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THE PUBLIC UTILITY CONCEPT OF THE PRESS AND RADIO

The newspaper industry has always been looked upon as a privileged industry, free of many governmental restrictions, by virtue of the constitutional guaranty of freedom of the press.¹ Under the police power, valid restrictions have been made against criminal syndicalism and publications inimical to the morals of the community,² but aside from these regulations newspapers have been almost unrestricted in what they have published. An effort to infringe upon this traditional liberty of expression has been seen in a few isolated efforts to have the courts declare newspapers in effect public utilities.

It has been contended that because of the importance of the newspapers to the public, and because of the element of monopoly, under the principle of *Munn v. Illinois*,³ they are impressed with a public interest, and consequently should be subject to certain regulations.⁴ The attempts to have newspapers regulated as a business impressed with a public interest have been comparatively few; but one such attempt proved to be successful when a trial court of the state of Ohio decided that newspapers were subject to some of the regulations placed upon public utilities.⁵ It is interesting to note that the courts which have decided that newspapers do not fall into the public utility category have reached this result without giving any consideration to what conflict, if any would result between a contrary holding and the time honored constitutional guaranty of freedom of the press. It is submitted that had such a defense been made by the newspapers, it might have proved the controlling element in those cases.

The courts' abhorrence of government regulation of private publications was well expressed when the case of *Esquire v. Walker*⁶ came before the Court of Appeals of the District of Columbia. Associate Justice Arnold, criticizing Postmaster General Walker's attempt to impose his tastes in art and literature on the American people, declared that such regulation would be unconstitutional even if authorized by Congress, and said, "the American way of getting that kind of contribution [meritorious art and literature]

¹ U. S. CONST. AMEND. I; U. S. CONST. AMEND. XIV
Gitlow v. People of New York, 268 U. S. 652 (1924).
Id. at 667.

² 94 U. S. 113 (1876).

³ *In re Louis Wohl*, 50 F. 2d 254 (1931)

⁴ *Uhlman v. Sherman*, 22 Ohio N. P. (N. S.) 225.

In re Louis Wohl, 50 F. 2d 254 (1931) *Friedenberg v. Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930) *Commonwealth v. Boston Transcript Co.*, 294 Mass. 477, 144 N. E. 400 (1924).

⁵ 151 F. 2d 49 (1945) *Certiorari granted*, —U.S.— 66 S. Ct. 100 (1946).

is by giving competitive opportunity to men of different tastes and different ideas, not by compelling conformity to the tastes or ideas of any government official."⁹

Whatever the attitude of the courts may be toward regulation of the press, however, recent decisions show that the courts are willing to accept regulation of radio programs on the theory that the radio industry is impressed with a public interest. It was decided by the Supreme Court of the United States, in the case of *National Broadcasting Co. v. United States*,¹⁰ that radio transmission may be regulated by an "application of the standard of 'public interest, convenience, or necessity,'" and that the licensing function of the Federal Communications Commission "cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license."¹¹ In this case, it was decided that the Federal Communications Commission had a right to deny renewal of a license to any radio station which contracted for the use of its time in a manner prohibited by an order of the Commission.

The extent to which the Federal Communications Commission has gone in regulating the content of radio programs is indicated by the matters which it considers in determining whether to issue or renew a station license. The Commission has stated in its opinions that it is contrary to public interest for radio stations to advertise patent medicine of questionable therapeutic value,¹² or to sell its time to an astrologer.¹³ It would seem that the Federal Communications Commission has decided that a radio station which persists in voicing an editorial policy should not be allowed a renewal of its license.¹⁴ It is further indicated by the decisions of the Commission that there can be no extension of the broadcasting time of a radio station, even where there is no question of interference with other stations, unless, *according to the finding of that board*, the additional time will be used in the public interest.¹⁵

It will be seen from the foregoing limitations placed on radio transmission by the Federal Communications Commission that radio broadcasts are far less free than are newspaper publications, despite the parallel constitutional guaranty of freedom of speech.¹⁶ These restrictions on radio have been explained on the ground that

⁹ *Id.* at 50-51.

¹⁰ 319 U. S. 190, 63 Sup. Ct. 997 (1943)

¹¹ *Id.* at 217.

¹² *Id.* at 216.

¹³ Matter of Calumet-Hammond Broadcasting Corp., 2 F.C.C. 321 (1936), Matter of Oak Leaves Broadcasting Station, 2 F.C.C. 298 (1935).

¹⁴ Matter of Adelaide Lillian Carrell, 7 F.C.C. 219 (1939)

¹⁵ Matter of KVOS, 8 F.C.C. 159 (1940).

¹⁶ Matter of E. F. Peffer, 6 F.C.C. 554 (1938)

¹⁷ U. S. CONST. AMEND. I.

radio is in a sense a public utility. In the *National Broadcasting Co.* case, the explanation is made in the following words: "Unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied."¹⁸ At first thought, such an explanation seems quite reasonable, for physical laws prevent the operation, free from interference, of more than a certain number of radio stations within a given area. However, the fallacy in this reasoning is seen when one considers that economic laws prevent the publication of more than a certain number of newspapers in a given area. Thus the element of monopoly is present both in radio and in the newspaper; and therefore the necessary conclusion is that regulation of expression should be extended to both forms of communication, or that it should not be exercised in either case. Such a conclusion presents the question of whether limitations on press and speech "in the public interests" are justified or desirable.

Such restrictions must in many cases lead to ludicrous—and not necessarily just—results. The difficulty in determining what is in the public interest is aptly illustrated in the *Esquire* case. In that case, Associate Justice Arnold quoted at length from the testimony at the trial. The quoted testimony was presented for the purpose of determining whether or not a picture of a scantily clad woman, which had appeared in an issue of *Esquire* magazine, was art. The ambiguous statements and the utter lack of basis of the conclusions of the witness show the impossibility of determining with any degree of accuracy what is in the public interest.

A more serious aspect of such regulation is indicated in the dissenting opinion of the *National Broadcasting Co.* case, in which Mr. Justice Murphy said:

" because of its, radio's, vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment."¹⁹

It may be true that thus far the Federal Communications Commission has not attempted to impose any political or ideological doctrines upon radio listeners; but so long as the power to do so exists, the danger of its being exercised remains.

In conclusion, it would seem that regulation of radio or the press presents the perfect means of disseminating political propaganda; that such regulation does not necessarily guarantee the best or most

¹⁸ 319 U. S. 190, 226, 63 Sup. Ct. 997 (1943)

¹⁹ *Id.* at 228.

satisfying service to the public; and that such regulation violates the spirit of the constitutional guaranty of freedom of speech and of the press. Therefore it would seem best to leave radio and the press unhampered in the selection of the information and entertainment it is to present to the public.

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