Constitutional Law: The Right of Access to the Press

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CONSTITUTIONAL LAW:  
THE RIGHT OF ACCESS TO THE PRESS

I. INTRODUCTION

The right to publish one's views on any particular issue is protected from state infringement by the First Amendment. A problem arises when an individual who lacks printing facilities attempts to publish editorial advertisements in privately owned newspapers. Since he owns no printing press, should he have the right to rent the paper's facilities and circulation to present his views?

The editorial advertisement is the same as a commercial advertisement; however, the editorial advertisement usually concerns an issue or controversy of a political nature. These advertisements are common around elections, but then they are encouraged by newspapers. The kinds of editorial advertisements which need the force of the First Amendment to gain access to a newspaper's pages concern other types of political questions, such as community labor disputes. Both labor and management will want to make known their side of the controversy and both may find that an advertisement in the local paper is a better way to reach the public than such familiar media as broadcasting facilities or picket lines.

This comment will examine the status of editorial advertisements which depend on another's printing presses and established circulation to reach the public. The effect of private ownership of newspapers, the types of speech protected by the First Amendment, and the special character of the press must be discussed in arriving at a proposed solution to the editorial advertisement problem. The similarities and distinctions between newspapers, private property and broadcasting provide the bases for this discussion.

1 "For present purposes we may and do assume that freedom of speech and the press—which are protected by the First Amendment from abridgement by Congress, are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Gitlow v. New York, 268 U.S. 652, 666 (1925).

2 A newspaper is under no obligation to give political candidates equal advertising space as is the holder of a broadcast license from the Federal Communications Commission.

3 See Lincoln Star, April 29, 1970, at 15 for an example of such an advertisement.


II. THE PRESS AND COMMUNICATION

A. STATE V. PRIVATE ACTION

Discussion of the problems surrounding access to the press should properly begin with two cases directly on point. In Chicago Joint Board, Amalgamated Clothing Workers Union, AFL-CIO v. Chicago Tribune Co., the plaintiff labor union wanted to print an advertisement in the Chicago Tribune and other major Chicago dailies presenting its position in a labor dispute with Marshall Fields Department Store. The Federal District Court for the Northern District of Illinois granted the defendant newspaper's motion for summary judgment and dismissed the case, emphasizing the lack of state action attributable to the private newspaper. As the court stated: "[P]laintiff's position that newspapers are quasi-public bodies has clearly been rejected by the judiciary."9

Four days earlier the Federal District Court for the Western District of Wisconsin rendered a declaratory judgment that the Royal Purple, a campus newspaper of Wisconsin State University in Whitewater, could not refuse to print an editorial advertisement criticizing the Vietnam war. Such a refusal was held to be a denial of the advertiser's freedom of speech. This was an impermissible infringement of the plaintiff's constitutional rights under color of law because of the newspaper's connection with a state tax-supported institution.9

The complaint in the Chicago case alleged that the plaintiffs had a right to advertise in the Tribune. The court summarily dismissed two claims based on acceptance of a standing offer to contract and detrimental reliance on a standing offer to contract.10 The first allegation, in which the plaintiff argued that the Tribune was a quasi-public entity which could not refuse to publish the union's advertisement without violating their constitutional rights to free speech and equal protection, was given thorough examination.

The court held that some state action was necessary to give rise to an unconstitutional abridgement of the right to free speech.11 The court recognized that other kinds of private property have been held to be affected with public character, which confers First Amendment and other constitutional protections. Some cases, nota-
bly Marsh v. Alabama,\textsuperscript{12} involved private ownership and control of the physical premises on which people live or work. However, Chicago Joint Board rejected any analogy between the newspaper situation and those cases. The court found that a newspaper was part of a special industry for which the Constitution had carved out special treatment.\textsuperscript{13} The kinds of property involved in Marsh and the cases following its lead were simply not applicable to the press.\textsuperscript{14}

Disassociation of press and government is a status secured by the First Amendment. It does not follow, however, that the courts may not require the privately owned press to accept and print advertisements advocating a particular cause.\textsuperscript{15} In fact, the newspaper's refusal to print such advertising may be an abridgement of First Amendment rights.

Lee v. Board of Regents of State Colleges\textsuperscript{16} also involved a private citizen's attempt to place an editorial advertisement in a newspaper. The plaintiff in Lee, however, desired to place his advertisement in the school newspaper operated by Wisconsin State University at Whitewater. Thus, refusal to run the advertisement was censorship asserted through state action, and could only be upheld in the face of "a clear and present danger."\textsuperscript{17}

In granting the plaintiffs' action for a declaratory judgment under Federal Rule of Civil Procedure 56(c), the court agreed that plaintiffs had a right to effective expression of their views.\textsuperscript{18} It was clear that the plaintiffs' anti-war message could be presented more forcefully and effectively by use of photographs, large type, and a full page presentation than by a letter to the editor. Therefore the plaintiffs had standing to present their case.\textsuperscript{19}

\textsuperscript{12} 326 U.S. 501 (1946).
\textsuperscript{13} 307 F. Supp. at 426.
\textsuperscript{14} "Finally the Marsh and Logan Valley decisions rested on the finding that privately owned territory was indistinguishable, in terms of public access and use, from non-privately owned towns, business districts, and shopping centers." Id. at 427.
\textsuperscript{15} The court in Chicago Joint Board obviously disagreed: "Yet, if, in many respects, private censorship is no better than public censorship, the fact remains that the right to free speech was never intended to include the right to use the other fellow's presses . . . ." Id. at 429.
\textsuperscript{16} 306 F. Supp. 1097 (W.D. Wis. 1969).
\textsuperscript{17} Id. at 1101.
\textsuperscript{18} Id.
\textsuperscript{19} See New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1963), calling editorial advertisements "an important out for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press."
The presentation of views through an advertisement in a campus newspaper is no less violative of the sanctity of the press than placement of a similar type of advertisement in a privately owned newspaper. In neither situation does the paper suffer any interference with their news presentation or editorial position. In both situations the individuals placing or attempting to place advertisements wish only to rent space, printing presses and use of the paper's circulation.

A thorough examination of other situations where individuals have been able to purchase space and circulation for editorial advertisements through quasi-public and public facilities will underscore the inconsistency in the outcomes of *Lee* and *Chicago Joint Board*.

B. **RIGHT TO COMMUNICATE THROUGH OTHER PRIVATE AND PUBLIC FACILITIES**

In the course of deciding the merits of the controversy, other cases involving the right to present views to the public through the use of some existing medium or facility have discussed the relative interests of the parties involved. Of particular interest is the state courts' treatment of the right to advertise in private newspapers and in space provided on transit facilities, and the right to use public buildings for political meetings.

1. **State Courts and the Press**

*Uhlman v. Sherman* is the only case which has held that the private individual's right to use another person's printing presses by advertising in his newspaper does not infringe upon the newspaper's right to freedom of the press. In *Uhlman* the Ohio court found that the quasi-public character of the newspaper required that once advertising space was sold to others of the class to which plaintiff belonged, it must be made equally available to all of that class. Those willing to comply with reasonable rules as to the character and length of advertisements could not be refused space. The court expressly grounded the decision on policy considerations, freely admitting there was no precedent for the holding as applied to newspapers. Although language of the holding suggests equal protection considerations, the court pointed out that they were not suggesting that the newspaper had the same legal status as an amusement center, inn, or common carrier. A newspaper acquired its quasi-public status by virtue of the sale of advertising space to a general public class.

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20 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (1919).
21 "We therefore believe that a newspaper company when it has advertising space to sell has no right to discriminate against a local mer-
The *Uhlman* court also mentioned the favors that government had bestowed upon newspapers. Often legislation requires that notices be printed in local newspapers to inform the community of certain facts which have legal consequences. All such legislation generates business for the newspaper. Whether the Ohio court meant to hint that this also gives rise to quasi-public status or is in fact state action was not made clear. However, the South Dakota Supreme Court has considered that question.

In *Mack v. Costello*\(^\text{22}\) the plaintiff wanted to petition to have his land removed from the corporate limits of the city, but to do so he had to publish notice in a newspaper published in the city or town where the petition was presented. When the local newspaper refused to print the plaintiff's notice, the trial court ordered it to do so. In dismissing the writ ordering the paper to print the notice, the supreme court commented that if plaintiff was thwarted in his attempted compliance with the law it was up to the legislature to dictate an alternative. A newspaper is a private business, and its publisher assumes no "office, trust, or station," in the public sense of the word; nor does he enter into any public or contractual relation with the community at large. Ironically, the South Dakota court felt that if the publication of a newspaper was a quasi-public business it was only because from long existence it was regarded as a public necessity. It seems the court had ample policy and factual considerations in *Mack* to find that the paper was involved in public activity and that even if tax dollars did not help support the paper, at least a certain percentage of income may have come from dollars which the legislative body required to be paid to the newspaper for its services. The publication of the notices in no way interfered with the news or editorial policy of the newspaper, and the legislature, by requiring that notices be published, had implicitly recognized that the use of another's presses and circulation in no way interfered with the publisher's right to the freedom of the press.\(^\text{23}\)

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\(^{22}\) See also J. J. Gordon, *Inc. v. Worcester Telegram Publishing Co.*, 343 Mass. 142, 177 N.E.2d 586 (1961), where, in a tort action against a newspaper publisher for refusal to accept plaintiff's advertising, the court affirmed the defendant's demurrer. A newspaper is under no obligation to accept advertising from all who apply for it. The court took judicial notice that a newspaper was not a public utility. See Note, *Torts—Newspapers—Publishers of a Newspaper Under No Obligation to Accept Advertising*, 37 Notre Dame Lawyer 575 (1962), including a discussion of Gordon's treatment of *Uhlman* and *Mack*.

\(^{23}\) 32 S.D. 511, 143 N.W. 950 (1913).
Although Mack was typical of state court treatment of the access problem, a recent case may reveal a shift in judicial thinking. The dissent in Bloss v. Federated Publications, Inc.\textsuperscript{24} expressly stated it could not agree with the sweeping proposition that a newspaper is

\begin{quote}
"a purely private business and, therefore, free to contract with and do business with whomsoever the publishers thereof see fit, and conversely, free to refuse to contract with and do business with any parties they choose to reject."\textsuperscript{25}
\end{quote}

The question in Bloss was whether plaintiff had a right to have the defendant newspaper publish his motion picture advertisement. The court dismissed the complaint, holding that even under Uhlman the action might fail since the advertisement did not meet publication standards. Justice Adams would have first asked if the defendant newspaper had conducted its business in a purely private manner with no holding out to the public of its columns for advertising, and second, had the advertisement offered by the plaintiff met defendant's publishing standards?\textsuperscript{26}

The dissenting justice insisted that the decision on the merits should not

preclude future plaintiffs—political candidates, commercial enterprises, governmental units—from the right to insist upon access to newspaper coverage upon equal terms where a newspaper controls the sole means of daily paid printed communication within a given area and the newspaper has held itself out generally to the public as affording such means of communication, subject to its rules and regulations.\textsuperscript{27}

Although the Bloss case was not resolved in the plaintiff's favor, the fact that the court recognized the validity of the Uhlman examination of a newspaper's conduct where an advertisement meets publication standards is encouraging.\textsuperscript{28} Especially significant is the dissent's concern with the manner in which the defendant had conducted his business: its actual public character. If the parties' interests and relative positions are given consideration in reaching a decision, the holding would seem to have more validity than a decision like Mack.

\textsuperscript{24} 380 Mich. 485, 157 N.W.2d 241 (1968).
\textsuperscript{25} Id. at 490, 157 N.W.2d at 244 (Adams, J., dissenting).
\textsuperscript{26} Id.
\textsuperscript{27} Id. Sounding much like the Uhlman court, the Bloss dissent emphasized the right of one person to have the newspaper publish advertising upon the same terms and conditions as set for other persons. Contra, Approved Personnel v. Tribune Company, 177 So. 2d 704 (Fla. App. 1965).
\textsuperscript{28} 380 Mich. at 487-88, 157 N.W.2d at 242. Justice Souris did not concur with this portion of the court's holding.
The incorporation of freedom of speech and press into the Due Process Clause of the Fourteenth Amendment is too settled a legal reality to be discussed here. However, other writers have given the subject excellent treatment and their work is an important source for analysis of this area. Basically most articles speak of the rights of speech and press in broad terms indicating that both rights need to be exercised free of restriction, and such exercise must be actively promoted. The importance of fostering freedom of communication is especially essential in a country such as the United States and the courts should recognize and nurture this concept.

Other writers, dealing specifically with commercial expression, have emphasized that along with the standard types of constitutionally protected speech other expression can gain constitutional protection by the economic interests it represents.

Although the Supreme Court has not held expressly that union and corporate political expression is protected by the first amendment, the Court's construction of several federal statutes suggests that it is.

While the Supreme Court has expressly held that "the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution," it might be argued that the advertisement offered in Chicago Joint Board was only union propaganda and not a presentation of the "facts" of the dispute. The fact remains that, in view of the types of union activity or expression protected in the picketing cases, it seems doubtful that the Supreme Court has not actually recognized that such union expression is protected by the First Amendment.

Thus it appears that placing advertisements in newspapers, whether for commercial or political-commercial purposes, falls within the area of speech which the First and Fourteenth Amendments protect. If that is so, the apposite factor again becomes the

29 "[U]nless the right to freedom of communication is wisely interpreted, its continuance may be jeopardized." Carroll, Natural Law and Freedom of Communication Under the Fourteenth Amendment, 42 Notre Dame Lawyer 219, 231 (1966) (footnote omitted).

30 "To be sure, not all peoples have been sufficiently developed or fortunate enough to realize that aspect of their human nature that calls for political participation. But where, as in the United States, institutions for political participation exist, the duty to implement and improve by protecting political rights, including the right to communicate, is evident." Id. at 224.


nature and conduct of the paper itself and not the type of expression which the individual is offering for circulation. The second test of the Bloss case is met whenever a legitimate political-community interest issue is offered for publication. To better appreciate the application of this conduct test which determines if the newspaper has held itself out generally to the public, an examination of state cases concerning advertising through other types of facilities will be profitable.

2. Advertising on Public Transportation

In 1967, two cases affirmed an individual's right to advertise his views on space provided or sold to the public at large. In Kissinger v. New York City Transit Authority,33 the Students for a Democratic Society wanted to post placards on the walls and in the trains of the New York subway system showing a girl partially burned by napalm and urging an end to the Vietnam war. They were denied the right to do so by the transit authorities because the signs to be posted did not fall into one of the three categories for which the Authority accepted advertising—commercial, public service, or political at times of elections. The court in Kissinger found sufficient state action to raise the application of the civil rights laws.34 Absent a showing of clear and present danger, the posters were protected speech; consequently they were to be exhibited in the available space, which a private advertising firm leased from the city.35

In Wirta v. Alameda-Contra Costa Transit District,36 the Women for Peace wished to run advertisements in defendant's motor coaches, advocating negotiation and immediate peace in Vietnam. The advertising company which controlled rental space declined the organization's offer whereupon they sought an order requiring the defendant to run the advertisement.

Wirta held for the plaintiffs, finding that the refusal was a denial of free speech and that the exclusion of advertising not connected with a political campaign was a denial of equal protection.37

35 274 F. Supp. at 442.
36 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).
37 The holding was not totally without precedent. See note 38 and accompanying text infra.

The court perhaps incorrectly dismissed the defendant's contention that the task of insuring equal treatment for all views was too great to require him to give advertising space to all who might apply. It found the contention without merit since this type of advertising was no different than speech in a public park, carrying no endorsement, and thus not requiring that those of opposing positions necessarily be
The treatment of the transit cases shows that courts are willing
to promote exercise of First Amendment rights through advertising
whenever public discussion has been encouraged by a party with
available facilities. The holding is applicable by analogy to newspa-
papers, and probably would have already been so applied had not
the word press in the First Amendment been interpreted only as
protection for private interest. The failure to treat advertising col-
umns of newspapers identically to advertising space in privately
controlled transit facilities indicates a failure to realize that a news-
paper can be separated into two distinct identities; the First Amend-
ment in using the word press is arguably concerned only with
newspapers’ opinions and news presentation.

3. Other Communication Media

California had compelling authority in Wirta to recognize the
women’s organization’s right to use the transit authority’s available
advertising space. The California Supreme Court, in Danskin v. San
Diego Unified School District, had sustained the grant of a writ of
mandamus to petitioner requiring the defendant school board to
give him unconditional permission to use the high school audi-
torium. The court, in a lengthy opinion by Justice Traynor, surveyed
the First Amendment protection of speech, but anchored the deci-
sion on the fact that while the school board was under no duty to
make their facilities available to the public for general use, if it
elected to do so it could not arbitrarily prevent certain members of
the public from holding meetings therein. Nor could it make the
privilege of holding meetings dependent upon conditions that would
deprive any members of the public of their constitutional
rights.

Borrowing from the Holmes concept of freedom of speech, the
court pointed out that in the competitive struggle of ideas for ac-
cceptance, the ideas which the board found acceptable were not
entitled to any advantage such as pronouncement in a forum where
competition had been diminished by censorship. The dulling effect
of censorship on community discussion is to be more feared than
the quickening influence of a live interchange of ideas.

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given the same treatment. But see Comment, Constitutional Law—
Transit District May Not Constitutionally Restrict Paid Advertising so
as to Exclude Opinions and Beliefs Within the Ambit of First Amend-
ment Protection, 43 Notre Dame Lawyer 781 (1968).

38 28 Cal. 2d 536, 171 P.2d 885 (1946).
39 Id. at 545, 171 P.2d at 891. “The convictions or affiliations of one who
requests the use of a school building as a forum is of no more concern
to the school administrators than to a superintendent of parks or
streets if the forum is the green or the market place.” Id. at 547, 171
P.2d at 892.
A similar problem in Ohio resulted in dissimilar treatment. In *State ex rel. Greisinger v. Grand Rapids Board of Education*, a local statute gave the board of education discretionary power to grant or deny applications of organizations to use the school auditorium. The court found that the refusal of an application of a religious sect, most of whose members were not citizens of the community and whose tenets were not consonant with the school's teachings of principles of good citizenship, was not a denial of the plaintiff's constitutional right of speech, worship, or assembly. Presumably the absence of any equal protection language in the opinion indicates that the board had not made it a policy to hold the buildings out to the public. The case seems consistent with the *Danskin* test of whether the facilities had been available to others in the past.

III. COMMUNICATION AND THE RIGHT TO ENTER PRIVATE PROPERTY

A. Federal Recognition

While private newspapers have been allowed to shield themselves from an individual's access to their galleys, other owners of private property have found the courts willing to pierce the veil of private ownership to recognize what is actually a public entity. *Marsh v. Alabama* was the forerunner of many state and federal cases holding that there is a right to espouse a particular cause on land owned by another without that owner's consent.

*Marsh* involved the distribution of leaflets by Jehovah's Witnesses in the business district of Chickasaw, Alabama, a company town owned by Gulf Shipbuilding Corporation. In reversing Marsh's conviction for trespassing, the Supreme Court discounted any notion that ownership of the town's business district by a corporation or defendants' lack of residency was sufficient to sanction infringement of Marsh's right to free expression.

The *Marsh* doctrine was reaffirmed and given added significance in *Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc.* The scene of the dispute was a shopping center, and the issue again was access to another's private property to communicate personal views. The Court compared *Logan Valley* to *Marsh*:

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42 "In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish this from any other town and shopping center except the fact that title to property belongs to the corporation." Id. at 503.
43 391 U.S. 308 (1968).
It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality.\(^4\)

Petitioners desired to picket on the property of the concern with whom the union was having a labor dispute. The shopping center felt that the union only had a right to picket along the street adjacent to the shopping center. The Supreme Court held that the *Marsh* and *Logan Valley* situations were identical.\(^4\)

Even after *Logan Valley* there remained considerable doubt about the kinds of picketing which would be allowed access to private property. *Logan Valley* was explicit in limiting its holding to the situation presented therein, the picketing of a store by those having a grievance with it.\(^4\) In the most recent case, an Oregon federal court interpreted *Logan Valley* to expand the access provided by the Supreme Court. *Tanner v. Lloyd Corporation*\(^4\) involved the owner of a shopping center who held his land open to the general public for business purposes. Plaintiffs were veterans passing out anti-Vietnam leaflets on the center mall. To the extent the land was the functional equivalent of a public business district, the owner was held to have given up the right to prohibit distribution of literature thereon, or to decide where literature might be distributed. However, the court knew it was making a rule not required by the *Logan Valley* doctrine: "If *Logan Valley* does not go as far as I suggest, the First Amendment does."\(^4\) *Tanner* holds that the public need for uncensored information should not be frustrated.

The district court took judicial notice that the defendant in *Tanner* permitted other groups "to use the mall even though they do not add to 'customer motivation.'"\(^4\) That fact brings the *Danskin* analysis into play; once a facility is held open to the public, those controlling it cannot pick and choose those it will allow to exercise their rights through its use.

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\(^{44}\) Id. at 315.
\(^{45}\) The shopping center and the sidewalks and parking lots were like the company town, "in short . . . accessible to and freely used by the public in general . . . ." Id. at 317 (quoting *Marsh v. Alabama*).
\(^{46}\) The Court stated it was not considering picketing of shopping centers for purposes other than for those connected with the operation of the center. Id. at 320 n.9.
\(^{48}\) Id. at 132.
\(^{49}\) Id. at 129.
The impact of *Logan Valley* on an individual’s right to communicate has been described as only a sanctioning of what the state courts had already done,\(^5^0\) and the only logical extension of *Marsh*.\(^5^1\) To the extent that *Tanner* rests on *Logan Valley*, however, it appears that *Logan Valley* may more properly be viewed as a positive policy statement by the Supreme Court on how the shopping center, as a socioeconomic phenomenon, will be treated in the law.

While the reach of *Marsh* and *Logan Valley* is still in doubt as far as the Supreme Court is concerned, *Tanner* is a very positive interpretation of those cases, recognizing that private property may exist on two planes. On one the owner has the right to control the property in such a way as to maximize his desires. But once the management of private property holds that property open for public use the property owner may not deny its public character. The courts have not invaded the private use or management of the owner’s property; there has been a balance struck between the Fifth and First Amendments and the First Amendment has been preferred.

IV. THE BROADCASTING MEDIA AND COMMUNICATION

The Federal Communications Commission is the agency in charge of the federally regulated broadcasting industry. Broadcasting bears a clear resemblance to newspapers; in fact the purposes behind many of the rules applied to the broadcasting media may be more applicable to the newspaper industry.

A. RED LION DOCTRINE

The controversy in *Red Lion Broadcasting, Inc. v. F.C.C.*,\(^5^2\) arose after personal attacks on the reputation and character of an individual were made over the radio station owned by Red Lion. The individual’s request for equal time to refute the charges was denied by the station. Acting pursuant to its fairness doctrine, which requires that time be given to an individual who requests it to answer a personal attack,\(^5^3\) the F.C.C. ordered Red Lion Broadcasting to

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\(^5^3\) The fairness doctrine also requires equal time be given to any interested party in a public controversy.
give equal time to the requesting party. The broadcasting company challenged the constitutionality of the fairness doctrine as an abridgement of its freedom of speech. The Supreme Court, in its first decision on the merits of the fairness doctrine, upheld the F.C.C.:

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in [an accompanying case] are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional...

The Court traced the history of broadcast regulation and affirmed the need to keep the media available to all those who were not fortunate enough to have a license to broadcast. The two-fold duty to give adequate coverage to public issues and to give accurate coverage to each side of a controversy would not be enforceable without the fairness doctrine supplanting the existing statutes.

The *Red Lion* decision was grounded on First Amendment concepts expressed in *Associated Press v. United States*:

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 monopolization of that market, whether it be the Government itself or a private licensee.

It has been suggested that although the limited access rationale used to justify broadcast regulations supports the fairness doctrine as applied to personal attacks, it is an untenable justification for application of the doctrine when controversial issues have been broadcast. "Because a genuinely controversial issue will get other public exposure, the FCC should take into consideration the activities of other media . . . ."

It is possible that, even considering the activities of other media, the fairness doctrine still requires equal time from a broadcasting medium when public issues are involved. The impact of a live broadcast, weighed against the force of printed material, is far from slight. Furthermore, the presence of direct state action in licensing

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54 395 U.S. at 375.
57 395 U.S. at 390.
59 See Note, Constitutional Law—Freedom of Speech—Federal Communications Commission's Fairness Doctrine is Constitutional, 13 Vill. L. Rev. 393 (1968). The writer seems to make the same point by asserting that in *Red Lion* it is difficult to tell if it is the medium which dictates the decision or the First Amendment.
broadcast stations adds weight to arguments for the necessity of regulation to guarantee that the state does not indirectly favor one party or another in the exercise of First Amendment rights. Thus, the regulation found constitutional in Red Lion rests on both the limited access rationale and the state action concept.

It has been suggested that if the reason for public regulation of broadcasting is the public's limited access to those facilities, then the fairness doctrine should be applied to newspapers as well. It is clear that everyone cannot obtain a license to operate a radio station, and consequently access to broadcasting facilities is limited; however, the economic barriers to entering the newspaper industry just as effectively limit access to the printing press.

On second glance the apparent analogue breaks down. The licensing factor makes the broadcasting medium unique, and regulation of broadcasting can reasonably be based only on this licensing-state action characteristic. The time allowed on radio and television for public debate must not favor one side over another or government will have indirectly interfered with an individual's freedom of speech. Although improved broadcasting techniques make the number of available frequencies almost limitless, licensing insures that only a limited number of stations will service a given geographical area.

This state licensing factor clearly differentiates the broadcasting and newspaper media. If a basic right to access to the press does exist, it must have an independent constitutional basis.

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60 National Broadcasting Co. v. United States, 319 U.S. 190 (1943).
62 According to a recent count there were 6,602 radio and television licenses and 1,751 daily newspapers. Robinson, supra note 61, at 157.
63 Comment, supra note 61.
64 "Indeed as one licensed to operate in a public domain, the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias." Mayflower Broadcasting Co., 8 F.C.C. 333, 340 (1940). See also Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Note, Red Lion Broadcasting Co., Inc. v. F.C.C.—Extension of the Fairness Doctrine to Include Right of Access to the Press, 15 S.D.L. Rev. 172 (1970).
65 The creation of UHF and FM stations make available frequencies limitless in actuality.
V. CONCLUSION—ACCESS TO THE PRESS

A. THE RIGHT TO COMMUNICATE

There can be little doubt that the Constitution and the courts recognize and find essential a First Amendment right to communicate. The idea can be traced through Gitlow to Logan Valley, but the conclusion is best summed up in Justice Brennan's simple statement: "Freedom of expression in areas of public affairs is an absolute." 67

Communication has taken the form of door-to-door solicitation, 68 assemblies, 69 criticism of public officials in the press, 70 passing out leaflets on private property 71 and picketing, 72 but in all these situations the message is the same as Justice Brennan articulated. The cases have often involved balancing rights existing under different amendments. First Amendment rights have invariably been preferred.

The state courts have zealously protected the right of groups or parties to have equal use of communications facilities dedicated to the public, whether those facilities were political or commercial in nature. This equal use protection raises a question with considerations similar to the personal attack portion of the fairness doctrine. Does one attacked in a newspaper have a right to answer that attack in the same medium? The newspaper can point to its letters column as providing such an opportunity, but no one can seriously claim that a letter appearing there has the same effect as a headline appearing prominently on a news page. Since the right to buy advertising space in the newspaper could provide the individual attacked with the appropriate forum, the personal attack question can be regarded as subsumed in the major theme of this comment: recognition of a right to use the newspaper's printing presses, galley space and circulation to make a point effectively.

B. IS LEGISLATIVE ACTION A PREREQUISITE?

While statutes requiring licensing are the keys to access to the broadcast media, any statute providing for access to newspapers would be faced with the same tests as the plaintiff's action in Chi-

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cago Joint Board. Any right of access to the press will need its own constitutional foundation. It is suggested that such a basis can be provided by the individual's right to freedom of the press and the dual nature of newspapers coupled with the economic limitations preventing an individual from operating his own newspaper.

If an individual had a right to have an editorial advertisement printed, the publisher of the newspaper would not find his own editorial policy or news interpretation affected. Judicial action would require only that the right to place an advertisement be granted. In addition, New York Times Co. v. Sullivan73 protects the publisher from liability for the publication of almost all such advertisements.74

C. Newspapers and the First Amendment

It has been argued that realism requires recognition that the right to expression is not very substantial if it can be exercised only at the will of those who manage mass communications.

Too little attention has been paid to defining the purposes which the first amendment protection is designed to achieve and to identifying the addressees of that protection. 75

The dualistic view of newspapers recognizes the publisher as a primary addressee of that protection. As Jerome Barron points out, judicial treatment of the press is exemplified by Justice Black's concurring opinion in New York Times Co. v. Sullivan. Black "seems to identify the 'press' with the 'people' and to think immunity from suit for newspapers is equivalent to enhancing the right of free expression for all members of the community ...."76 Any hope that the Burger Court might take a more realistic view of the press in the access problem is discounted by Barron because of a dictum which the Chief Justice wrote while a Circuit Court Judge in the otherwise pioneer decision Office of Communication of United Church of Christ v F.C.C.:77

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.78

74 "Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." Thornhill v. Alabama, 310 U.S. 88, 95 (1940).
75 Barron, supra note 64, at 1648.
76 Id. at 1658.
77 359 F.2d 994 (D.C. Cir. 1966).
78 Id. at 1003.
Barron's pessimism is perhaps unwarranted, for if the statement is read in light of uniqueness-because-of-licensing analysis, it is a correct view of the broadcasting-newspaper distinctions. The fact that licensing of broadcasters makes that medium’s public access requirements inapposite with respect to the right of access to the newspaper does not, however, preclude recognition of a right to communicate ideas through the press on some other ground.

While courts continue to deny the public character of a newspaper, the market keeps forcing the major dailies into a monopoly position. Barron may be close to the real reason the press will some day find itself subject to others' First Amendment access rights in his reliance on this movement toward monopoly and Justice Douglas's open-ended “public function” theory in *Evans v. Newton.*

If the parks located on private lands in *Evans* could not escape the stigma of public character due to the public services they rendered, it seems “that a newspaper, which is the common journal of printed communication in a community, could not escape the constitutional restrictions which a quasi-public status invites.” It remains to be seen whether courts will finally attach the public entity label to newspapers, thereby obligating the press to respect the exercise of a person's First Amendment rights. In absence of this, it is suggested that freedom of the press includes the right of a party to rent the paper’s facilities through its advertising department for the purpose of effectively presenting one’s ideas.

The courts have held that the public needs to be informed about the type of controversy involved in *Chicago Joint Board.* By denying the union's editorial advertisement, the paper denied the use of an effective means of presenting the union case to the people of Chicago. The result was either a denial of free speech by a quasi-public, limited entry facility or a denial of freedom of the press to a citizen trying to exercise that right.

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80 Barron, *supra* note 64, at 1669.
81 “In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.” *Thornhill v. Alabama,* 310 U.S. 88, 102 (1940).