

Apart from this, however, there is nothing in the first amendment which says that it is proper to abridge freedom of speech because of scarcity, whether it be a scarcity of public halls, of soapboxes, or churches, or printing presses, or newsprint. As a matter of fact, we are warned by conservationists that the supply of timber is being rapidly exhausted and we may have an acute shortage of newsprint in the not-too-distant future. Will this justify a Fairness Doctrine for newspapers?

Finally, it is argued that the people own the airwaves and broadcasters operate in the public domain. Therefore, since private persons can be prohibited from using the spectrum, their privilege to use it can be conditioned in any way that the Congress or the FCC, in their own discretion, deem desirable.

It is axiomatic that the power of government to grant or withhold a privilege does not carry with it power to bargain with a citizen for the surrender of his constitutional rights.

It is clear that, even though it be said that Congress merely extends a privilege which it is free to withhold—access to a microphone in the public domain—it nevertheless may not exact for that privilege the surrender of the right of freedom of speech. Assuming that the Constitution no more guarantees the private use of a microphone than it guarantees the private use of Government buildings, once that use is permitted, the constitutional rights attach to and govern it.

Indeed, if anything, the assumption that the Government has absolute discretion to refuse the private use of a means of communication makes it more than ever necessary that the constitutional rights be given the broadest reach.

In sum, the facts are: that none of the judicially acceptable limits on freedom of speech apply to broadcasting per se; that broadcasting is an important part of the press, that the available channels for broadcasting are not only abundant but far more numerous than those of the daily newspaper and no constitutional distinction can legitimately be drawn between the two, and that the Government may not compel a broadcaster to surrender his constitutional rights in exchange for the privilege of using the spectrum.

The doctrine, conceived originally as a policy of a very general nature designed to bring out a balanced presentation on matters or public controversy, has been repeatedly extended and broadened. These raise additional serious questions. It now contains specific rules relating to personal attacks and political editorializing, and has even been applied to product advertising.

Under this extension of the doctrine, the Commission actually compels licensees to broadcast particular programs or to offer time to particular spokesman. Failure to comply subjects licensees to fine, forfeiture, or immediate revocation-of-license proceedings. This is in contrast to the general requirement of fairness in other areas which are reviewable, along with other items of station operation, at renewal time.

In many ways, the burdens imposed upon the broadcasters by the personal attack rules are, if anything, more severe than the burdens of damages for defamation that have been held unconstitutional as applied to even false, nonmalicious statements in printed media.