

# **FREEDOM OF EXPRESSION IN THE UNITED STATES OF AMERICA :**

## **Freedom of expression, First Amendment and Mass Media**

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### **I. FREEDOM OF EXPRESSION, FIRST AMENDMENT AND THE SUPREME COURT**

#### **1. First Amendment and Freedom of Expression :**

Twentieth century is indeed the Age of Anarchy. The unprecedented velocity of advances in technology in the modern world has reached such dimensions and has resulted in such social and technological changes that it may rightly be called the most important revolution in human history. As might be expected, however, the constitutional and legal institutions of the modern society have not been able to keep abreast with these changes in social infrastructure.

The basic constitutional principles underlying the individualistic, liberal approach of democratic western societies are unable to meet the challenge of new social, political and legal institutions brought about by changes in technology. The western democracy is in urgent need of new constitutional concepts that would confirm its basic belief in civil liberties and the rule of law.

The area of freedom of expression is one of the perfect examples of this dilemma that democracies are encountering, and in this brief study we will try to find a coherent solution to this difficult problem within the framework of the Constitution of the United States of America.

In accordance with international documents, and as is generally accepted, we may give a working definition of freedom of expression as "the right of the individual to have access to information from all sources, and the right to express the opinions he has formed as a result of receiving this information to other individuals"<sup>1</sup>.

The important factor in freedom of expression, as might be understood from this definition, is the act of expression. Freedom of expression is dissimilar from other liberties such as the right of privacy, as it does not aim at protecting the person, the individual from an invasion, an intervention by a third party. It is not there to enable the individual to think but to enable him to express what he is thinking. As Meiklejohn puts it, "The principle of the freedom of speech... is a deduction from the basic agreement that public issues shall be decided by universal suffrage"<sup>2</sup>.

The purpose of freedom of expression is to enable every member of the society to disseminate their opinions on how to achieve common good of that society. Thus, it has been rightly argued by Meiklejohn and others that the purpose of the U.S. Constitution and the First Amendment in particular "is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal... The primary purpose of the first amendment is, then, that all the citizens shall, so far as possible, understand the issues which have bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves"<sup>3</sup>.

Although Meiklejohn is of the opinion that "the text of the Amendment is, with respect to its meaning, partial and incomplete"<sup>4</sup>

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- 1) RIVERO, J., *Cours de Libertes Publiques*, 1966/67, Paris, p. 247. Also see İLAL, E., *Radyo Hürriyeti, Özerklik ve 1961 Anayasası*, İstanbul 1972.
  - 2) MEIKLEJOHN, A., *Free Speech and Its Relation to Self-Government*, NY, 1949, pp. 26 - 27, 29, 88 - 89.
  - 3) *Ibid.*, p. 23.
  - 4) COMMITTEE of AALS, ed., *Selected Essays on Constitutional Law*, West pub. Comp. Minn., 1963, p. 602.

the First Amendment seems to support this absolutist view, if taken in its classical context :

“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”.

The phrasing of the Amendment seems to leave no doubt that no restriction is possible. “Congress shall make no law... abridging the freedom of speech, or of the press...”.

Surprisingly, the history of Supreme Court cases in the last seventy-five years has been a history of developing methods to restrict this freedom of speech and press.

Thus, the meaning of First Amendment, which has been generally accepted as “the most significant political statement which we Americans have made”<sup>5</sup> that “contains the most important elements of individual freedom”<sup>6</sup> has always been blurred and controversial.

It is significant to note that the Court has always relied on the basic concept of “marketplace of ideas”. The Court has accepted that :

a. there is a “marketplace of ideas” from which truth will finally emerge if free exchange of knowledge and opinion is allowed.

b. that members of society must be fully informed of issues if they are to participate in self-government.

c. that freedom of expression is the necessary tool for individual happiness that makes a society advance<sup>7</sup>.

The Court, however, has severely restricted this “marketplace” by various tests which limit the freedom of expression by balancing

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5) *Ibid.*, p. 600.

6) ERWIN, S., in *The GEORGETOWN LAW JOURNAL*, Media and the First Amendment in Society, Un. of Mass. Press, Amherst, 1973, p. 1.

7) *Ibid.*, p. 14.

it with competing interests. Such tests as clear and present danger test, the redeeming social value test and the ad hoc balancing test have all been insufficient and dangerous tools in limiting freedom of expression under the pretext of legitimate state interest, or public peace, or social interest.

Beginning with the clear and present danger test of Holmes, the content of freedom of expression as stated in the First Amendment has always been interpreted to be limited. Even such strong proponents of the absolutist interpretation as Justice Black and Justice Douglas have admitted the need to balance competing interests<sup>8</sup> and it is necessary to note that even Meiklejohn makes a limitation by stating that the First Amendment does not forbid abridging speech; rather that it prohibits abridging freedom of speech<sup>9</sup>. "I venture the preliminary suggestion that the prize of victory which our forefathers won when the First Amendment was adopted was not the unlimited right of the people to *speak*. It was the unlimited right of *Religious and Political Freedom* - whatever those words may be found to mean".

Thus, the content of freedom of expression has always been interpreted as being limited. This, however, has not been the only limitation imposed on freedom of expression. The expression of any idea in a society is the call for a particular solution to an existing problem, and as it calls for a change in the existing order, it is against the existing authority in society<sup>10</sup>. It follows that any expression of opinion that is novel and demanding is in minority and weak in its initial stages. Consequently, it is equally important that the means of effective expression of these opinions be available in society, as the opportunity of unlimited expression be given to them.

It is not sufficient in modern society to state simply that the Constitution or the First Amendment guarantees the freedom of speech and that there is no restriction on expressing opinions in public, on streets and parks. This age is the age of mass media

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8) *Cox v. Louisiana* 379 U.S. 536, 577 (1964).

9) MEIKLEJOHN, A., *Free Speech*, p. 204.

10) SIEPMANN, A., *Radio, Television and Society*, Newyork, 1959, p. 204.

when opinion is moulded by television, radio and the press . Any opinion that cannot have access to these mass media is ineffective to say the least, and it cannot be defined as expression, when opinions are expressed only outside these media. In the twentieth century, freedom of expression means freedom of expression in mass media.

It is apparent that there is a big difference in meaning between "the press" as it existed in the years of the framing of the First Amendment and the "press" of our era.

The aim of the sponsors of the First Amendment was to prevent the government, and the government only, from interfering with expression. They saw freedom of expression as the foundation of their political system and free society.

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

There is no doubt that this reasoning was well justified at that time and under those circumstances. The only obstacle to freedom of expression in those days was government censorship. The press consisted of hand-printed sheets, which were either regular newspapers or pamphlets and books. Presses were cheap, it was easy to become a publisher and editor by borrowing a few dollars, hiring an assistant and setting up a shop. Actually, the Herald was founded without any capital at all, and the Tribune with \$1000 by Bennett and Greenby to express their own opinions<sup>11</sup>.

It was believed that in the "marketplace of ideas" if one newspaper would not express all opinion, then anyone with a different opinion could always publish another newspaper.

It must also be remembered that less than 6 percent of the adult population voted for the conventions held to ratify the Consti-

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11) LASKI, H., *American Democracy*, London, 1946, p. 65.

tution, and that there was no great discrepancy between the number of citizens who could read and were participating in political life and those who could command the financial means to engage in publication<sup>12</sup>.

However, these circumstances which provided the "marketplace" and "access" to the individual have been radically altered by the communications revolution, and the marketplace with unlimited freedom of expression has therefore lost its earlier reality. Protection against government censorship is not sufficient guarantee now for an individual who has something new to express. He also has to be protected against the big business that the "press" has become. But to achieve this protection the congress must act to legislate, and this is in contradiction to the First Amendment or at least with the traditional interpretation of the First Amendment.

In attempting to resolve this apparent contradiction, let us first endeavour to define the present meaning and content of freedom of expression outside mass media, by going through the Supreme Court decisions and then compare this definition with cases on freedom of expression in mass media.

## 2. The Supreme Court and Freedom of Expression :

The meaning of the First Amendment may only be fully understood by determining what the Supreme Court has interpreted it to be; for as it has been stated repeatedly, what the law is is what the Supreme Court says it is. And yet we find that the Court has only become interested in freedom of expression and the First Amendment during the last seventy-five years, when the problem of individual liberty gains more importance than the early day problems of federal and state power.

The "incorporation" of the First Amendment into the Fourteenth begins with a 1908 decision which declares that "it is possible that of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded

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12) COMMISSION on the FREEDOM of the PRESS, *A Free and Responsible Press*, NY, 1947, p. 14.

again state action, because a denial of them would be a denial of due process of law"<sup>13</sup> and is settled in 1925 with the statement "we ...assume that freedom of speech and press —which are protected by the First Amendment from abridgement by Congress— are among the fundamental personal rights and liberties protected by the states"<sup>14</sup>. Since then, numerous decisions have held every First Amendment protection immune from invasion<sup>15</sup>, and the Supreme Court has also held enforcable against the States, the protections in the Fourth<sup>16</sup> and Fifth<sup>17</sup> Amendments. It is through these decisions that the Court has overcome the procedural difficulties it has encountered in protecting freedom of expression.

In passing, we should point out to a basic mistake the Court has committed in approaching freedom of expression problems by attempting to include freedom of silence within the First<sup>18</sup> Amendment instead of the Fourth Amendment, where it really belongs. This confusion of freedom of silence which is really under the protection of the Fourth Amendment with freedom of expression which is governed by different principles has contributed to the chaos that exists today in the definition of freedom of expression. Furthermore, it has been an effort in vain, as may be understood from recent decisions of the court<sup>19</sup>.

13) *Twining v. New Jersey*, 211 U.S. 78, 79 (1908).

14) *Gitlow v. New York*, 268 U.S. 652 (1925).

*NAACP v. Button*, 371 U.S. 415 (1963). (Association and speech) *New York Times v. Sullivan*, 376 U.S. 254 (1964).

(Speech and press). *Brotherhood of R.R. Trainmen v. Virginia ex. rel. Virginia State Bar*, 377 U.S. 1 (1964). (Association)

15) *Grosjean v. American press co.*, 297 U.S. 233, 244 (1936). (Press)

*De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). (Speech and press)

*Lowell v. City of Griffin*, 303 U.S. 444, 450 (1937). (Speech and press)

*Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). (Religion)

*Staub v. City of Baxley*, 355 U.S. 313, 321, (1957).

(Speech) *Shelton v. Tucker*, 364 U.S. 479, 485 - 86 (1960). (Association)

16) *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

*Wolff v. Colorado*, 338 U.S. 25, 27 - 28 (1949).

17) *Malloy v. Hogan*, 378 U.S. 1 (1964).

18) See *Watkins v. United States*, 354 U.S. 178 (1957) and *Barenblatt v. United States*, 360 U.S. S. 109 (1959).

However, the limited scope of our present study prevents us from being able to discuss in detail this interesting and challenging problem.

Relying on the basic premises of the necessity of individual participation in a democratic society, the freedom of expression of opinions that enables this and the "marketplace" that makes freedom of expression possible, the Court has tried, throughout years and decisions to find the "limits" to this "unlimited" freedom. Even Mr. Justice Black, who has been the most persuasive proponent of the "absolute" interpretation of the First Amendment has admitted to such limits : "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press and assembly *where people have a right to be for such purposes*. This does not mean, however, that these Amendments also grant a constitutional right to engage in the conduct of picketing and patrolling, whether on publicly owned streets or privately owned property... Were the law otherwise, people in the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear. Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment...<sup>20</sup>.

This seems to be in agreement with the interpretation of Meiklejohn on the basis that they both accept freedom of speech is under the protection of First Amendment, "speech" and manifestations of it may be regulated by the Government. However, the danger in deciding what constitutes an expression of "governing importance" that may be distinguished from "private" speech<sup>21</sup> as defined by Meiklejohn, and what constitutes speech... where people have a right to be, is more than one that can be overlooked.

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19) See, for example: *Cole v. Richardson*, 405 U.S. 676 (1972) where the loyalty oath is upheld.

20) *Cox v. Louisiana*, 379 U.S. 559, 578 (1964), dissenting opinion of Justice Black.

21) DEVOL, K.S. ed., *Mass Media and the Supreme Court*, N.Y., 1971, p. 273.



Moreover, although Justice Black joins Justice Douglas in stating that "with the exception of *Beauharnais v. Illinois*, 343 US 250, none of our cases have resolved problems of free speech and free press by placing any form of expression beyond the pale of the absolute prohibition of the First Amendment..." and that "The First Amendment, its prohibition in terms absolute, was designed to preclude the courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the *preferred position*..."<sup>22</sup> they admit, as stated in the Cox dissent quoted above and in the concurring opinion of Justice Douglas in *Brandenburg v. Ohio*<sup>23</sup>, to limitations in regulating expressions such as picketing. They also make the basic mistake of evaluating the content of speech by trying to distinguish between political, obscene and libelous expressions.

On the whole, however, the Court has come up with several tests which try to balance the so-called competing interests. These competing interests, whether they are called the right to public peace or legitimate state interests are always weighed and balanced against the freedom of expression of the individual. Even Justice Black himself is guilty of this balancing act when he declares, "A state statute... regulating conduct - patrolling and marching - as distinguished from speech, would in my judgement be constitutional, subject only to the condition that if such law had the effect of indirectly impinging on freedom of speech, press or religion, it would be unconstitutional if under the circumstances it appeared that the state's interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms"<sup>24</sup>.

### *Redeeming Social Value*

The perfect example of this futile balancing effort has been the test of redeeming social value. A majority of the Court has recognized that the government has the power to limit speech as such.

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22) *Roth v. United States*, 354 U.S. 476, 77 (1957), dissenting opinion. z

23) *Brandenburg v. Ohio*, 395 U.S. 444, 89 (1969).

24) *Cox v. Louisiana*, 379 U.S. 559, 578 (1964).

They have based their decisions on the supposition that the First Amendment renders immune from regulation only speech that has "redeeming social importance". Although it is admitted that all ideas, with even the slightest redeeming social value, however controversial and against the majority opinion, have the full protection of the First Amendment ; it is argued that from this definition it is implied that speech that is utterly without redeeming social value is not protected<sup>25</sup>.

The inherent danger in this test is apparent : The test examines the content of speech. This dangerous and arbitrary power has made the Court jump from one definition to another. In obscenity cases, where the test has been used abundantly, they have gone from the "redeeming social value" that is "appealing to prurient interest" in Roth to the "utterly without social importance" test of *Memoirs v. Massachusetts*<sup>26</sup>, and then to the "commercial exploitation" test of *Ginzburg*<sup>27</sup>. The recent efforts of the Court to reaffirm the Roth holding by applying "contemporary community standards" as against "national standards" makes it worse by giving the States the power to regulate *obscene* material which the Court holds "is not protected by the First Amendment"<sup>28</sup>. Justice Douglas points to the dangerous mistake by stating, "Obscenity - which even we cannot define with precision - is a hodge-podge. To send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do... The idea that the First Amendment permits government to ban publications that are (offensive) to some people puts an ominous gloss on freedom of the press... The use of the standard (offensive) gives authority of government that cuts the very vitals out of the First Amendment... To many the Song of Solomon is obscene..."<sup>29</sup>.

It is obvious that the test has proved insufficient, even in such a controversial area as the obscenity area, because of the inherent danger presented by exploring the content of speech, thus making

25) *Roth v. United States*, 354 U.S. 476, 77 (1957).

26) *Memoirs v. Massachusetts*, 383 U.S. 413, 86 (1966).

27) *Ginzburg v. United States*, 383 U.S. 463, 86 (1966).

28) *Miller v. California*, 413 U.S. 15, 93 (1973).

29) Dissenting opinion in *Miller v. California*, loc. cit.

the power allotted to the examiner, be it government or court, an arbitrary one. The Constitutional protection that forbids government to suppress material that, although having sex as its subject, advocates ideas or has cultural, artistic or other social importance seems insufficient. The Court has held that prior restraint of obscene material is not acceptable<sup>30</sup>, that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech"<sup>31</sup> and that into any noncriminal process designed for prior restraint must be built the state burden of proving that material is unprotected expression, and judicial determination, enabling both sides to be heard, that material constitutes nonprotected expression<sup>32</sup>. This, however, makes no basic change in the arbitrary approach of the test itself, and only satisfies the classical "prior restraint" ban partially.

#### *The ad hoc Balancing Test*

Another test used by the Court to limit the freedom of expression has been the ad hoc balancing test. As Prof. Emerson has defined it, "The formula is that the Court must in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression"<sup>33</sup>. Justice Harlan, speaking for the majority, has stated in 1959 that "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the Courts of the competing private and public interests at stake in the particular circumstances shown... We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended"<sup>34</sup>. Justice Harlan again wrote for the majority in 1961, when

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30) *Burstyn v. Wilson*, 343 U.S. 495, 72 (1952).

31) *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731 (1961).

32) *Freedman v. Maryland*, 380 U.S. 51, 58 - 59 (1965).

33) EMERSON, T., *Toward a General Theory of First Amendment*, 1967, pp. 53 - 54.

34) *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

he said, "we reject the view that freedom of speech and association... are absolutes, not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited licence to talk. On the one hand certain forms of speech, or speech in certain contexts have been considered outside the scope of constitutional protection... On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress of the states to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interests involved... It is in the latter class of cases that this court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of valid Governmental function... Whenever in such a context, these constitutional protections are asserted against the exercise of valid Governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved... With more particular reference to the present context of a state decision as to character qualifications, it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically and without consideration of the extent of deterrence of speech and association and of the importance of the state function, exclude all reference to prior speech or association on such issues as character, purpose, credibility or intent"<sup>35</sup>.

This almost arbitrary scope of the new "ad hoc balancing" by the Court has been criticized extensively by Justice Black in his dissent. As he so rightly puts it, "The Court, by stating unequivocally that there are no (absolutes) under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the (balancing test)

35) *Konigsberg v. State Bar*, 366 U.S. 36, 50 - 51 (1961).

and that therefore no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgement..., such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed our entire structure of government rests". To Justice Black, there is a difference "between the sort of (balancing) that the majority has been doing and the sort of (balancing) that was intended when that concept was accepted as a method of insuring the complete protection of First Amendment freedoms even against purely incidental or inadvertent consequences. The term came into use chiefly as a result of the cases in which the power of municipalities to keep their streets open for normal traffic was attacked by groups wishing to use those streets for religious or political purposes. When these cases came before this Court, we did not treat the issue posed by them as one primarily involving First Amendment rights... But those cases never intimated that we would uphold as constitutional an ordinance which purported to rest upon the power of a city to regulate traffic but which was aimed at speech or attempted to regulate the content of speech... Those cases have only begun to take on that meaning by being relied upon, again and as they are here, to justify the application of the (balancing test) to governmental action that is aimed at speech and depends for its application upon the content of speech... I cannot agree that the questions asked *Konigsberg* with regard to his membership in the Communist Party had nothing more than an (incidental) effect upon his freedom of speech and association ... As such it is a (direct) and not an (incidental) abridgement of speech... But even if I thought that the majority was correct in its view that (balancing) is proper in this case, I could not agree with its decision. The interest of the Committee... has been inflated out of proportion to its real value-the vast interest of the public in maintaining unabridged the basic freedoms of speech, press and assembly... have once again been balanced away. This, of-course, is one ever-present danger of the (balancing test), for the application of such a test is necessarily tied to the emphasis particular judges give to competing societal values"<sup>36</sup>.

36) The dissent of Justice Black, *loc. cit.*

### *The clear and present danger test*

The most significant and long-lived formula used by the Court which has had far-reaching effects all over the world has been the clear and present danger test. The formula was first equated by Justice Holmes when he said "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substansive evils that Congress has a right to prevent. It is a question of proximity and degree"<sup>37</sup>.

Thus, even at the beginning, the formula seemed insufficient and it is ironical that in the first case that it was used, the indictments were affirmed, restrictions on freedom of speech upheld. Holmes, writing for the unanimous Court, asserted that speech is not protected by the First Amendment if it a- is of such a nature as to create a clear and present danger b- is used in special circumstances c- will bring about the substantive evils that Congress has a right to prevent.

The test, although seemingly less dangerous than the "balancing tests" as it does not necessitate the evaluation of the content of speech, presents many other difficulties because of its inherent vagueness. The definition of "clear" and "present" danger, as well as "special circumstances" is almost impossible.

The evolution of the concept has also been rather to limit than to broaden the scope of freedom of speech. In 1925, the Court altered the formula to read that "the State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means... such utterances by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen... the general statement in the Schenck case... has no application to those like the present, where the legislative body

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37) Schenck v. United States, 249 U.S. 47, 52 (1919).

38) CAPALDI, N., Clear and Present Danger, U.Y., 1969.

itself has previously determined the danger of substantive evil arising from utterances of a specific character... It was not necessary, within the meaning of the statute, that the defendant should have advocated (some definite or immediate act or acts) of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms, and it was not essential that their immediate execution should have been advocated... The advocacy need not be addressed to specific persons<sup>39</sup>.

The *immediacy* or the *presence* of danger was thus dropped, and the clarity was turned over to the State to decide about. Holmes was dissenting by saying, "If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement... But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration"<sup>40</sup>. This, however, does not save him from being attacked, by Meiklejohn among others, as the one responsible for the abridgement of Freedom of speech through the clear and present danger formula. Meiklejohn condemns the "striking and inaccurate statement of Mr. Justice Holmes that (Every idea is an incitement). That assertion, when taken seriously, means that every idea is within the reach of legislative control. And with that dictum accepted, the essential meaning of the First Amendment is undermined and swept away"<sup>41</sup>.

The effort by Justice Brandeis to require that danger be *imminent* was in vain, when he stated "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was *imminent*"<sup>42</sup>.

39) *Gitlow v. New York*, 268 U.S. 652, 45 (1925).

40) Justice Holmes dissenting in *Gitlow*, loc. cit.

41) COMMITTEE of AALS, op. cit., p. 601.

42) *Whitney v. California*, 274 U.S. 357 (1927), Brandeis concurring.

In 1951, the Court further modified the formula to read, "In each case (courts)... must ask whether the gravity of the *evil* discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"<sup>43</sup>.

The formula by then was heavily distorted, notions like the *gravity* of danger, and the *intent* of speech further limited freedom of speech by examining the content. In this respect, the dissent of Justice Douglas in the above case must be noted : "...The act, as construed, requires the element of intent-that those who teach the creed believe in it. The crime then depends not on what is thought but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen... There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destruction flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test... Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed... Free speech, the glory of our system of government-should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent"<sup>44</sup>.

The Court is seemingly back to the *imminent* danger criterion when, ironically, in a case involving a Ku Klux Klan leader they find that the statute punishing mere advocacy falls within the condemnation of the First and Fourteenth Amendments. They indicate that "The constitutional guarantees of free speech do not permit (state regulation)... except where the speech is directed to inciting or producing *imminent* lawless action, and is likely to incite or produce such action"<sup>45</sup>.

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43) *Dennis v. United States*, 341 U.S. 494, 510 (1951).

44) Justice Douglas dissenting, *loc. cit.*

45) *Brandenburg v. Ohio*, 395 U.S. 444, 89 (1969).



It is in this case that Justice Douglas writes his brilliant concurring opinion, where he traces the development of the clear and present danger test, and clarifies his own view on freedom of speech. We quote from this impressive opinion : "The (clear and present danger) test was adumbrated by Mr. Justice Holmes in a case arising during World War I... Though I doubt if the (clear and present danger) test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace... Holmes, though never formally abandoning the (clear and present danger) test, moved closer to the First Amendment ideal... in dissent in *Gitlow*... We have never been faithful to the philosophy of that dissent... in *Dennis v. United States*, we opened wide the door, distorting (the clear and present danger) test beyond recognition... came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution (*Yates*). But an *active* member, who has a guilty knowledge and intent of the aim to overthrow the government by violence (*Noto*) may be prosecuted... so the investigation roams at will through all the beliefs of the witness, ransacking his conscience and his innermost thoughts... My own view is quite different. I see no place in the regime of the First Amendment for any (clear and present danger) test whether strict and tight as some would make it or free-wheeling, as the court in *Dennis* rephrased it. When one reads the opinions closely and sees when and how the (clear and present danger) test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment. Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?... One's beliefs have long been thought to be sanctuaries which Government could not invade. *Barenblatt*

is one example of the ease with which that sanctuary can be violated... But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by the investigating committees was notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20.000.000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action... They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience<sup>46</sup>.

This precious defense of the individual, however, seems in vain, as may be seen from the recent decisions of the Court<sup>47</sup> and the growing conservative tendency of the Court.

(It is also important to note that Justice Douglas, in his brilliant opinion, is also committing the basic mistake of confusing freedom of speech with invasion of privacy and belief and as such require the state not to pass any law permitting the invasion. Thus, this is an area where the state may not even *regulate*. To confuse this with the "Congress shall make no law... abridging the freedom of speech, or of the press..." provision of the First Amend-

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46) Justice Douglas concurring, *loc. cit.*

47) See for example: *Cole v. Richardson*, 405 U.S. 676 (1972).

ment leads to the confusion of different basic principles regarding the *active* freedom of speech and the *passive* right of privacy. Congress may make a law that does not abridge freedom of speech. Indeed, in the area of mass media the Congress will have to make law in order to prevent the abridgement of freedom expression. This we will try to study in the second chapter).

To-day, freedom of expression in the United States outside mass media, besides being ineffective as a form of expression, is also severely limited by the many restrictive interpretations of the First Amendment and the limiting tests accepted by the Court. As we have previously stated, freedom of expression has no value per se, its value lies in its function, which is to create a free exchange of ideas by which the society will change for the better. The ineffective forms of expression outside mass media in the United States today lack this crucial effectiveness, and are also heavily restricted by the Court and the existing statutes in scope and content.

## II. FREEDOM OF EXPRESSION IN MASS MEDIA

The effective expression of ideas today is expression in mass media. It follows then, that freedom of expression is the freedom of expression in such media as the press, motion pictures, radio and television. The press, however, is not the press of the days when the sponsors of the First Amendment tried to prevent government interference with expression. Then, the problem was relatively simple. It was understandable that Jefferson should prefer newspapers without a government, rather than a government without newspapers. The "press" that the First Amendment and Jefferson tried to protect was the pioneer newspaper publisher, the individual with the urge to express his ideas, who published the newspaper himself. The "press" of today is something quite different. It has become a huge business run by monopolies, which rely on advertisement for profit, in which the ownership and the editorial management are forces outside the individual with an urge to express himself. The protection of the freedom of speech of the individual and the protection of the press have become alienated. This important

development has been clearly expressed by the Commission on Freedom of the Press early in 1947, when they have stated that "First, the importance of the press to the people has greatly increased with the development of the press as an instrument of mass communication. At the same time, the development of the press has greatly decreased the proportion of the people who can express their opinions and ideas through the press.

Second, the few who are able to use the machinery of the press as an instrument of mass communications have not provided a service adequate to the needs of the society.

Third, those who direct the machinery of the press have engaged from time to time in practices which the society condemns and which, if continued, it will inevitably undertake to regulate or control<sup>48</sup>.

Thus, there is a basic contradiction between the freedom of speech, and of the press of the individual that is protected by the First Amendment and the interests of the private owners of the media. In their greed for more profit "owners have subverted opposition in legal and illegal ways to create exceedingly profitable chains and monopolies and have bought competing media... Yet every time the Department of Justice, Federal Trade Commission or others attempt to curb the owners ravenous appetites they cry (freedom of the press), oblivious to the fact that the intended beneficiaries of press freedom are the news consumers, not purveyors<sup>49</sup>.

Today the intended beneficiaries indeed have almost no access to the complicated structure of the institution called mass media, which assert the right to be the beneficiary of the *freedom of the press*.

This may easily be understood from a simplified chart showing the structure of mass media :

48) COMMISSION on the FREEDOM of the PRESS, op. cit., p. 1.

49) RUCKER, B.W., *The First Freedom*, S. Illinois Press, London 1971, p. 3.

	NEWSPAPERS	RADIO - TV	MOVIES
1. Information source	News Agencies	News Agencies	News Agencies
2. Raw Materials	Paper - ink	Wavelength	Film
3. Management	a. columnist	a. speaker	a. actor
	b. editor	b. editor	b. director
	c. owner	c. owner	c. producer - owner
4. Facilities	printing-press	station	studio - theatre
5. Finance	advertisement sales	advertisement subsidy	advertisement sales

The First Amendment, originally protecting the individual, has been interpreted to protect this huge new phenomenon, the institution of the "press". The news agencies, the reporters and columnists the editors or the station owners have all been deemed, at one time or another, to be under the protection of the First Amendment. The freedom of speech, or the right of access as it has recently been called, of the individual, however, has always been neglected.

As it has been pointed out by FCC Commissioner Johnson<sup>50</sup>, there are only a limited number of ways an individual can obtain access to mass media :

1. Buy a newspaper, radio or TV station
2. Buy commercial space for promotion of goods and services
3. Develop a situation worthy of news coverage (picket etc)
4. Obtain sympathy of editorial staff member to have view presented by "proxy"
5. Obtain rebuttal time under fairness, personal attack or equal time doctrines
6. Purchase time or space for non-commercial expression.

The severe limitations in access to the mass media in each case are obvious. We will try to summarise and outline the efforts of the

50) GEORGETOWN LAW JOURNAL, op. cit., p. 15.

Supreme Court to overcome the insurmountable difficulties this contradictory development presents.

### 1. News Agencies :

One of the biggest threats to freedom of expression is the concentration of ownership in news agencies, which are almost the only source of information available to all mass media. Today Associated Press and United Press International together monopolise this source in the United States. Only 16.4 per cent of the dailies in U.S. receive a service other than AP and UPI, and most of these are large dailies which also receive both AP and UPI<sup>51</sup>. The result may easily be predicted. The incorrect reporting in such instances as Hungarian Revolution, Cuba and other internal affairs prove that the tendencies of the owners and - or editors of the AP and UPI are reflected in the reporting and may have tremendous effects on the moulding and manipulating of public opinion. The individual, however, has no access to this influential source.

The Supreme Court first encountered the contradiction between the "no law... abridging" statement of the First Amendment and the necessity to intervene for the individual to give him access to limited outlets of expression in mass media in *Associated Press v. United States*<sup>52</sup>.

The difficulties encountered by the Court is reflected by the fact that eight justices delivered five opinions, and the five majority justices had three divergent views. Justice Black, in delivering the opinion of the Court, stated :

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51) RUCKER, BW., op. cit., p. 68.

52) *Associated Press v. United States*, 326 U.S. 1 (1945). The case arose when the Government alleged that certain AP bylaws had the effect of excluding competitors of its members from membership and together with the agreement of its members to supply local news exclusively to AP, illegally restrained interstate commerce in violation of Sherman Act. Affirming the lower court's injunction, the Court rejected the contention by AP that application of the antitrust laws to an association of newspaper publishers would be an abridgement of the freedom of the press.

"Finally the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgement of the freedom of the press guaranteed by the First Amendment... It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary.

That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas *does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom of all and not for some. Freedom to publish is guaranteed by the constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support of the contention that a combination to restrain trade in news and view has any constitutional immunity*"<sup>53</sup>.

It is curious to note that Justice Black, the absolutist, is limiting the holding of the Court by this restraint of trade opinion, by stating that the decree does not compel AP or its members to permit the publication of anything their (reason) tells them should not be published. Thus, the government is not allowed to interfere with the marketplace of ideas but is obligated to remove the restraints on access to that marketplace. This view, with all its contradictions, still seems to be the prevalent opinion of the Court, as may be seen from the recent cases<sup>54</sup>.

53) *Ibid.*, p. 19 - 20.

54) See *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)  
"However, neither exclusively, nor even primarily are the interests of the newspaper industry conclusive, for that industry

Justice Frankfurter, on the other hand, comes up with the public service theory earlier propounded in the lower court by Judge Hand<sup>55</sup>, "...But in addition to being a commercial enterprise, it has a relation to the public interest unlike that of any other enterprise pursued for profit..."<sup>56</sup>.

## 2. The Press :

The Associated Press case, however, stands isolated as a gallant effort by the Court to stop the monopolistic tendency in mass media and protect the insufficient system of the First Amendment. Justice Black is very right in asserting that the First Amendment should not "afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom". This, however, has been afforded. The newspaper industry, or the original benefactor of the "press" in the First Amendment, has been the worst example amongst the mass media in this respect. The "marketplace" in this era is nonexistent, even if we accept the columnists or the editors and not the individual as the benefactors of the "marketplace". It has become evident that the most important factor influencing both the editorial and the news columns of a newspaper is owner<sup>57</sup>. In the last 200 years the newspaper industry has come under the influence of two developments : The concentration of ownership and the effects of commercialism. In the first decade of the century 2442 newspapers were published nationwide daily and 689 cities had competing dailies. Today the number is down to 1748, while the circulation has gone up to 62 million copies; 40% of this circulation is controlled by 25 ownership groups (50% of the Sunday circulation).

Only 42 cities have competing newspapers. Newspaper owners have reported enormous profits, with after-tax profits ranging from

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serves one of the most vital of all interests : the dissemination of news from as many different sources, and as many different facets and colors as is possible..."

54) For example, see *Citizen Publishing Co. v. United States*, 394 U.S. 131, 134 (1969).

56) *Associated press v. United States*, 326 U.S. 1 (1945), Frankfurter concurring.

57) *GEORGETOWN LAW JOURNAL*, op. cit., p. 26.



7 up to 14 % of gross revenues. The newspaper industry, the fifth largest employer in the U.S. have made profits at the expense of freedom of expression. The press has come, at present, to be dominated by a select group whose prime interest is economic<sup>58</sup>.

The effect of chains is further magnified by intermedia ownership. 68 Cities have a radio station owned by the only local daily newspaper, and 160 TV stations have newspaper affiliations. In 11 cities diversity of ownership is completely lacking, with the only TV station and newspaper under the same control<sup>59</sup>.

The other factor has been growing commercialism. Today, newspapers depend on advertising revenues for over 70% of their income<sup>60</sup>. Furthermore, the more the circulation of a newspaper the higher is the rates for advertisement; and this magnifies the tendency for concentration<sup>61</sup>.

The apparent inevitability of concentration has held the Congress to act in 1970. The Newspaper Preservation Act of 1970<sup>62</sup>, although recognizing the need for and the public interest in maintaining a competitive press, accepts this inevitability and tries to solve the problem by differentiating between ownership and editorial policy. The law makes the insufficient effort to create an autonomous editorial and reportorial staff free from the control of the owner. This approach is radically different from the marketplace approach of the First Amendment days when the owner was deemed to be the one with the protected speech. Otherwise, the law is an antitrust exemption for the press, in accordance with the "No law... abridging" approach. The act provides that two newspapers may enter a joint operation agreement combining the business operations of both papers if one of them is in danger of probable failure and if the papers' editorial and reportorial policies can be maintained with independence and integrity<sup>63</sup>.

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58) *Ibid.*, p. 23.

59) *Ibid.*, pp. 23 - 24.

60) *Editor & Publisher*, Apr. 4, 1970, p. 6. See, *ibid.*, p. 23.

61) ROBERTS, J., *Antitrust Problems in the Newspaper Industry*, 82 *Harv. L. Rev.* 319, 324 (1968).

62) USC 1801 - 04 (1970).

63) USC 1802 (2) (1970).

It must be pointed out in this respect, that the Supreme Court, in contradiction to the act, has two additional prerequisites to the conditions of joint operations<sup>64</sup> : 1. The company must be on the verge of liquidation. 2. There must be no prospective buyer other than competitor.

It is evident that neither the legislature nor the Court has the intention of protecting the right of access of the individual. The "press", whose First Amendment rights are protected, is at best the columnists, and at worst, the owners.

*New York Times Co. v. Sullivan*<sup>65</sup>, a case praised by many as an example of protection of the freedom of the press, is a perfect example of this basic mistake. The consideration that "debate on public issues should be uninhibited, robust, and wide open" is put forward in the case to protect the Times and not the individual expression.

### 3. The Motion Picture :

The motion pictures, like the broadcasting media, have been both lucky and unlucky in not being in existence at the time of framing of the First Amendment, though for different reasons. The movies forever considered in their infancy in comparison with the printed word, have never been considered serious enough to be protected fully by the First Amendment. Although accepted by the Supreme Court to have "a greater capacity for evil" the motion pictures had to wait until the 1950's to be accepted as worthy of constitutional protection<sup>66</sup>. In *Mutual Film Corporation v. Ohio* (1915) the Court ruled that the motion pictures did not fall under

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64) See *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969).

65) *New York Times v. Sullivan*, 376 U.S. 254 (1964).

66) See *Burstyn v. Wilson*, 343 U.S. 495 (1952) See also Justice Douglas' majority opinion in *United States v. Paramount Pictures* 334 U.S. 131, 166 (1948) where he states "We have no doubt that motion pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."

the First Amendment protection, considering them a "business pure and simple" for diversionary entertainment.

In one respect, this has been a lucky break for freedom of speech in motion pictures, as it has prevented the big business from using the shield of First Amendment in anti-trust cases. The chains<sup>67</sup> which have existed in the motion picture business have been attacked in a series of anti-trust cases, beginning in 1928 with the Paramount Famous Lasky case<sup>68</sup>, and the attack has been comparatively successful, due to the fact that the shield of First Amendment has been unavailable to the owners. This, however, does not mean that all is good in motion pictures. Even after Justice Douglas wrote that they had "no doubt that motion pictures, like newspapers and radio, are included in the press whose freedom is guaranteed in the First Amendment". in his opinion for *United States v. Paramount*, and even in *Burstyn v. Wilson*<sup>69</sup>, in which case the Court held that motion pictures are to be included within the protective scope of the First Amendment, it is very clear that the Court has no intention of recognizing unlimited freedom of expression in this medium. They state "It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the per-

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67) The Commission on the Freedom of the Press reported in 1947 "The eight major motion picture companies are Loew's (MGM), RKO, Warner Brothers, Paramount and Twentieth Century Fox, which five produce, distribute, an exhibit pictures, Columbia and Universal, which produce and distribute alone, and United Artists, which distributes for a group of independent producing companies an exhibits in England. Approximately a fifth of the theater capacity of this country has been affiliated with the five producing companies among the eight majors. The theaters in the best city locations with the largest audiences, the highest admissions, and the longest runs have been controlled by the eight major companies." *op. cit.*, pp. 41 - 42.

68) *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930).

69) *Burstyn v. Wilson*, 343 U.S. 495 (1952).

missible scope of community control... To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places... Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression"<sup>70</sup>.

The motion pictures today is a medium where even prior restraint, in the form of motion picture censorship, is still acceptable to the Court<sup>71</sup>, and where the freedom of expression is heavily restricted through such pretexts as obscenity, immorality etc. and where access to the medium for the individual is nonexistent.

#### 4. Radio and TV :

Broadcasting, like motion pictures, has only been accepted as being under the protection of the First Amendment in 1948, when Justice Douglas declared that "motion pictures, like newspapers and radio, are included in the press whose freedom is guaranteed in the First Amendment". At the outset, the broadcasting industry had a development very similar to the newspaper industry. In a few years, however, it was realised that without regulation of the limited wavelengths available, there would be chaos. The Federal Communications Act of 1934 stated that "a person engaged in radio broadcasting shall not... be deemed a common carrier"<sup>72</sup> and the Court was of the opinion that "... the Act recognizes that the field of broadcasting is one of free competition... The Commission is given no supervisory control of the programs, of business management or of policy..."<sup>73</sup>. The basic principles still governing the broadcasting business in U.S. was established with this act which stated that :

70) Ibid.

71) See, for example : *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

72) 47 USC sec 153 h.

73) *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

- a. Wavelengths are public domain
- b. Broadcasting is open to free enterprise and free competition
- c. Freedom of expression in broadcasting must be preserved.

Thus, a distinction was made between ownership of frequencies and the use of these frequencies by station owners. A Federal Communications Commission was established to regulate the allotment and use of the frequencies. The Act empowered the Commission to regulate the field "as public convenience, interest, or necessity requires"<sup>74</sup>. This regulation over private enterprise was justified by the generally accepted opinion that broadcasting was a limited-access medium. In fact, it was only a few years after the *FCC v. Sanders Brothers* decision in which Justice Roberts had identified the field of broadcasting as one of free competition that Justice Frankfurter developed the principles of limited-access medium. Speaking for the Court in 1943<sup>75</sup>, he stated, "...the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply... We come, finally to an appeal to the First Amendment. The regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it, must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Com-

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74) 47 USC sec 303.

75) *National Broadcasting Co. Inc., v. United States*, 319 U.S. 190 (1943).

mission by these Regulations proposed a choice among applicants upon some such basis the issue before us would be wholly different... The right of free speech does not include, however, the right to use the facilities of radio without a license... The standard it provided for the licensing of stations was the (public interest, convenience, or necessity). Denial of a station license on that ground, if valid under the Act, is not a denial of free speech".

It is curious to note at this point that the number of newspapers in U.S. is less than the radio stations; and yet this more limited-access medium has never been considered as worthy of the same regulation as that exists in the broadcasting business, neither by the Congress, nor by the Court<sup>76</sup>. The scope of our study does not enable us to go into the long history of the struggle between the broadcasting business and the FCC. It should be noted, however, that the efforts of FCC have not prevented the existing monopolies, chains or networks in the broadcasting field. The struggle has been limited to such areas as the right of reply, the development of the fairness doctrine, and the final emergence of the concept of the right of access. One case, however, deserves mentioning. In the *Red Lion* case, decided in 1969<sup>77</sup>, the Court seemed to approach the problem from a broader aspect. The access rationale seemed to replace the Frankfurter approach of limited-access medium theory, based on limited frequencies. There is, in the decision, an interplay between the old technical limited-access theory of Frankfurter and the new First Amendment-based theory of access, which tries to find new systems for expression of new ideas in mass media<sup>78</sup>. The Court states that broadcasting requires standards of First Amendment interpretation different from those applied to the "press" or the print media. The Court rules that the fairness doctrine as applied by FCC does not violate the First Amendment rights of Broadcasters. The most important principle stated by the Court in *Red Lion* is that the First Amendment is aimed at protecting the

76) For statistical Knowledge see RUCKER, B.W., *op. cit.*

77) *Red Lion Broadcasting co v. FCC* (together with *U.S. v. RTNDA*) 395 U.S. 367 (1969).

78) BARRON, J.A., "Access, The Only Choice for the Media?", *Texas Law Review*, Vol. 48 (March 1970).

listening and viewing citizen rather than the licensed broadcaster. Justice White, speaking for the Court, states : "Although broadcasting is clearly a medium affected by a First Amendment interest (U.S. v. Paramount Pictures), differences in the characteristics of new media justify differences in the First Amendment standards applied to them... Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilised 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 (Associated Press v. U.S.) ... Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licencees in favor of others whose views should be expressed on this unique medium. *But 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. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolisation of that market, whether it be the Government itself or a private licensee... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here..."

However, the conservative approach of the Burger Court made itself manifest in 1973, when the Court seemed to reverse the Red Lion holding. Chief Justice Burger's opinion rejected the argument that a broad right of access could be drawn from the Red Lion ruling. He stated "that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations". What is more interesting to note is the concurring opinion of Justice Douglas, making the inevitable mistake in consistence with his absolutist First Amendment ap-

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79) Columbia Broadcasting System v. Democratic Nat. Comm. (decided together with several other cases, including FCC v. BEM), 412 U.S. 94 (1973).

proach : "My conclusion is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines". The Red Lion case, in which he had not participated, according to Douglas, is unduly curtailing broadcasters' rights, as "the First Amendment puts beyond the reach of Government federal regulation of news agencies save only business or financial practices which do not involve First Amendment rights... The ban of "no" law that abridges freedom of the press is in my view total and complete" Douglas states his mistake openly; to him all mass media "are entitled to live under the laissez-faire regime which the First Amendment sanctions".

Thus, the court once more commits the basic mistake of not distinguishing between freedom of expression by the individual outside mass media, and the freedom of expression in mass media, whether it be radio-TV or motion pictures or newspapers. The inherent differences in the limited-access media, make expression in mass media a separate problem and the different principles governing freedom of expression in such media is still to be discovered by the Court.

#### CONCLUSION

We would like to conclude by quoting from the dissenting opinion of Justice Brennan in *CBS v. Dem. Nat. Comm.*<sup>80</sup>. He states, "Freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum - whether it be a park, a school-room, a town meeting hall, a soap-box, or a radio or TV frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed... In the fight of the current dominance of the electronic media as the most effective means of reaching the public, any policy that absolutely denies citizens access to the media is unjustifiable".

It is evident that freedom of expression, or to put it in First Amendment terms, "the freedom of speech, or of the press" for the

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80) Ibid.



individual rings hollow indeed under existing circumstances in the United States.

On the one hand, the severe and elusive tests as applied by a Court that is tending to be more conservative than ever makes freedom of speech very limited in its content.

On the other hand, the individual has no access to the mass media, which are the only effective means of expression that are dominant in society. Thus it is safe to conclude that the freedom of expression of the individual has become severely limited, contrary to the philosophy of the First Amendment and the Constitution.

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