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Citations

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus,* in support of the Petitioners' position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 122 national and international labor unions having a total membership of approximately 12,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinion below, jurisdictional statement, questions presented, and the statutory provision involved are set out at pp. 1-8 of Petitioners' brief.

INTEREST OF THE AFL-CIO

The labor movement is, and has always been, confident of the justice and appeal of its programs and policies. Secure in that confidence it seeks, and has traditionally sought nothing more than the opportunity to present its views to the American public in general and to working men and women in particular. This opportunity has frequently been denied. Prior restraints though licensing laws have been employed to seal off entire states from union organizers, see, *Thomas* v. *Collins,* 323 U.S. 516 (1945). The streets, parks, and meeting halls of large industrial cities have been closed to union solicitations and handbills, *see, Hague* v. *CIO,* 307 U.S. 496 (1939); *cf., Schneider* v. *State (Snyder* v. *Milwaukee),* 308 U.S. 147, 155 (1939). Company towns have been declared off limits to unions, *see National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U.S. 226 (1949). Door-to-door solicitation has been barred, *see Staub* v. *Baxley,* 355 U.S. 313 (1958). Privately owned streets open to the public at large have been closed to those who wish to spread the union's views, *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308 (1968). And organizers who seek to spur organization have been refused access to the plant they seek to organize, *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 451 U.S. 105 (1956). As the foregoing citations indicate, resistance to the spread of labor's message is hardly a matter of history. In combating this resistance the fact that this Court has established the proposition that the right of access to the streets of those who seek to communicate is a basic civil right protected by the First Amendment, *Hague* v. *CIO, supra,* 307 U.S. at 515 has been a most formidable aid.

It is our view, as we demonstrate herein, that the public's right of access to the airwaves to present all points of view on issues of public importance should also be regarded as a basic right of free men protected by the First Amendment. Given radio's and television's vast potential for the "advancement of informed public opinion," *Report on*

Editorializing by Broadcast Licensees, 13 FCC 1246, 1249 (1949) and our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open," *New York Times* v. *Sullivan,* 376 U.S. 254, 270 (1964), the First Amendment requires that the public airwaves be open to the members of the general public.

If such a rule of law is not established, the loss to the labor movement, as well as to all other members of the general public who do not hold broadcast licenses, will be a substantial one. We merely note two examples here, both of which have been brought to the attention of the Commission to indicate the nature of that loss. In the proceedings which led to the instant case, the International Typographical Union, AFL-CIO, noted:

> "Since December 1964 there has been a strike by Lafayette Typographical Union No. 832, one of the affiliates of the International Typographical Union, against the publisher of the Lafayette Advertiser, a daily newspaper which is the only newspaper in the Lafayette area. There has been a refusal of this company to recognize the union, a refusal which is presently the subject of a complaint against the company issued by the General Counsel of the National Labor Relations Board. The issue is obviously one of great public importance and interest in the community and for obvious reasons the struck newspaper is not available to the union as a medium for the expression of its views. Accordingly, the union has made strenuous efforts to obtain air time on the local broadcasting stations. It offered to submit the script for its proposed program for review by the station. In every instance the union was denied the opportunity to purchase the time. The derelection of the broadcasters in Lafayette is noteworthy in this rule-making proceeding because it is symptomatic of a prevalent practice contrary to the public interest as defined by Congress."

This is not an isolated example. All broadcasters are employers and it is too often true that their self-interest in keeping unions weak affects their news judgements, *see* Hearings, Administration of the Labor-Management Rela-

tions Act by the National Labor Relations Board, before the Subcommittee on the National Labor Relations Board, 87th Cong., 1st Sess. (1961) Part I, 292-331.

This past year the Arkansas State AFL-CIO submitted amendments to the state's Workmen's Compensation Law by securing a petition signed by the requisite number of registered voters to put the matter on the ballot. This proposal was enacted into law by a 7500 vote margin out of 500,000 votes cast. The opposition campaign to this measure was vigorously pursued and according to public opinion polls changed strong public support for the measure into a close race during the week or two immediately preceding the election. This opposition campaign was carried out primarily through advertisements in newspapers and on radio and television. The Arkansas State AFL-CIO, the only major supporter of the measure, was not able to approximate the amount of money spent on advertising by its opponents. Television stations serving Arkansas viewers were, therefore, asked to give time to the State Federation so that the voters would hear both sides of the issue. Generally, because of the provisions of the Communications Act the stations cooperated. Nevertheless, even at this late date in the history of the Act, and despite the fact that their duty was clear, two stations refused. The matter of their refusal is now pending before the Commission.

The foregoing makes the AFL-CIO's interest in this proceeding manifest and it is because of this interest that we have sought to acquaint the Court with our views.

ARGUMENT

The Public Has A Constitutionally Protected Right of Access To The Airwaves To Present Variegated Views On Issues Of Public Importance.

In *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 212-213 (1943) this Court noted:

> "Without licensing the result [would be] confusion and chaos. With everybody on the air, nobody could

> be heard . . . [This] is attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile."

To deal with the consequences of these facts of physics, §301 of the Communications Act of 1934 as amended, 47 U.S.C., §301 provides:

> "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio [in or affecting interstate commerce] except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

Section 153(h) provides:

> A person engaged in radio broadcasting . . . shall not be deemed a common carrier."

And §501 of the Act, 47 U.S.C. §501 provides:

> "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of

not more than $10,000 or by imprisonment for a term not exceeding one year, or both . . ."

Thus, the penal laws of the United States assure that only those persons who have received a federal license enjoy the right to practice electronic journalism in the United States. If there were nothing more in the governing law, those who unsuccessfully seek a federal license, or those who unsuccessfully seek air time from a licensee would be barred, by governmental action, from reaching the general public through the airwaves—barred, in other words, from setting up their own electronic "press" to propagate their views. The situation which would obtain is equivalent to that which would result if the Government were to decree that only a limited number of licensed presses might be operated in this country, and that the public thoroughfares and the mails might be used only to circulate the product of these presses. If Congress had stopped at this point, thereby creating an unrestricted monopoly position over a valuable public communications' resource for those in the broadcasting industry, there would, we submit, be no doubt that the Act would be inconsistent with the First Amendment, *see* pp. 14-15 *infra*. But §§301 and 501 do not comprise the entirety of the governing law. For the Act imposes on licensees an "obligation . . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," §315(a)(4); *see also, Report on Editorializing by Broadcast Licenses,* 13 FCC 1246 (1949); Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (Fairness Primer)* 29 Fed. Reg. 10415 (1964).

The Radio Television News Directors Association (RTNDA) and the National Broadcasting Company (NBC) argue that the limited right of access to the airwaves granted by §315 places burdens on them which generate self-censorship. On this basis they argue that the §315 requirement that licensees must afford a reasonable opportunity for the discussion of conflicting views is incompatible with their right of free speech guaranteed by the First

Amendment.[1] It is our view that the Government has the power, indeed the duty, to promote variegated speech on the airwaves by assuring non-licensees an opportunity to exercise their right of free speech, and that the financial and practical costs of such a policy do not serve to render it unconstitutional. With the exception of *National Broadcasting Co., supra,* 319 U.S. at 226-227, this Court has not had occasion to apply the basic principles of the First Amendment to broadcasting. Nevertheless, we suggest that the prior decisions of this Court do point toward the proper resolution of the instant case.

The Government stands astride three important avenues for the circulation of views—public thoroughfares, the mails, and the airwaves. As we view the matter, the basic issue here is the right of access of the general public to the third of these valuable resources for communication. While the law on the exact nature of this right is relatively undeveloped, there is a substantial body of law on the right of access to public thoroughfares of those who seek to exercise their First Amendment rights. As we shall now demonstrate, that body of law presents the appropriate starting point from which to reason toward a solution to the problem present here.

1. In *Davis* v. *Massachusetts,* 167 U.S. 43, 47 (1897) *affirming* 162 Mass. 510 (1895), this Court endorsed the following language of Mr. Justice Holmes, then a member of the Supreme Judicial Court of that State:

> "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the

[1] The Columbia Broadcasting System, Inc. has taken the narrower position that, assuming *arguendo* that this requirement of §315 is constitutional the Commission's Rules on Personal Attacks in issue here are not justified by the Act and conflict with the First Amendment.

> dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes."

It has since been recognized that the inhibitions *Davis* placed on the effective enjoyment of First Amendment rights are intolerable and that case is no longer good law. For the "liberty of circulating is as essential to . . . freedom [of speech] as liberty of publishing, indeed, without the circulation the publication would be of little value," *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938). Free circulation is of the essence since the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (US DCSD NY 1943) (L. Hand, J.). "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 . . . Freedom to publish means freedom for all and not for some." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

It is plain that allowing the States to close the streets at their discretion to the circulation of free speech would effectively curtail "the widest possible dissemination of information from diverse and antagonistic sources." For it would inhibit the right of expression of those whose means are too limited to utilize methods of communication other than the handbill and the picket sign. It would, therefore, damage the entire society by limiting the opportunities of both the potential publishers and their auditors, *see, Martin* v. *Struthers,* 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General,* 381 U.S. 301, 306-307 (1965). Thus, as Mr. Justice Roberts stated in *Hague* v. *CIO,* 307 U.S. 496, 515 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

> purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient time, been a part of the privileges, immunities, rights, and liberties of citizens." *See also Schneider* v. *State (Town of Irvington),* 308 U.S. 147 (1939); *Jamison* v. *Texas,* 318 U.S. 412, 415-416 (1943); *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308 (1968).

As Professor Kalven has noted, Kalven, *Cox* v. *Louisiana: The Concept of the Public Forum,* 1965 Supreme Court Review 1, 12, 13:

> "There is the aura of a large democratic principle [at work in *Hague*]. When a citizen goes to the street, he is exercising an immemorial right of a free man, a kind of First-Amendment easement . . . In an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom."

This right of access to public thoroughfares in order to communicate is, of course, not limited to the publishers of newspapers and magazines of general circulation. It was fought for and won by minority groups, such as the Jehovah's Witnesses and organized labor, whose needs and finances have simply required them to get their message to the general public on occasion. In our pluralistic society, dedicated as it is to dissemination of information from diverse and antagonistic sources, this occasional use of First Amendment freedoms enjoys a claim to protection equal to that of the public press:

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation

> comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin, supra,* 303 U.S. at 452.

While the First Amendment status of handbilling and leafletting on public thoroughfares invalidates much in the way of governmental regulation, it does not prevent regulation aimed at orderly expression: "A person could not exercise this liberty by taking his stand in the middle of a crowded street contrary to traffic regulations and maintain his position to the stoppage of all traffic." *Schneider* v. *State, supra,* 308 U.S. at 160. Thus, in *Cox* v. *New Hampshire,* 312 U.S. 569 (1941), affirming 91 N. H. 137 (1940), this Court upheld the Supreme Court of New Hampshire in sustaining a conviction for parading without a permit since the licensor was limited exclusively to considerations of time, place and manner and in effect to the Newtonian principle that you cannot have two parades on the same corner at the same time: "A license to permit [a parade on a public way] may not be required as a form of censorship, but a license to permit its enjoyment in fair adjustment with the enjoyment of other relations and conditions is not understood to be under the ban of the federal constitution," 91 N. H. at 148; *cf., National Broadcasting Co., supra,* 319 U.S. at 226-227.

As Professor Kalven points out, 1965 Supreme Court Review at 23-24, *Schneider* and *Cox* v. *New Hampshire* bring into focus a classic distinction in speech theory:

> "It is the distinction between regulations like Robert's Rules of Order and regulation of content. No one has ever argued that speech should be free of the restraints of reasonable parliamentary rules, and any concessions on this front should not be taken as relevant to the questions most central to speech theory—questions of control of content. The point then is that, in any theory, speech has always been dependent on some commitment to order and etiquette . . . Listen for a moment to Alexander Meiklejohn describing a town meeting, [Meiklejohn, Political Freedom 24-28 (1960)]:
>
> > 'In the town meeting the people of a community assemble to discuss and to act upon matters of public

> interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridge. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen . . . The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed . . . The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged . . .
>
> 'These speech-abridging activities of the town meeting indicate that the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an inalienable right to speak whenever, wherever, however he chooses. They do not declare that any man may talk as he pleases, when he pleases, about what he pleases, about whom he pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right.' ''

The lessons of *Hague, Schneider* and their progeny can profitably be summarized as follows: The First Amendment embodies a "profound national commitment to the principle that *debate* on public issues should be uninhibited, robust and wide open," *New York Times* v. *Sullivan,* 376 U.S. 254, 270 (1964). (Emphasis added). We emphasize the word "debate" because the First Amendment protects effective access to the general public for the full range of potential publishers rather than for just a chosen few. We have "staked . . . our all" on the proposition that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection," *United States* v. *Associated Press, supra,* 52 F. Supp. at 372. For this reason, the First Amendment requires govermental action to facilitate speech by removing

obstacles to the circulation of ideas through public channels of communication even though such action may create substantial burdens. Use of the streets to communicate may complicate traffic control, may increase the expense of providing police protection and maintaining sanitation, and may disadvantage abutting business men who wish to be free of the message of unions, consumer groups and the civil rights movement. Within wide limits, *see Cameron* v. *Johnson,* 390 U.S. 611 (1968), these costs are acceptable for "this Court has characteized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used," *Schneider, supra,* 308 U.S. at 161. Indeed, the force of the First Amendment right of access to public facilities appropriate for communication is such that where interference with the right to circulate views is shown, it is for the Government to justify the abridgement, not for the speaker to justify his right to inform, for the prinicples underlying the First Amendment are his justification. For this reason, so far as we are aware, there has never been a First Amendment case in this Court in which a speaker seeking the right to use a particular medium has been required, as a precondition to the exercise of this basic right, to establish that alternative channels of communication are insufficient for his purposes:

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State, supra,* 308 U.S. at 163; *see also Logan Valley Plaza, supra,* 391 U.S. at 323-324.

Nevertheless, as *Schneider* and *Cox* v. *New Hampshire* demonstrate, restrictions on the circulation of views which flow from regulations designed to promote orderly access

to a public facility, and not to ban or restrict access unduly, are proper. Such regulation is not anathema; instead, it is inherent in the very concept of free public debate. In enacting and applying these rules of order, however, the Government must follow a course of neutrality. A ruling that only the American Legion, the Consumers Union, the NAACP, or the Teamsters could use the streets of a city to make their views known could not pass muster:

> "The only questions asked of the witnesses at the hearing [which resulted in a denial of permission to use a public park for a meeting] pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks. The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Wisnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.
>
> ". . . In this Court, it is argued that state and city officials should have the power to exclude religious groups, as such, from the use of the public parks. But that is not this case. For whatever force this contention could possibly have is lost in the light of the testimony of the Mayor at the trial that within his memory permits had always been issued for religious organizations and Sunday-school picnics." *Niemotko* v. *Maryland,* 340 U.S. 268, 272-273 (1951).

2. The basic approach governing access to the streets in order to communicate is applicable here and justifies government action to assure "reasonable opportunity for the discussion of conflicting views on issues of public importance" on the airwaves.

First, there can be no doubt that the airwaves are an appropriate public facility for the exercise of the right of free speech: "Basically, it is in recognition of the great contribution which radio can make in . . . the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of

the day . . . that portions of the radio spectrum are allocated to that form of radio communications known as radio broadcasting." *Report on Editorializing,* 13 FCC at 1249. Thus, the underlying rationale for the development of this resource is to facilitate the exchange of ideas and information. It is true, of course, that this development is undertaken by private licensees rather than by the Government itself, but §301 of the Act expressly declares that the airwaves remain under the ultimate ownership and control of the United States, *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940). "A broadcast license is a public trust subject to termination for breach of duty," *Office of Communications* v. *Federal Communications Commission,* 359 F.2d 964, 1003 (CA DC Cir., 1967). Moreover, as we noted at the outset, the Government's role in the development of radio and television includes an undertaking, backed by the criminal law, to prevent nonlicensees from broadcasting. Since government action thus permeates this field, there can be no doubt that the First Amendment claims of those who seek access to this medium cannot be disregarded. Radio and television stations are not the private preserve of the licensees. Just as one who is the "owner" of a public thoroughfare cannot close it to those who seek to exercise their right of free speech, *Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Logan Valley Plaza, supra,* 391 U.S. at 315-325, licensees, who do not have a property right to stand on, cannot claim a privilege broader than that of the Government, to bar reasonable access to that facility by members of the public.

Second, the Constitution certainly permits, and indeed requires, governmental action designed to facilitate access to the airwaves by members of the public. Despite the weighty claims of travelers, the First Amendment protects the right of access to the streets of those who seek to exercise their First Amendment rights, and as we have pointed out, this right of access is not limited to the public press, *see* pp. 9-10, *supra.* Moreover, the Government is barred from closing the mails to those who wish to use that medium

to transmit their ideas, *see, Hannegan* v. *Esquire,* 327 U.S. 116 (1958), *Lamont, supra,* 381 U.S. 301. Thus, the use of these facilities for communication is considered a basic right of free men, *Hague* v. *CIO, supra,* 307 U.S. at 515. Given radio's and television's vast potential for the "advancement of informed public opinion" and our devotion to the proposition that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection," *Associated Press, supra,* 52 F. Supp. at 372, the First Amendment requires that the public airwaves be open to the members of the general public. The airwaves cannot, consistent with the Constitution, be made the exclusive domain of those in the business of broadcasting.

Third, the foregoing does not mean that the Government cannot enact rules of order to govern the use of the airwaves. Such rules are consistent with the First Amendment. They are, indeed, a necessary condition for implementing the principles of free speech. Just as experience has taught that two parades on one corner may be expected to produce disorder without communication, and that a town meeting without a moderator does not advance the free flow of ideas; it has also taught that unrestricted use of the airwaves produces chaos, *National Broadcasting Co., supra,* 319 U.S. at 212-213. Thus restrictions on access are warranted, even though "freedom of utterance is thereby abridged to many who wish to use the limited facilities of radio" *Id* at 226-227. But where the subject is an "issue of public importance" the very concept of rules of order requires neutral rules that do not favor one side or the other. The precepts of the First Amendment imply that as to debatable topics there shall be debate. Naturally, in pursuing this goal, the Government cannot constitutionally require that "*each* speaker must be fair to both sides," Kalven, *Broadcasting and the First Amendment,* 10 Journal of Law & Economics 15, 47 (1967) (emphasis in original); but as moderator it has an affirmative obligation to assure that both sides are heard. That, as we understand it, is what

Congress sought in §315; and for the reasons set out thus far, we submit that this provision therefore promotes the basic aims of the First Amendment.

3. The counterarguments of the Respondents as developed in the court below suffer from a basic error of omission. Throughout their briefs to the Seventh Circuit, there is not a single mention of the First Amendment rights of non-licensees who are denied access to radio and television by the combined force of the Government and its licensees. The instant case is argued as if it were a contest between the Government, acting to suppress criticism, and the licensees, acting to preserve a free press. As we have attempted to demonstrate, this view of the matter distorts reality. The question truly at issue here is whether the Government can act to effectuate the right of the general public to speak, as well as to hear, without offending the First Amendment. As we have stressed, the answer to this question is that the Government has a constitutional obligation to effectuate this right by enacting rules designed to assure that licensees will air "conflicting views on issues of public importance." Members of the general public are not limited to the right to hear the uncensored views of broadcasters, a right protected by both the Constitution and §326 of the Act. They also have a right to speak on the public airwaves, and this right too is protected by the Constitution and under the Act by §315.

In cases such as *Speiser* v. *Randall,* 357 U.S. 513 (1958); *Smith* v. *California,* 361 U.S. 147 (1959); *New York Times, supra,* 376 U.S. 254 and *Lamont, supra,* 381 U.S. 301, upon which Respondents rely, this Court has been quick to protect First Amendment values by striking down laws which placed burdens or inhibitions on free speech. The rationale of this line of authority is not applicable here. For in each of these precedents the Court was required to make a judgment for or against speech. The question *Speiser, Smith* and *New York Times* presented was whether free speech was to be sacrificed to serve some other social interest. The decision arrived at demonstrates the continuing

force of Mr. Justice Roberts' statement in *Schneider, supra,* 308 U.S. at 161: "this Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used." It is for this reason that this Court has refused to countenance even relatively minor inhibitions on the right to speak.

But the basic insight of *Schneider* cannot be made the key to the problem presented here for whether the instant decision goes for the Petitioners or the Respondents a free speech interest will be served. If the decision is for government regulation which secures access to the airwaves for the public the interest served will be that of the multitude of citizens who are not licensees; if it goes for the Respondents the interests served will be that of the few who are licensees. By the same token, no matter which way this Court turns, the right of free speech of one group or the other will be burdened. If the Court should hold that there is not a right of access to radio and television for members of the public the burden imposed will be complete suppression of their right to reach the radio and television audience. And this suppression cannot be justified on the ground that there are other media available: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schneider, supra,* 308 U.S. at 163.

On the other hand, if the Court should hold that the public does have a right of access to radio and television the free speech right of broadcasters will be burdened in that their speech on public issues will be "conditioned . . . upon [their] sending tapes or transcripts to persons affected, making available free broadcast time for reply, facilitating the presentation of opposing views which may be abhorrent to [them], disrupting [their] program schedule, or any combination of these." (RTNDA Brief to the Seventh Circuit 26). These burdens are *de minimus.* Certainly they are as nothing when compared to the burdens Respondents seek to have imposed on non-licensees, the burdens imposed

by the facts of physics ,or the burdens sustained by this Court in *National Broadcasting Co.* Indeed, a holding that a broadcaster must open a public channel of communication to its owners free of charge does not impose a constitutionally cognizable burden upon him: "Freedom of speech . . . [is] available to all, not merely to those who can pay their own way," *Murdock* v. *Pennsylvania,* 319 U.S. 105, 111 (1943). Nor is it accurate to say that the facilitation of the presentation of opposing views which are abhorrent to him injures a broadcaster in any constitutional sense: "The freedom of speech protected against governmental abridgement by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement." *Report on Editorializing,* 13 FCC at 1256, *see also, Niemtko, supra,* 340 U.S. at 227-228. Moreover, any disruption of program schedules which may result, while perhaps a financial and practical burden, does not approximate the burdens which would be imposed on the free speech rights of others by holding for Respondents. For we think it plain that there are limits to the self-censorship which broadcasters may practice to avoid this burden. The Government cannot require licensees to take any particular position on controversial "issues of public importance," but it can require that such issues be raised and explored on the airwaves. Government action to facilitate and encourage discussion is not contrary to the precept of the First Amendment; such action does not impose an unconstitutional condition on the right of licensees:

> "The Commission does therefore coerce their [the licensees] choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects . . ." *National Broadcasting*

Co. v. *United States,* 47 F. Supp. 940, 946 (US DC SD NY, 1942) (L. Hand, J.).

It is precisely because there is a free speech interest on both sides that the approach of *Cox* v. *New Hampshire* should govern the disposition of this controversy. For *Cox* illustrates the proper approach to regulation in the interest of orderly and variegated speech. Such regulation which furthers the interest in "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press, supra,* 326 U.S. at 20, is lawful even though the burdens imposed on those who would monopolize public discourse are considerable. For the overriding free speech interest is not that of the putative monopolist; it is the interest of those who, absent the regulation, would be denied any opportunity to speak. Just as the two *Associated Press* cases (*Associated Press, supra,* 326 U.S. 1; *Associated Press* v. *National Labor Relations Board,* 301 U.S. 103, 132 (1939)) rest on the recognition that there is a certain price the press must pay as a participant in our social system, *Cox* v. *New Hampshire* rests on the recognition that there is a price that speakers must pay as participants in a dialogue. The First Amendment protects advocacy channeled through the judicial process, *NAACP* v. *Button,* 371 U.S. 415 (1963); and there can be no doubt that this right would be utilized more freely if judgment went for the Plaintiff as soon as he stated his claim without affording the Defendant an opportunity to answer. But such a proceeding would make a mockery of the legal system and no one suggests that the cost incident to a balanced presentation of views tends to inhibit potential plaintiffs and imposes a price too high to pay. But the same token, the mere fact that access to the airwaves may prove a burden to broadcasters is insufficient to demonstrate a need for one-sided debate on public issues on the airwaves.

4. There can be no escape from the proposition that the Government has the power and the duty to set up rules of order designed to assure that members of the public will have a "reasonable opportunity for the discussion of con-

flicting views on issues of public importance'' on the airwaves. In pursuing this goal the core value at stake is access of the public to the airwaves in order to enrich and diversify the discussion of issues of public importance. As the Respondent, CBS, pointed out below there is a question as to whether the Personal Attack Rules in their present form are adequately confined to furthering that goal. Not every personal attack raises a point of personal privilege. And to the extent that *New York Times* is relevant here at all it does point toward the conclusion that protection of one's interest in an unblemished reputation is not the prime concern of the First Amendment. Thus, in dividing the limited air time open to the public it might be best to focus on personal attacks that go to the substance of debatable issues rather than personal attacks per se.

Moreover, as the Government points out, effective enforcement of any obligation imposed on licensees in this area may well depend on the availability of sanctions less harsh, and thus more credible, than loss of license, and the Commission may impose such sanctions only where there is willful disregard of its rules. This indicates that an effective right of access for the public cannot be assured unless specific rules, along the lines of the personal attack rules, are set down to cover the field. If, as the Government contends, the rules in question here were necessitated by widespread disregard of this aspect of the overall obligation to afford access to the public on issues of public importance, there is no reason to believe that other and more critical aspects of the obligation were, or will be, followed as long as the present regime is followed.

Finally, as we have pointed out, the entire question of what the Constitution requires of broadcasters is in its infancy. There will be many difficult practical problems to be resolved in developing a meaningful right of access to the airwaves just as there were, and continue to be, many difficult practical problems in adjusting the competing rights of those who would use the streets for communication. Thus far a meaningful attempt to grapple with these issues has

been thwarted by the fact that the Respondents here take the position that the Constitution bars any governmental activity which burdens their right of free speech, even though that activity is on behalf of the free speech interests of the public; while, at times, the Government has appeared to take the equally unsound view that the normal inhibitions of the First Amendment do not bind it in regulating radio and television, *see,* Kalven, *supra,* 10 Journal of Law & Economics 15.

The foregoing suggests, as the Government admits, that the Commission has not yet perfected the rules necessary to implement the public's right of access to the airwaves, and that the necessary improvements will come only after this Court has set down the basic standard which will guide the course of future developments. It also suggests, as the Office of Communication of the United Church of Christ notes, that thus far the Commission has erred on the side of leniency in designing the sanctions which support such a right and make it meaningful; in other words that the Commission far from overreacting to this problem has been overly cautious. Nevertheless, the Commission's Rules can and should be affirmed. As the *Red Lion* case demonstrates the Rules in question contain a basic core of validity that cannot be impeached. Moreover, none of the parties before the Court are challenging the Commission's failure to go far enough fast enough. It is, of course, true that these rules govern speech and that in this area "precision of regulation must be the touchstone," *NAACP* v. *Button, supra,* 371 U. S. at 438, and that even legitimate ends must be "narrowly achieved," *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). But the question of whether these Rules meet those tests can wait for a concrete case. In the interim, the Respondents are simply required to write a letter to the Commission when faced with a questionable situation or to provide minimal amounts of airtime to members of the public. Sanctions for alleged violations of the Commissions Rules are dependent on a showing of willfullness and this requirement of scienter saves the regulations from

Respondent's claim of vagueness, *Screws* v. *United States,* 325 U. S. 91, 102 (1945). Indeed, since the Respondent's fears as to the scope of these Rules may well prove groundless, there is a substantial question as to whether their claims based on vagueness are ripe for adjudication, *cf., Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 106-110 (1961). It is instructive to compare the broadcasters situation to that of the petitioners in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). In *Abbott Laboratories,* a 5-3 decision, the majority found that the case was ripe since the regulations were "clear cut," compliance with the order was costly, and failure to comply risked "serious criminal and civil penalties." On the other hand, the main counterpoint was the government's post-litigation representation that only an injunctive remedy would be sought, *Id.* at 151-154. In this setting, the Court felt that it would not be "entangling [itself] in abstract disagreements about administrative policies," by taking jurisdiction *Id.* at 148. Here on the other hand the very point being made by Respondents is that the Rules are not clear cut, compliance with the Rules is not costly, failure to comply does not create the risk of serious penalties, and the Act, not an informal representation is Respondents guarantee. Moreover the Commission has from the first indicated a wililngness to modify the Rules to meet principled objections. In the setting of the instant case reaching the vagueness point would, therefore, lead to the Court entangling itself in an abstract disagreement.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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