MONOPOLY NEWSPAPERS: TROUBLES IN PARADISE

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion.

John Stuart Mill, *On Liberty*

INTRODUCTION

A basis of the Supreme Court's decision in the 1969 case of *Citizen Publishing Company v. United States*[1] is the principle that competition in the newspaper industry, as in any industry, provides the consumer with a better product. In the newspaper industry, that product, ultimately, is an informative publication. Implicit in *Citizen* is the companion principle that competition within an industry will prevent an individual or corporation from becoming dominant and from controlling the industry: Control of an industry carries with it the power to foreclose the introduction of new ideas into that industry and can result in the consumer receiving a "poorer" product.

Competition does not in fact exist in the newspaper industry. Only 135 of the nation's 1,752 newspapers can be said to be in a competitive statues.[2] Hence there now exists a real possibility that a few powerful interests can control the newspaper industry and thereby, if they choose, control the free interchange of ideas that is fundamental to our system of government. To allow such control contravenes the philosophy on which the first amendment guarantee of a free press is based and could result in a calculated suppression of ideas. At least one monopolistic newspaper chain has already begun announced suppression of certain news items.[3]

There are three possible methods of alleviating the problem and insuring that a free flow of ideas will once again be achieved in the newspaper industry. The obvious method is to restore competition in the industry. Proponents of this method suggest that when the competitive process is restored, the consumer will

1. 394 U.S. 131 (1969).
2. See note 12, *infra*.
3. See text at note 64, *infra*.

receive the best newspaper. But given the current economic state of the newspaper industry, the restoration of competition would entail a difficult, if not impossible, long range project. For the present, the power to suppress ideas would reign unchecked. Another method is to do nothing and hope that the newspaper industry will not exercise its power of suppression. This approach subjects a fundamental constitutional right of all citizens to the caprice of a few powerful interests. A third approach to the problem is to find a substitute for the checks that the competitive economic system once provided. The latter is the most revolutionary because it upsets almost 200 years of government abstention from the regulation of the press.

This note does not attempt to resolve the myriad constitutional, economic and social issues involved in the task of insuring a free press. It will, however, illuminate the main constitutional and economic problems involved in this process and demonstrate that the government has the power to formulate a substitute for the checks that were once provided by the competitive economic system. If the citizen's right to a free press is to be more than just an historical oddity, the government must begin regulation of the newspaper industry to insure that no powerful interests have the power to suppress the free interchange of ideas.

I. THE ECONOMIC MARKETPLACE

A meaningful discussion of the position of newspapers in our democratic society requires a basic understanding of the economic posture of the newspaper industry. In this section of the note, the demise of competition among newspapers and the methods used to maintain a monopoly once it is established will be analyzed. Only daily newspapers will be considered in this analysis.[4]

The newspaper industry is a thriving, vigorous industry. The President of the American Newspaper Publishers Association recently remarked that "the economic well-being of our newspaper business has never been better."[5] Examination of a few

4. The weekly newspaper is usually limited in scope, with a minimum of news. Although the weekly has its place within the newspaper industry, it is not a primary source of ideas and information and for this reason is not considered in this analysis.

5. *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 2, at 936 (1967). [hereinafter cited as *Hearings on S. 1312*] (Testimony of Harry Keller, professor, New York Institute of Technology).

of the newspaper industry's vital statistics will substantiate his statement. Between 1965 and 1966, daily newspaper circulation increased nine percent. The size of the average edition grew by six percent and employment increased two percent.[6] As an indication of the industry's confidence in itself, expenditures rose six percent; this figure includes the addition of 71 new computers.[7] Profits showed a high percent of return on investment and can be expected to hold that position in the future.[8] The American Newspaper Publishers Association conducted an economic study of newspapers in 1965 and predicted that by 1980, newspaper circulation would increase by 30 percent.[9]

Advertising is the lifeblood of newspapers and from an economic standpoint it is the best means of comparing the industry's strength with that of the other communications media. Advertisers pay the bulk of a newspaper's expenses and by so doing insure its success or failure. In 1966, advertising revenue totaled almost $4.9 billion. Classified advertising alone exceeds the total income of all national magazines, is more than radio's total income, and is more than the revenue received from television advertisements.[10]

Not all newspapers, however, are sharing the prosperity of their brother tabloids. In fact, many cities have found that where two or three newspapers once thrived, only one now remains. Of the 1,752 daily newspapers in the United States,[11] only 135 are in a city where there is another separately owned daily newspaper,[12] and 44 of these are involved in joint working agreements.[13] This

6. 6 *Hearings on S. 1312* at 2553.

7. *Id.*

8. In 1966, the New York Times had a net profit after taxes of $9,355,469, an increase of 416.6% over 1962. The Times-Mirror Company, which publishes the Los Angeles Times, had a net profit of $18,455,550, an increase of 196.5% over 1962. The average medium city newspaper (50,700 circulation) had a net profit of $598,600 in 1966, compared with $218,000 in 1958. *See* 1 *Hearings on S. 1312* at 170-71.

9. 7 *Hearings on S. 1312* at 3081, 3107.

10. *See* 1 *Hearings on S. 1312* at 205.

11. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 504 (90th ed. 1969). [hereinafter cited as STATISTICAL ABSTRACT].

12. *See* 1 *Hearings on S. 1312* at 63-65.

13. A joint operating arrangement is formed when two competing newspapers place their production equipment into joint ownership. A third corporation is formed in which the two newspapers have equal stock interest. The third corporation manages the jointly owned property and operates joint production, advertising, circulation and business departments. The third corporation receives all revenues and pays all of its own production and operating costs. Revenue in excess of these costs is distributed to the two newspapers

is compared to the 1,875 newspapers that existed in 1940.[14] The reasons for the decline in the number of daily newspapers are both social and economic. The demise of the downtown newspapers parallels the demise of the city center itself. There has been a large scale exodus to the suburbs since the end of World War II. Additionally, retail businesses have moved to the suburbs and the suburban shopping center has replaced the city downtown area as the center of consumer activity.[15] With the move to the suburbs, businesses have found it more effective to advertise in the small suburban newspapers than in the larger downtown newspapers.

The effect of the suburban newspaper upon the downtown newspaper is best evidenced by a comparison of circulation growths from 1945 to 1962. In the 10 largest metropolitan areas,[16] circulation of downtown newspapers has increased only two percent, while circulation of suburban newspapers has increased 81 percent.[17] This competition from the suburban newspaper is for the advertising dollar only. Instead of producing several editions with detailed coverage of international and national news and a large number of features and editorials, generally the suburban newspaper produces only one edition and concentrates on local news and advertising. Thus, the suburban newspaper neither competes for ideas and information nor does it adequately replace the downtown newspapers which have failed.

Much of the responsibility for the economic failure of the daily newspaper has been placed upon the radio-television industry and organized labor. An analysis of these two factors will show

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and each newspaper pays its own news and editorial operations. In effect, the commercial operations of the two newspapers are merged while the news and editorial departments remain separate. *See* 1 *Hearings on S. 1312* at 6-7.

14. STATISTICAL ABSTRACT at 504 (1969). *See also*, 1 *Hearings on S. 1312* at 43.

15. *See* J. BOLLENS & H. SCHMANDT, THE METROPOLIS: ITS PEOPLE, POLITICS, AND ECONOMIC LIFE 130-35 (1965).

16. 1. New York, New York
2. Chicago, Ill.
3. Los Angeles—Long Beach, Calif.
4. Philadelphia, Pa.—N.J.
5. Detroit, Mich.
6. San Francisco—Oakland, Calif.
7. Boston, Mass.
8. Pittsburgh, Pa.
9. St. Louis, Mo.—Ill.
10. Washington, D.C.—Md.—Va.

STATISTICAL ABSTRACT at 14-15 (1964).

17. 6 *Hearings on S. 1312* at 2591.

that this is not the case. Newspapers compete in two areas: circulation and advertising. On the other hand, competition between newspapers and radio-television is limited to advertising dollars. While radio-television has acquired many former newspaper advertisers, newspapers still maintain a strong economic posture which is evidenced by the fact that newspaper advertising revenue exceeds that of radio and television.[18] Competition between newspapers and radio-television for the reader-viewer is very limited because newspapers cannot compete with television as an entertainment media, and television cannot compete with newspapers as an in depth communicator of information and opinion. The television and radio news programs are able to cover only the most important news stories, and then only in a comparatively cursory manner.[19]

If the broadcast media is the first whipping-boy of the newspapers, the other most widely publicized whipping-boy is the labor unions. They are accused of featherbedding, syphoning-off profits through higher wage demands and strikes, and retarding automation of the industry.[20] An obvious rebuttal to these allegations is that suburban newspapers which are subject to the same union demands and practices are not closing down. There are instances where unions have precluded publishers from using new automated equipment.[21] These, however, are exceptional cases; generally, the unions have not only shown an acceptance of automation, but have taken an active role in bringing it about.[22]

The primary economic reason for the failure of newspapers is the spiraling effect of circulation and advertising. If an advertiser has a choice of two or more newspapers in which to advertise, he will choose the one that has the largest circulation.[23] Thus circulation has a direct effect upon advertising revenue.

18. *See* text accompanying note 10, *supra.*

19. 1 *Hearings on 1312* at 388-89 (Testimony of William L. Rivers, associate professor of communications, Stanford University). There are no studies which indicate the extent to which radio and television have replaced newspapers as a dissiminator of information. However, the authors believe that such a study would reveal that only a small percentage of readers have substituted radio or television as their prime source of information.

20. *See Id.* at 389.

21. Interview with Mark Ethridge, Chairman of the Board, Louisville Courier-Journal, Louisville, Ky., in San Diego, California, Oct. 18, 1969.

22. *See* 1 *Hearings on S. 1312* at 389. (Testimony of William L. Rivers, *supra* note 19).

23. This presumes that the relative cost of an advertisement in the newspapers is approximately the same.

Advertising affects circulation both directly and indirectly. Circulation is directly affected because the average reader bases his choice of newspapers to some extent on the advertisements carried in the newspaper. It is affected indirectly because a decrease in advertising revenue will result in a decrease in reader services as an economizing measure. This in turn results in a loss of readers; consequently, fewer advertisers will advertise in the paper. Thus, the downward spiral of the newspaper begins and rapidly accelerates with little chance of halting. The spiraling effect, once started, is nearly always fatal.[24]

Once a newspaper fails, the remaining newspaper usually acquires the majority of the later newspaper's circulation and advertising and consequently becomes healthier and stronger. In fact, the remaining newspaper is usually so strong that it precludes other newspapers from entering the market and thus another natural monopoly newspaper emerges.

A monopoly newspaper is particularly desirable because it is considerably more valuable than a newspaper which is competing for advertising and circulation. A competing newspaper is worth approximately $30 to $35 per unit of circulation while a monopoly newspaper is worth approximately $80 to $100 per unit.[25] Assume newspapers A and B both have a circulation of 10,000 readers. Thus, each newspaper is worth $350,000 on the open market or a total maximum worth of $700,000. One of the papers fails and as a consequence the remaining newspaper increases its circulation to 15,000 and becomes a natural monopoly. Since the average monopoly newspaper is worth $80 to $100 per unit, this monopoly newspaper is now worth $1.5 million.

Many cities with two newspapers, a morning and an evening, are monopoly newspaper towns. The newspapers may be working together under a joint working agreement, or they may be owned by the same publisher. For example, in San Diego, the Copley chain owns the Union and the Evening Tribune. By owning both a morning and evening paper, the publisher can adjust his advertising rates so as to effectively preclude outside competition. The advertising rate for the Union is $12.30 per column inch; for

24. 2 *Hearings on S. 1312* at 545 (Testimony of Charles Thieriot, editor and publisher of the San Francisco Chronicle).

25. 2 *Hearings on S. 1312* at 968 (Testimony of J.R. Malone, economist, Newspaper Economics and Technology, Chicago, Ill.).

only $3.78 more the same advertisement can be placed in the Evening Tribune.[26] If both papers are relatively equal in circulation, an advertiser is able to secure a 100 percent increase in circulation of his advertisement for only a 31 percent increase in cost. A new newspaper would not be able to compete for very long at this rate, nor would an established third newspaper. The United States Supreme Court has held that combination advertising is not a violation of the antitrust laws.[27]

Another deterrent to competition is the monopolization of syndicated features. One of the main attractions of a newspaper is its features such as question and answer columns, political columns, comic strips and the like. A large newspaper, such as the Los Angeles Times, purchases the features which are most popular with its readers and in so doing requires the syndicates to grant them exclusive use of the feature within their area of distribution. In the case of the Los Angeles Times, this precludes over twenty-five other newspapers from using that feature.[28] Without these features, a newspaper cannot adequately serve its readers and is less likely to survive as an effective voice in the community.[29]

The cost of starting a newspaper or purchasing one has also become prohibitive. In Athens, Georgia, a daily newspaper with a circulation of only 7,000 sold for $1,700,000. Ten years ago it would have sold for $30,000.[30] Mr. John Hay Whitney summed up the business climate of newspapers today, when he said:

> We are, I think, at a point where to venture into a competitive market requires a great deal of money or a great variety of resources. And the profit still lies in monopoly situations where, too often, there is more income than excellence.[31]

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26. Prices quoted to authors by Retail Advertising Dep't, San Diego Union-Evening Tribune on Feb. 13, 1970.

27. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

28. *See* 7 *Hearings on S. 1312* at 3067.

29. For an insight into the extent to which the Los Angeles Times precludes other dailies from using the same syndicated features as the Times, *see* 1 *Hearings on S. 1312* at 460-508. Contained therein are copies of correspondence between the editor of the Riverside (Calif.) Press Enterprise and various feature syndicates and also the Department of Justice. The Press Enterprise serves the city and county of Riverside which is located 60 miles southeast of Los Angeles. The paid circulation of the Press Enterprise was 75,238 in 1967.

30. F. GILBRETH, *"Who Says Newspapers are Going Broke?,"* SATURDAY REVIEW at 74 (Dec. 11, 1965).

31. 1 *Hearings on S. 1312* at 28 (Testimony of Eugene Cervi, editor and publisher of Cervi's Rocky Mountain Journal).

The newspaper industry has reached the point where it is almost economically impossible to maintain a competing newspaper, nearly financially impossible to purchase a prosperous one, and, from a practical standpoint, generally impossible to establish a newspaper in a city where one is already in existence. In effect, the newspaper industry is closed to any prospective new entrants.

With this in mind, where is the newspaper industry headed? The biggest influence upon the newspaper industry in the next 20 years will probably be exerted by newspaper chains. Predictions have been made that all daily newspapers in the United States will be chain owned by 1990.[32] Between 1960 and 1967, the number of dailies owned by chains increased by 311 for a total of 871—which is 49.3 percent of the total number of dailies in the United States.[33] From 1962 to 1967, the number of chains owning 10 or more newspapers increased by five.[34] Chains own 19 of the 25 largest dailies in the United States and control 61.8 percent of the circulation.[35] In California, 70 percent of the daily newspapers are chain owned.[36]

Chain ownership of newspapers is socially undesirable for two reasons. First, the ownership of the paper is removed from the local area which it serves. Although the editors are in most cases local people, the owner, of course, has ultimate control. Second, newspaper chains have tremendous financial resources in comparison to the local publishing company. If needed, the chains have both the financial and management resources which can be used to sustain one of their newspapers which is in need of help.[37] The chain can manipulate the financial posture of its member newspapers and either exert so much pressure on the local maket so as to cause the competing newspaper to fail, or by various means it can syphon-off profits so as to create the surface impression that a particular newspaper is failing. Either one of these methods would result in the chain being able to enter a joint working agreement with the competing newspaper in the city. If the trend toward monopolies is combined with the increase in

32. *Id.* at 281 (Testimony of Bryce W. Rucker, professor of journalism, Southern Illinois Univesity).

33. *Id.* at 282. See also, chart at 290.

34. *Id.*

35. *Id.*

36. *Id.*

37. 2 *Hearings on S. 1312* at 745.

chain owned newspapers, the possibility that the whole newspaper industry may be composed solely of chains A, B, and C does not seem very remote.

The efficient use of new technological advances has been proposed as the savior of the newspapers as a competitive industry.[38] One press critic stated that ". . . Gutenberg would feel at home in the composing rooms of a modern newspaper."[39] While, of course, this is not a completely accurate picture, it does indicate the need for implimentation of technological advances, especially in large newspapers. Technological advances reduce labor costs, increase the rate at which newspapers are printed, and result in a lower initial cost of equipment. This enables the new publisher to go into operation with a lower capital expenditure and to have a reduced overhead while operating. With the use of offset printing and cold type, a small newspaper can be established for $150,000, which is within the range of businessmen in many cities and towns.[40] The fallacy in depending upon reduced entry costs to increase competition is that the fledgling newspaper must still compete against an established newspaper, possibly chain owned. The task will still be impossible for most aspiring publishers.

The newspaper industry is now faced with the inevitable conclusion that no longer is it an industry of competing newspapers but rather one of monopoly newspapers each guarding its own area of distribution much like the lioness feasting on its prey. Because of the spiraling effect of advertising and circulation, monopolization of features, chain ownership, and combination advertising rates, competition among newspapers is at an end. The search must now begin for a substitute for compeition so that newspapers once again can assume their vital function within our society.

II. THE CONSTITUTIONAL ISSUES

A. Historical Antecedents of a Free Press

Although the question of a free press and the methods to safeguard it were discussed in the Constitutional Convention, the views of Alexander Hamilton prevailed and the guarantee was not

38. 6 *Hearings on S. 1312* at 2555 (Testimony of John Biddle, president, National Newspaper Association).

39. 1 *Hearings on S. 1312* at 313 (Testimony of Ben H. Bagdikian, press critic).

40. *Id.* at 401 (Testimony of William L. Rivers, *supra* note 19).

included in the Constitution. Hamilton wrote: "Why, for instance, should it be said that liberty of the press should not be restrained, when no power is given by which restriction can be imposed?"[41] By 1789, when the Bill of Rights was submitted, the views of James Madison were accepted and the guarantee of a free press was included in the first amendment. Madison was of the view that in England there was no need for freedom of the press because the Crown and parliament were omnipotent and there was no need to criticize or discuss their decisions. But in America the people were omnipotent. Hence, for the people to exercise their power as final arbitrators, they had to be able to freely discuss their government and any changes they wished to make in it. Madison believed that the right was so important that it must be included in the Bill of Rights.[42]

B. Development of the Free Marketplace Rationale of the First Amendment

Because the literal words of the first amendment do not encompass the newer forms of communication, the amendment is interpreted as protecting ideas and their communication rather than just press and speech.[43] In effect, the freedoms of press and speech are merged into the general concept of freedom of ideas. Because of this merger, questions concerning freedom of the press were dealt with in the general context of freedom of ideas. With the possible exception of libel and slander, there are few cases dealing directly with freedom of the press.

In searching for a rationale on which the first amendment could be enlarged, the Court turned to the Framers' philosophy. The first judicial articulation of the theory behind freedom of the press was made by Mr. Justice Holmes.[44] A typical statement of the theory is found in *Abrams v. United States*:[45]

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—*that the*

41. THE FEDERALIST No. 84 (A. Hamilton).

42. C. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION, 361-62, § 127 (1922).

43. *E.g.* Mutual Film Corp. v. Ohio Industrial Comm'n, 236 U.S. 230 (1915).

44. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967) [hereinafter cited as Barron].

45. 250 U.S. 616, 630 (1919) (concurring opinion) (emphasis added).

> *best test of truth is the power of thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our constitution. It is an experiment as all life is an experiment.

Holmes' free marketplace of ideas theory was adopted by the Court and remains the basis on which many first amendment questions are decided.[46]

C. *The Failure to Deal With the Two Marketplaces*

Several years ago, Professor Barron characterized the free marketplace rationale of the first amendment as "romantic" and called for its burial.[47] Continuing developments in the newspaper industry indicate that instead of a burial, what is needed is a realization that there are *two* marketplaces involved in the communication of ideas by a newspaper.

The first market through which ideas must pass is the economic market. This market, as the name implies, is shaped and controlled by the laws of economics. One may enter this market in two ways. He may begin his own newspaper—which is direct entry—and, as indicated in Part I, is difficult if not impossible. The second method of penetrating the economic market is the indirect method. Here, one must find a middle man who is already admitted to the market. The middle man agrees to handle the proffered idea and, in turn, recommunicates it to his readers. Letters to the editor columns are illustrative of this approach.

The second market through which ideas must pass is the marketplace of ideas. According to Holmes, this marketplace is to remain totally free from external controls. If there are no external controls, each individual will "purchase" only those ideas which he desires. Ideas which do not "sell" or become accepted will be withdrawn from the market to make room for new ideas.

The Supreme Court first adopted the position that the first amendment does not protect the economic market in *Associated Press v. United States*.[48] That case involved an antitrust suit

46. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927); Thornhill v. Alabama, 310 U.S. 88 (1940); Wieman v. Updegraff, 344 U.S. 183 (1952) (Black, J. concurring).

47. Barron at 1641, 1647.

48. 326 U.S. 1 (1945).

against AP. The government alleged that AP's bylaws, which restricted membership in the organization, were a *per se* violation of the antitrust laws. AP raised the defense that the first amendment prevented the government from interfering with the press and that the imposition of antitrust laws was constitutionally proscribed. The Court held that the bylaws were a *per se* violation of the antitrust laws and, in reference to the first amendment question, stated:

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . 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. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.[49]

In early 1967, the Justice Department brought suit against the Tucson, Arizona, Citizen Publishing Company.[50] The Department alleged that a "joint working agreement" involving the city's two daily newspapers was a *per se* violation of the antitrust laws. The district court ordered Citizen to end the agreement and, in effect, begin competition with the other paper.[51] Citizen's defense was based on interpretaton of the antitrust laws, and, of course, the first amendment. Citizen alleged, as had AP, that the government was precluded from applying antitrust laws to it by virtue of the first amendment. Although much had transpired in the newspaper industry in the 25 years since *AP*, the *Citizen* Court merely quoted *AP*'s language on this point.[52] Again, the Court clearly demonstrated that the first amendment did not operate to provide a shield for the newspaper industry.

As *AP* and *Citizen* indicate, the Court has not felt constrained to apply existing laws to insure that the economic

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49. *Id.* at 19-20.

50. 280 F. Supp. 978 (D. Ariz. 1968).

51. *Id.* The final order of the district court requiring Citizen to sell its interest in the other paper and to end the joint working agreement was entered on Jan. 24, 1970. Los Angeles Times, Jan. 25, 1970, part 1 at 10, col. 2 (home ed.).

52. 394 U.S. at 139-40.

market remains free from unnatural monopolies. But a different result is reached when the Court begins to deal with monopolies in the idea market. An example is provided by the *AP* case. Although the Court spoke of a "grave concern" for freedom of the press and stated that "information from diverse and antagonistic sources is essential to the welfare of the public," it appended the following footnote:[53]

> The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published. *It only provides that after their "reason" has permitted publication of news*, they shall not, for their own financial advantage, unlawfully combine to limit its publication.

AP and *Citizen* represent the Court's current view of the first amendment right to a free press. *AP* recognizes the government's power to regulate, via the antitrust laws, the economic market of the newspaper industry. But *AP* also vests in the newspaper industry the absolute power to "permit publication" and thereby control the idea market. Because an idea must pass both markets before it can be communicated, the application of the antitrust laws to the newspaper industry is meaningless, in terms of free exchange of ideas, as long as the industry controls the idea market.

In summary, the Framers adopted the philosophy that the people must be exposed to all manner of ideas if they were to exercise their power to control their government. The Framers attempted to insure this right by providing that there should be no restrictions on the two known methods of idea communication. It was the function of the nation's newspapers to provide the information and interchange of ideas necessary to exercise this power of control. In writing the first amendment, the Framers provided safeguards against government control of the free interchange of ideas but did not provide safeguards against private control of idea communication. The economic system, through the process of competition, had previously provided the safeguards to insure that no interest could become powerful enough to control the industry and thereby the free interchange of ideas. But this process of competition has failed and no substitute has been provided. The result is that the people, through their government,

53. 326 U.S. at 20 n.18 (emphasis added).

can control only the economic market of the newspaper industry while the industry can control the important idea market. The free marketplace of ideas—which Holmes saw as one of the most important elements in maintaining a government of the people—is not dead, but it is subject to the absolute control of a few powerful people. The time has come to end this control and return the marketplace of ideas to a truly free status.

IV. Old Approaches to a New Problem

The rise of monopolies and failing newspapers have not escaped notice by Congress and the Justice Department. Both branches of government have suggested methods of "solving" the industry's problems. What is common to both approaches is the apparent lack of understanding of the industry's real problems and its unique position under our Constitution. It is clear that much education will be necessary before any meaningful progress can be made in solving the composite constitutional, economic and social problems which the newspaper industry faces.

A. The Justice Department Approach: A Hollow Victory in Citizen

The current official position of the Justice Department is to prosecute those newspapers or combinations of newspapers that violate the antitrust laws.[59] The Department is of the belief that such prosecutions will result in greater protection of the first amendment right to a free press.[55] Of several reasons why the approach does not support the Department's opinion, the most persuasive is that only 44 of the nation's 1,752 newspapers appear amenable to antitrust prosecutions.[56]

The Department's position is also based on what appears to be a misunderstanding of the newspaper industry's economic state. The Department believes:

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54. Letter from Walker B. Comegys, Acting Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice to *San Diego Law Review*, Nov. 26, 1969, on file at the *San Diego Law Review*.

55. *See Hearings on H.R. 279 Before the Subcomm. on Antitrust and Monopoly of the House Judicial Comm.*, 91st Cong., 1st Sess. at 279 (1969) [hereinafter cited as *Hearings on H.R. 279*] (Statement of Richard W. McLaren, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice).,

56. This number represents the newspapers which are involved in joint working agreements. See note 12, *supra*. The exact number of newspapers which would be amenable to all forms of antitrust action is unknown.

> A business enterprise, including a newspaper, which can be saved only by eliminating all competition between it and its competitors is undoubtedly so lifeless that it simply should not be saved. It is better that it disappear from the market, thus making room for its replacement by a more robust competitor.[57]

This statement is unrealistic. Although competition in the industry has been declining at an unprecedented rate, no "robust competitors" have materialized.

Another difficulty with the Department's position is that a natural and legal monopoly might result if the illegal monopoly is broken-up. This point was unsuccessfully raised in the *Citizen* case and the defendants presented detailed studies which purported to show that one of the two newspapers would fail after any break-up.[58] The Department, however, makes the banal statement: "[W]e think the public interest is best served by treating newspapers the same way we treat other businesses and asking them to engage in the same type of free market competition that we expect from others."[59] That same "free market competition" provided this nation with General Motors, Ford and Chrysler. Could it not also provide newspaper chains one, two and three?

The Justice Department's approach does not solve the fundamental problems of how the public will be assured of its right to a free interchange of ideas. Antitrust laws are simply too indirect and unencompassing to be used to safeguard such an important right.

B. The Congressional Approach: Back Door to Nowhere

The congressional approach to the newspaper industry's problem is the antithesis of the Justice Department's position. For the past several years, bills have been introduced to exempt newspapers from the antitrust laws.[60] Newspapers would be allowed to combine in "joint working agreements" to create monopolies. The only condition to the exemption is that one of

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57. *Hearings on H.R. 279* at 358.

58. Brief for Appellants at 52, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). The Court appears to have found this argument "too trivial for discussion." 394 U.S. at 140.

59. *Hearings on H.R. 279* at 358.

60. *E.g.*, S. 1312, 90th Cong., 1st Sess. (1967) ("The Failing Newspaper Act"); H.R. 19123, 90th Cong., 2d Sess. (1968); H.R. 279, 91st Cong., 1st Sess. (1969) ("The Newspaper Preservation Act").

the newspapers must be "failing."[61] A basis of the bills is the belief that once a newspaper publisher is freed from the rigors of competition, he will expend more time and capital increasing competition in the idea market.[62] A second rationale is that it is more in the public interest to have two non-competing newspapers than one newspaper.[63] There is some validity to this—provided that the non-competing newspapers actually compete in the idea market. However, the various bills do not require or even suggest that the exempt newspapers devote more effort toward increasing competition in the idea market. In effect, the newspapers would receive the right of monopoly without any responsibilities.

Testimony concerning the various bills reflects the tacit assumption that newspaper publishers always act in the public interest. The proponents of the bills seem to feel that if the industry was granted monopoly power, it would not use it to restrict the free flow of ideas. That assumption is false. Recent actions by a newspaper chain provide an example. In one city, the chain's monopolistic newspapers began open and announced suppression of ideas in their news columns.[64] If the government tried to restrict the content of newspapers, as this chain has done, it would be swiftly restrained. But the results to the public are the same whether it is governmental or private power which restricts the right to a free interchange of ideas.

The fact that none of the bills contain any guarantee or statement of the public's interest in a free interchange of ideas indicates that the reaction of one witness before the Senate subcommittee may be accurate. He called the proposed legislation the "millionaire crybaby publisher's bill."[65]

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61. *E.g.*, H.R. 279, 91st Cong., 1st Sess. (1968) which reads:

> Sec. 4(a) It shall not be unlawful under any antitrust law for any person to propose, enter into, perform, enforce, renew, or amend any joint newspaper operating arrangement if, at the time at which such arrangement is or was first entered into, not more than one of the newspaper publications involved . . . was a publication other than a failing newspaper.

62. *See, e.g., Hearings on H.R. 279* at 178. This rationale is reflected throughout the various hearings.

63. *Hearings on H.R. 279* at 71.

64. On Aug. 1, 1969, the San Diego Union and Evening Tribune newspapers, both owned by the Copley Chain, announced: "[E]ffective [today] the two newspapers will no longer chronicle in their news columns [movies] whose content is not rated or is rated 'X' . . . ." San Diego Union, Aug. 1, 1969, part A at 14, col. 3.

65. 1 *Hearings on S. 1312* at 26 (Testimony of Eugene Cervi, editor and publisher, Cervi's Rocky Mountain Journal, Denver, Colorado).

V. RED LION BROADCASTING COMPANY V. FCC: THE RATIONALE FOR NEWSPAPERS

In the same term that it decided *Citizen*, the Supreme Court handed down the decision in *Red Lion Broadcasting Company v. FCC*.[66] This decision suggests a rationale which would allow the people, through their government, to regulate the idea market of newspapers to insure that there is a free interchange of ideas. The decision also indicates that the Supreme Court is willing to move from the traditional concepts of the first amendment when it is clear that traditional interpretation restricts, not increases the free interchange of ideas.

In *Red Lion*, the FCC's "Fairness Doctrine" was challenged as being unconstitutional.[67] The doctrine requires that a station which broadcasts a controversial issue or a political attack make an equal amount of time available for rebuttal. A rebuttal must be requested and the station must offer the broadcast time free of charge if the rebuttor cannot afford to purchase time. The *Red Lion* broadcasters invoked what the Court called the "conventional First Amendment grounds"—the allegation that the government was abridging their freedom of speech and press. They contended that the first amendment "protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."[68] The Court held that differences in new media justify differences in first amendment standards applied to that media.[69] It appears to define new media as any method of idea communication that did not exist when the first amendment was written.[70]

The broadcast media is obviously new. Is there not also a "new" newspaper industry? Is not the modern newspaper which reaches millions of citizens and is not answerable to the laws of competition a new media? The Framers of the first amendment were describing and protecting the press as they knew it in 1791, not as it exists in 1970. Is this not a new media in terms of what the Framers intended to protect? Just as the time came when the

66. 395 U.S. 367 (1969).
67. *Id.* at 370.
68. *Id.* at 386.
69. *Id.*
70. *Id.* at 387.

Court had to recognize that the use of sound trucks justified certain restrictions on free speech, the time has now come to recognize that the newspaper industry has changed in all but name and that new standards must be applied to it—if it is to continue to perform its proper function in our society.

In both the broadcast and newspaper industries there can be only a limited number of competitors. In the broadcast industry the limit is fixed by the laws of physics. The newspaper industry is also restricted, but by the laws of economics. Although the limiting factors are different, the results are the same. As has been shown, the economic limitations of the newspaper industry generally restrict the number of newspapers to one per town. This economic limitation, however, is not totally fixed. There is always the possibility that another newspaper can be established. The Court was faced with an analogous argument in *Red Lion*. The broadcasters contended that all frequencies were not in use; therefore opponents of a particular station could apply for license and start their own station. They contended that there should be no regulation until an absolute monopoly was established.[71] To this the Court said:

> Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. . . . *Some present possibility for new entry by competing stations is not enough, in itself to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.*[72]

Logically, then, the Court should not allow the mere possibility of competition in the newspaper industry to invalidate any regulation of that industry. Although the newspaper industry and the broadcast industry are not identical, they are both communication media. Competition has failed in both to insure that there will be a free interchange of ideas. Congress recognized the limits of the competitive process in the broadcast media and provided a substitute for it. The Court has held that substitute constitutional.[73] The question is not whether there should be a

71. *Id.* at 396.

72. *Id.* at 400 (Emphasis added).

73. The Court did not deal with the specific question of whether the fairness doctrine

substitute in the newspaper industry, but is how much longer the people must wait until such a substitute is provided. As the Court in *Red Lion* stated: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[74] That same right of the people is paramount in the newspaper industry.

Finding a substitute for competition in the newspaper industry will not be easy, but a start must be made. At the outset, Congress should adopt a newspaper fairness doctrine, similar to that in the broadcast industry. Newspapers should be required to provide equal space for rebuttal of an editorial or opinion item. This right sh[illegible]d be enforceable in the courts. With such a fairness doctrine, citizens would be assured that both sides of important issues would be presented in their newspapers and that they, not the editor, would choose which idea to adopt. A newspaper fairness doctrine would not provide a complete substitute for competition in the industry, but it would provide a platform from which other needed regulation could be developed.[75]

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could be sustained on the basis that it "multiplied" rather than abridged the first amendment right. *Id.* at 401 n.28.

74. *Id.* at 390.

75. Various types of regulation and support for the newspaper industry, other than a fairness doctrine, have been suggested. Senator Philip Hart, Chairman of the Senate Antitrust and Monopoly Subcommittee, has suggested that the government directly support newspapers. "As a matter of policy I believe that Congress should solve problems directly, not through antitrust exemptions. If newspapers need subsidy then it should come from the public treasury, not from a state granted monopoly." Letter from Senator Hart to the *San Dego Law Review*, Nov. 19, 1969, on file at the *San Diego Law Review*. There has also been some discussion within the industry concerning the establishment of local press councils. These councils, which would be patterned after the British system, would exercise some form of control over local newspapers. The industry does not seem to be able to agree on the need for such councils or their functions. *See* INTERNATIONAL PRESS INSTITUTE REPORT, Nov. 1969 at 8.

ADDENDUM

1. On Mar. 25, 1970, the FCC proposed a rule which would prohibit the owner of a newspaper from owning any broadcast station in the same market.

> In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, it is not desirable that these two organs of mass communication should be under the same control in any community.

35 Fed. Reg. 5963, 5966 (1970). Estimates are that 127 television stations and 526 radio stations would be affected by the rule. Los Angeles Times, Mar. 27, 1970, part 1 at 12, col. 1 (Home ed.).

In what must be called a classical understatement, the Commission states: "[C]omments . . . have led us to the view that it might be in the public interest to fashion rules embracing divestiture and newspaper ownership . . . ." 35 Fed. Reg. at 5963. If the FCC's rule is adopted, the Supreme Court is certain to be faced with the question of what the first amendment right to freedom of the press really means.

2. On Jan. 20, 1970, the Senate passed S. 1520 ("The Newspaper Preservation Act").

Red Lion indicates that Congress can legislate rules for the broadcast industry because rules are needed to insure that the public's right remains paramount. Congress must realize that the public's right to a free press must also be paramount and that legislation will be necessary to insure that it remains so. *Red Lion* should provide the basis on which the newspaper industry can be regulated.

CONCLUSION

Reduced competition in the newspaper industry poses significant constitutional, economic and social problems. Although the Supreme Court has recognized that the economic marketplace of the newspaper industry can be regulated by the government, there has been no attempt to protect the idea marketplace against domination by powerful interests. The result is that monopoly newspapers have the power to stifle the free interchange of ideas. The competitive process no longer provides adequate safeguards against such concentration of power.

It is clear that a substitute for the competitive process must be found if the people's right to a free press is to be protected. The Supreme Court has indicated that governmental regulation of the broadcast media is constitutional if it increases, not restricts, the public's right to a free and full interchange of

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See Section 2B *supra*. The final version of the bill requires the Attorney General to give prior written consent to any joint operating agreement. S. Rep. 91-535, 91st Cong., 1st Sess. (1970).

S.Rep. 91-535 also carries the dissenting views of Senators Hart, Kennedy, Burdick and Tydings in which they state:

> History tells us that monopolies unaccompanied by regulatory supervision develop practices which compel the creation of a regulatory agency. It's not unreasonable to suggest that history would repeat itself.
>
> [I]f the premise is correct, it may be necessary for Congress to treat the limited publishing opportunities as it treats the limited broadcast spectrum space. After the decision in *Red Lion* . . . the first amendment may be said to require creating a "fairness doctrine" for newspapers to provide divergent views with access to the limited facilities.
>
> The possible clamor for Federal regulation of newspapers and for imposition of a "fairness doctrine" on newspapers should be avoided by rejecting the legislative finding of fact implicit in this bill.

Id. at 13-14.

3. For an interesting exposition of *Red Lion* where the argument is made that *because* newspapers are not regulated, the broadcast media should not be regulated, *see* Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75, 86-87 (1969).

ideas. The time has come for the people, through their government, to apply this same power to the nation's press. The first amendment commands that Congress shall make no laws *abridging* the freedom of the press. Laws which would enhance this freedom are not proscribed by that amendment.

> *Since therefore, the knowledge and survey of vice in this world is so necessary to the constitution of error to the confirmation of truth, how can we safely, and with less danger, scout into the regions of sin and falsity, than by reading all manner of tractates and hearing all manner of reason?*
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> Milton, *Areopagitica*

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