has been accepted by the public and government, and this acceptance has been recognized by the Supreme Court.

Newness itself was accepted by the Court as deserving of perhaps different standards in United States v. Paramount Pictures, Incorporated, a 1948 censorship issue concerning a new medium—motion pictures. This was again commented upon with approval in Red Lion:

Although broadcasting is clearly a medium affected by a First Amendment interest, United States v. Paramount... differences in the characteristics of new media justify differences in the First Amendment standards applied to them.

If newness, or post-constitution scientific developments require a shifting standard it might flow logically that the protection afforded newspapers might also require a renewed investigation. The purpose of a constitutional protection for the press had as its foundation the concept that citizens should have the ability to communicate and exchange different ideas. Guaranteed by freedom of speech, the framers recognized the new power position given to an idea if it could be widely disseminated by use of the press. A press heartily protected in the late 1700's could meet the desire of the framers' "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopoliza-

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126 See W. Hocking, Freedom of the Press 8-12 (1947).
127 "Sound broadcasting... may be said to have come into being about 1920, while television broadcasting began about 1940." 4 Encyclopedia Britannica, Broadcasting 206 (1954).
129 334 U.S. 131 (1948).
130 395 U.S. at 386.
131 Scientific developments in the printing and distribution processes along with the cost of such developments to the publisher have led to a diminution of the number of major newspapers in the United States.
tion of that market...

The press in the late 1700's was seen as effectively open to all who desired to become involved in the "marketplace of ideas". The new press of today has seen the number of newspapers diminish. The economic costs of starting a newspaper that can compete with the remaining newspapers is staggering. And with two press services writing much that appears in the limited number of newspapers that exist, the marketplace of ideas in the new press has developed to the point that it is no longer open to all. And, as was stated in Red Lion:

There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'

Today, the power of the press is a totally different power. A power to stifle and hide ideas as well as personalities exists. A power which when recognized in the new media of broadcasting brought some government action to retain for its citizens the "collective right to have the medium function consistently with the ends and purpose of the First Amendment." This language could just as easily be applied to the adhesive conditions found in today's new newspaper industry.

Treating the newspaper publisher as a proxy of the public might well be a concept the Court will be timid to adopt. Not without reason, such a shattering of traditional protection might well put before the public the issue of constitutional validity itself, a process guaranteed to cause unrest. But not to tread these dangerous waters may be to uphold the image of a protective Constitution while emasculating its most basic protection.

Donald D. Moss

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132 395 U.S. at 390.
133 Id. at 392.
134 The editorial in The New Yorker, Feb. 28, 1970, supra note 125, at 30, pointed out:

One of the most distressing results of the new standard of news coverage has been the minimal space given to statements by the very few politicians who have been warning of growing repression.
135 395 U.S. at 390.