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# FEDERAL CONTROL OF DEFAMATION BY RADIO

## INTRODUCTION

"One venomed word  
That struck its poison-darted blow  
In craven whispers, hushed and low  
And yet the wide world heard."

—Anonymous.

Federal control of radio has, since its inception, been considered a scientific and practical necessity. Since the Act of June 24, 1910, which was the first federal law having any relation to radio communication, Congress has steadfastly continued to exercise a powerful regulatory control in this particular field. Realizing that to suggest further assumption by the central authority of powers which seem to be inherently the property rights of the several states is not popular in this day, it is with little hesitation that we undertake to suggest a further and vital federal control of radio in the broad field of defamation. Our purpose shall be to show that such legislation is an immediate necessity and that it should, and must, come before we encounter hopeless confusion in the field of defamation by radio. We must not further add to the chaos which already exists here. The purpose of all radio legislation is to prevent chaos by properly regulating the use of the ether and the use of the ether is a question involving the strict public policy.<sup>1</sup>

Our thesis is not that the states can not regulate defamation by radio but rather that the Federal Government has the authority and the duty to assume this control. Recent events have served to intensify the need for regulation in this particular field and almost daily we have added proof

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<sup>1</sup> *Journal Company v. Federal Radio Commission*, 48 Fed. (2d) 461 (App. D. C. 1931).

of the necessity for such regulation. Federal control of defamation by radio is no longer a question for ingenious disputation. State legislatures have been wrestling with the problem of control of defamation by radio and have been struggling valiantly to determine upon a method of correcting the evils which undeniably exist. The courts, both state and federal, have undertaken to determine the question in a number of cases which are to be discussed in detail in this paper. However, none of them has attained the degree of finality and authority which is necessary if the problem is to be completely solved. "The past two months have witnessed an unusual number of proposals in the legislatures of the various states to extend the libel and slander laws to cover specifically the publication of defamatory statements by radio."<sup>2</sup> There has been, however, no serious attempt either upon the part of the state legislatures or the Federal Government to assume control definitely in this particular field. Our purpose, therefore, is to show the need for such regulation, to show that the states have not, and can not, exercise control properly in this field, to show that the Federal Government can, and must, exercise control in this particular field, to demonstrate that such federal control will not be a threat to freedom of speech nor will it lead to vicious or even apparent censorship, nor that it will be a burden upon the broadcaster or the person using the broadcasting facilities, and finally that the public interest could best be served by federal control of defamation by radio. While no attempt will be made to submit a proposed draft for such legislation—since to do so is not within the province of this article, nevertheless, an endeavor will be made to set forth the paramount issues which should be covered in such legislation.

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<sup>2</sup> Dr. Henry A. Bellows, Chairman of the Legislative Committee of the National Association of Broadcasters, writing in the March 15, 1935, issue of "Broadcasting."

The First Amendment to the United States Constitution provides that,

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Let us approach this subject with an open mind and put aside definitely and resolutely the thought that if you assume federal control in this particular field you will in any way abridge freedom of speech which all true Americans hold so dear. Rather, let us realize that unless we do assume to recognize the problem here and to solve it, that the very principles which we hold so dear will be devastated by conditions which already exist and which will mount increasingly if some control is not forthcoming.

"The radio as a means of communication has such tremendous potential possibilities that one must be wary of any attempt to limit or curb its natural development as an instrumentality to further education, to spread knowledge and to promote business. . . . Of greater importance is the protection of the rights of the people. . . ." This statement made by Honorable N. S. Levine, Judge of the Court of General Sessions of New York County, New York, on November 7, 1932,<sup>3</sup> eloquently expresses the problem as we view it today. Again, it was stated by Secretary Hoover<sup>4</sup> that,

"Through the policies that we have established the Government, and therefore the people, have today the control of the channels through the ether just as we have control of our channels of navigation; but outside of this fundamental reservation, radio activities are largely free. We will maintain them free—free of monopoly, free in program, and free in speech—but we must also maintain them free of malice and unwholesomeness."

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<sup>3</sup> *People v. International Broadcasting Corp.*, 143 N. Y. Misc. 122, 255 N. Y. S. 349 (1931).

<sup>4</sup> Reported in *JOURNAL OF RADIO LAW*, Vol. 1, p. 468, as a quotation from Secretary Hoover's address to the Third National Radio Conference (held in 1934).

Secretary Hoover has here given expression to a popular theory that the Government owns the ether or the channels in the ether and that it may exclude all others at will. This idea has long been a popular belief in Congress also.<sup>5</sup> In 1926 the preamble of a bill introduced into the House declared that "the ether is the 'inalienable possession of the people thereof.'"<sup>6</sup> While scientists disagree even as to the existence of the ether,<sup>7</sup> which our legislators have claimed so unconcernedly, nevertheless, such discussion demonstrates the breadth of the scope of the regulation as well as the popular conception of the right of Congress to regulate the commerce "upon these intangible, unexplainable highways of the sky."

Radio broadcasting, as now developed, constitutes the most powerful agency for defamation the world has ever seen.<sup>8</sup> The radio "is a young and great institution and one must be lenient toward it as to every other manifestation of crude but creative and developing youth. The radio is growing up. It has already given mankind many blessings, and it will give more. But it needs to learn from experience. Years ago political spell-binders, who sought to help themselves by blacking their rival's character, learned that such efforts at a street corner rally would instantly be met by a challenge by answering hecklers, or by persons who rose to make utterly serious, truthful denials of the defamation just spoken against a fellowman. At least, it took nerve to face this risk. The radio speaker, on the other hand, stands in a well-guarded room with all of civilized society, laws and police force to protect him from any interruption, no matter how false or uncivilized his attacks on other human beings may be."<sup>9</sup>

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<sup>5</sup> 57 CONG. REC. 5500, 12351 (1926); 68 CONG. REC. 2588 (1927).

<sup>6</sup> *Interim Report on Radio Legislation* (1926) 12 A. B. A. J. 848.

<sup>7</sup> EDDINGTON, *NATURE OF PHYSICAL WORLD* (1929) 31.

<sup>8</sup> Vold, *Defamation by Radio*, 2 JOUR. RADIO LAW 673, 683.

<sup>9</sup> Editorial, *Boston Transcript*, November 17, 1934.

Statements are being made over the radio constantly which no newspaper could print even if it so desired. Yet these statements continue to be made oftentimes by irresponsible persons and defamation which they speak is cast out upon the highways of the sky to be heard by millions of listeners. Listeners have a way of believing that whatever is said over the radio has the benediction of the Federal Government, or else why is it placed upon the highways of the ether? The permanence of the written record over the evanescent spoken word has been, we believe, exaggerated. We Americans have become in the last twenty-five years decidedly ear-minded, as the salesman of advertising time on the radio will eloquently convince you. The growing feeling, therefore, that defamation by radio is as heinous as written defamation is not to be denied. Publication of defamatory utterances by radio ought properly to be regarded as an equivalent to libel. Whether regarded from the standpoint of the deliberation involved, the extent of diffusion achieved, or the amount of damage to reputation inflicted, it is in each aspect clear that defamation by radio is, if anything, more provocative of mischief than is written defamation. No wonder then that we have the statement:

"Radio's unexpected, unprecedented usefulness as a carrier of information and entertainment is still a cause of wonder and confusion. Many seemingly settled institutions of life have come within its influence. Education, the press, the church, the theatre, and to some extent public and home life have felt its transforming touch. In a period of ten years broadcasting has appeared and developed beyond a stage of convenient control. Is it any wonder that our attempts to deal with it have led to confusion and disappointment!"<sup>10</sup>

Just as the difference in form when writing and printing first came into general use, following upon the invention of the printing press, was seized upon as the occasion for enforcing a wider liability for written defamation than was available directly under the old narrowly confined slander

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<sup>10</sup> Address ("Our Stake in the Ether") by Bethuel M. Webster, Jr., at New York University, April 10, 1931.

precedents,<sup>11</sup> so also the difference in form between writing and broadcasting could and should be seized upon to further extend the protection of the public from unwarranted defamation by radio. The deliberation involved being greater, the diffusion being wider, and the damage being heavier were cited as reasons for enforcing a wider liability for written defamation.<sup>12</sup> How much greater then the reason for further extending the law of defamation to cover radio.

But it is our assumption here that defamation by radio is not and can not be controlled by the states. Indeed, at least four states have already extended by statute the law of defamation to radio.<sup>13</sup>

That the problem has also received attention in foreign countries is illustrated by the cases decided in Australia,<sup>14</sup> in France,<sup>15</sup> and in Great Britain.<sup>16</sup>

We have had an increasingly large number of state courts passing upon the question in recent months also, which cases are to be discussed in detail later in this paper. Our problem is precisely this: If present legislation by the states in this field is permitted to continue, we will have forty-eight different state laws, each with a different notion of whether defamation by radio is libel or slander; each setting up perhaps civil liability or criminal liability, or both; each having various concepts of where the defamation occurred, whether in the place where it was spoken or where it was heard, or both; or whether the defamation was based upon the law

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<sup>11</sup> See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 366.

<sup>12</sup> "The distinction between slander and libel grew up in English law early in the 17th Century. Judges, frightened as it were, by the power of the printed word, decided that printed slander should be considered greater in effect than oral slander. From it grew the principle that a thing may be libel when written which would not be slander if spoken." DAVIS, RADIO LAW (2nd ed. 1930) 101.

<sup>13</sup> CAL. PENAL CODE (Deering, 1931) § 258; ILL. REV. STAT. (1935) c. 38, § 567 (1); N. D. LAWS (1929) c. 117; ORE. LAWS (1931) c. 366.

<sup>14</sup> *Meldrum v. Australian Broadcasting Co.* [1933] Vict. L. Rep. 425. See 7 AUSTR. L. J. 257-262.

<sup>15</sup> Tribunal Correctionnel de la Seine (12s Chambre) February 1, 1929, p. 57.

<sup>16</sup> See 70 SOL. J. 613.

of defamation or upon the law of negligence, with the added possibility of utter confusion and chaos in satisfactorily determining actions between citizens of different states. How can such a situation help but lead us to the point of demanding Federal regulation of defamation by radio? We will approach the situation where it will appear that Congress "is trying to import all of Europe's radio afflictions, so far as broadcasting is concerned, into the United States by giving too much recognition of the rights of states . . . . Whatever language it chooses to use to express its power, even if it be a declaration that it owns the ether, I trust that it will always preserve to the Federal Government the most far-reaching control of radio communication that the Constitution permits."<sup>17</sup>

In the same article this writer admits that a surprisingly large amount of radio legislation is to be found in the statute books of the several states and in the ordinances of cities, towns, and villages.

Faced with an intolerable situation such as we have outlined above, how would it be possible for the chain broadcaster to be able to determine in any possible way whether a particular item to be sent out over the chain would be defamatory or not? What would be defamatory in one state might not be defamatory in another. Indeed, if the present situation continues to enlarge we might be faced with the hopeless situation of broadcasting defamatory matter in a particular city which might not be defamatory within the law in the state, of which such city is a political subdivision. Such a condition would be utterly hopeless and inexcusable in view of the fact that the Federal Government possesses the authority necessary not to correct such evils as they exist but to prevent them by adequate legislation here and now.

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<sup>17</sup> Louis G. Caldwell, *CATHOLIC UNIVERSITY RADIO LAW BULLETIN*, August, 1931.



Radio broadcasting is a new scientific wonder and challenges our Federal Government to new methods of control. "Radio has brought to the courts and before our legislative bodies new issues on the law of slander."<sup>18</sup>

The power of radio to sway public opinion and thought is amply illustrated by the facts surrounding the recent lynching of the alleged kidnapers at San Jose, California, graphically described by the Reverend Cornelius D. Deeney.<sup>19</sup>

Legislation seeking to control rash statements made over the radio will undoubtedly serve as a deterrent to those who would pour into the microphone wild statements for which later retraction is unsatisfactory, if not impossible. The masters of invective who have arisen within recent months in political debates presage a new danger in radio broadcasting which already stands as a challenge to the Federal Government. These widely discussed debates already stand as a monster Frankenstein of the radio industry which have struck fear into the hearts of broadcasters and which present problems which even now thoughtful executives are struggling frantically to solve. "Political Bundling," "Cream Puff General," "Twin Termites," and "Political Padre" are terms which must inevitably lead to stronger language which, in turn, must and will bear more than a tinge of defamation. Stranger and stronger language than this has been held to be defamatory. R. F. Wood, in a speech in behalf of W. M. Stebbins, candidate for nomination for the office of United States senator, called C. A. Sorensen, candidate for reelection as attorney-general of Nebraska, a "nonbeliever, an irreligious libertine, a madman and a fool," and suggested by *innuendo* that he had other faults, such as being a grafter and a racketeer. This language was held to be de-

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<sup>18</sup> Codel, *Radio and Its Future*, HARPERS (1930).

<sup>19</sup> Hearings before Federal Communications Commission pursuant to Section 307 (c), Communications Act of 1934, held at Washington, D. C., October 1 to November 12, 1934.

famatory.<sup>20</sup> It is pale and decidedly weak language when compared to the raucous bellowings of radio demagogues which have come thundering into millions of American homes via the airwaves in recent weeks!

The power and speed of radio are so great and retraction later is so unsatisfactory as to intensify further the need for such legislation. Recent statistics show that there are 25,551,569 radio receiving-sets in 21,455,799 homes in the United States and the total number of radio listeners over ten years of age is placed at 70,804,157.<sup>21</sup>

Never in the history of the world has so vast an audience been possible upon any occasion. Society, it may be argued, has laws of libel designed to punish defamatory attacks when they are launched without warrant of fact. But in broadcasting, do we not have far greater difficulties in establishing a libel by radio than we do by the printed word? To establish the defamation spoken by radio, witnesses must be sought out and consulted and their testimony must be cross-checked and collated. The defense counsel might easily create doubt that the alleged words were spoken in defamation by radio, whereas the incontrovertible evidence of the printed word is always available in the ordinary case of libel.

Again, we have difficulties in proving that a person alone in a studio uttered words of defamation which were heard by one or more people. There may be no one in the room with him, but millions may hear him defame another. Can the person be identified by the sound of his voice where there are no witnesses on the set? <sup>22</sup> Will experts testify that a radio receiving-set is so delicate and so true in reproduction that one can distinguish the characteristics of another's

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<sup>20</sup> *Sorensen v. Wood*, 243 N. W. 82 (Neb. 1932).

<sup>21</sup> Statistics released by the Columbia Broadcasting System in cooperation with the statistical staffs of Dr. Daniel Starch and of the McGraw-Hill Publications Co.

<sup>22</sup> Van Allen, *State and Municipal Regulation of Radio*, 1 JOUR. RADIO LAW, at p. 40.

speech and will this remove all doubt that he and not another was the guilty person? We have difficulties enough here without the added burden of chaotic state legislation on the subject.

Let us consider, also, whether the person at the microphone spoke without notes or memoranda or writing or read from a written statement of which he is the author. If you sue for slander, can you sustain the action on the ground that it was oral as between the person broadcasting and the person who heard it, even though the spoken word was derived from a written document; or, conversely, can we sustain an action for libel, if the words were derived from a written document, or are we coming into a field where, if injury is alleged, we must base it on both libel and slander in order to avoid a dismissal? The legislation on the subject is by no means uniform to date, although cases have shown a rather marked consistency in the United States in holding that broadcasting is libel and not slander.<sup>23</sup> More is to be said later on this interesting phase of the subject.

At this point, we deem it only fair to state emphatically that this recital of the possibilities for defamation by radio in no way reflects upon the broadcasters of this nation; that is, upon those who are operating broadcasting stations today. The vast majority of them are public servants of the highest order. They have obtained their licenses upon the strict condition that they will so operate their stations so as to serve "public interest, convenience and necessity."<sup>24</sup> Defamation by radio and the control thereof is as much a problem for the broadcaster as it is for the general public. The broadcaster is not unmindful of the tremendous responsibility attaching to the ownership and operation of a broadcasting station. Broadcasters are cognizant of the fact that

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<sup>23</sup> *Sorenson v. Wood*, *op. cit. supra* note 20; *Coffey v. Midland Broadcasting Co.*, 8 Fed. Supp. 889 (W. D. Mo. 1934).

<sup>24</sup> Communications Act of 1934, § § 303 (f), 307 (b), 309 (a).

the Federal Government has given them a valuable license and that they are entitled to use but not abuse their licenses and that they have to accept the responsibilities which possession of the license includes. The National Association of Broadcasters has undertaken to care for this problem by specific provisions in their Code of Ethics,<sup>25</sup> already widely publicized. The language in their Code which is pertinent is as follows:

"Care should be taken to prevent the broadcasting of statements derogatory to other stations, to individuals, or to competing products or services except where the law specifically provides that the station has no right of censorship."

Doubtless, their covenant could have been strengthened. Doubtless, needed legislation, if enacted, would make their covenant unnecessary. But at any rate it is a start, an indication that the broadcaster is not entirely unaware of his obligations as a broadcaster.

#### HISTORICAL BACKGROUND

It will prove helpful for the purpose of our discussion here to have "a preliminary review of the codes of those law-makers who in the beginnings of society united the law with their religion and morals"<sup>26</sup> and will prove of assistance in an examination of the present state of the law of defamation in general. From the time of the old Mosaic law, slander was a serious offense. It is not difficult to trace a swiftly developing body of law on this subject down through the laws of ancient Egypt, the laws of the Athenians, the ancient Roman Law of the Twelve Tables, the laws of Sylla, the Cornelian law, the Theodosian code, the Institutes of Justinian, the edicts of Valentinian and Valens, the English laws under Alfred and Edgar and the Norman Kings, the Statute of Westminster, the Statutes of Richard II, the libels of the Star Chamber and so on down to more modern

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<sup>25</sup> Adopted March 25, 1929, at Washington, D. C.

<sup>26</sup> NEWELL ON DEFAMATION (2nd ed.) 1, 2.

days. Thus we find that we have the same authority for the law of libel that we have for the most important maxims of the common law. The American law, always identical with the English law, has proceeded along definite lines from the decision in the famous case of *The King v. Zenger*,<sup>27</sup> tried in New York in August, 1735.

Defamation is generally understood to mean a false publication calculated to bring a person into disrepute. By the common law, it has been divided into two classes; written defamation, or libel; and oral defamation, or slander. Libel is defamation published by means of writing, printing pictures, images or anything that is the object of signs. Slander is defamation without legal excuse, published orally, by words spoken, being the object of the sense of hearing. Both libel and slander are but different methods of accomplishing the same wrong, differing mainly in the manner of publication.<sup>28</sup> That defamation by radio is more logically libel than slander seems a sane conclusion inasmuch as publication, in the light of the earlier determinations on this subject, was never meant to encompass publication by radio. We believe publication by radio, for all intents and purposes, gives rise to an action for libel as much as does any type of publication held to be libel.

Innumerable other definitions of libel and slander have been devised by writers in all fields of the law. To repeat them here is not within the scope of this writing. Publication is the communication of the defamatory matter to some third person or persons. Radio is an agency which makes possible the widest kind of communication on a scale not previously even imagined.

The law of defamation provides for punishing a criminal libel at the same time it assures civil responsibility. The

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<sup>27</sup> CHANDLER'S AMERICAN CRIMINAL TRIALS 205.

<sup>28</sup> COOLEY ON TORTS (1st ed.) 193.

criminal libel has been defined as including any publication which has a tendency to disturb the public peace or good order of society.<sup>29</sup>

"It is clearly necessary that there should be a criminal as well as a civil remedy for libel for the following reasons: (1) The evil done by libel is so extensive, the example so pernicious, that it is desirable that they should be repressed for the public good. Slanders do less mischief as a rule, are not permanent, and are more easily forgotten; their evil influence is not so widely diffused. (2) Many libellers are penniless, and a civil action has no terrors for them. The plaintiff will never get his damages. In fact, the proprietor of many a low newspaper rather rejoices at the prospect of a civil action for libel being brought against him. He regards it as a gratuitous advertisement for his paper."<sup>30</sup>

Publication of defamatory utterances by radio many times multiplies the diffusion and the possible damage beyond what could be attained in those respects by any written publication. Every substantial reason commonly cited for imposing a broader liability for libel than for slander is therefore at hand to dictate that publication of defamatory utterances by radio must be regarded as equivalent to libel.<sup>31</sup>

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<sup>29</sup> WHARTON'S CRIMINAL LAW (12th ed.) § 1931.

<sup>30</sup> ODGERS ON LIBEL AND SLANDER (5th ed) 7.

<sup>31</sup> "It can readily be seen that the California Legislature thought that with the development of radio, slander should be punished criminally, as it is now civilly, and had in mind the fact that many English authorities had deprecated the favoritism which slander had enjoyed for centuries. The basis for the punishment of libel as a crime is the tendency to breach the peace. If this is at all a valid ground for state interferences, the danger for such breach is greater now from radio than from the printed word. One can influence people with the spoken word in a way in which it cannot be done by the printed." DAVIS, RADIO LAW (2nd ed. 1930) 102.

"So far as concerns defamatory matter, the common law distinctions between libel and slander (both as to criminal and civil responsibility) seem to be based upon the more permanent nature and the wider dissemination of libelous statements. The invention of radio broadcasting has created a means of giving to oral defamatory utterances a wideness of circulation greater than that now generally given to written defamations." DAVIS, RADIO LAW (2nd ed. 1930) 69.

"Libel is more heavily punished than slander, because of its greater possibility of harm and the greater deliberateness on the part of the perpetrator. When the

It is not to be imagined that the First Amendment to the Federal Constitution is a guarantee of one's right to defame another. There is as wide a distinction here as there is between freedom of the press and the right to print libelous statements without incurring either civil or criminal responsibility. Impeaching a man's honesty, integrity, virtue or reputation and exposing him to public hatred, contempt, ridicule or financial injury is hardly to be held to be within the protective confines of our so-called "bill of rights." That is making freedom of speech and of the press a license to commit a positive wrong. Such was not the spirit of those who framed our Constitution as even a cursory examination of the constitutional debates will reveal. Of course, this Amendment is not to be forgotten in the exercise of control over broadcasting under the so-called "Commerce Clause" of the Federal Constitution.<sup>32</sup> It serves there to operate as a check upon the abuse of authority under the Commerce Clause. But federal control of defamation by radio is not to be considered as an abuse of this authority. We propose to demonstrate that it is entirely within the authority of Congress to legislate in this field under this constitutional provision as well as under the so-called federal "police power."

#### COMMERCE CLAUSE

The Commerce Clause of the Federal Constitution has had an interesting history. It has been regarded as a pro-

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defamation is by radio, may not the deliberation of the actor be as great as if the tort or crime is perpetrated through a newspaper and may not the harm be even greater, reaching, as the broadcasting may, through chain arrangements a far greater audience than the circulation of any newspaper? . . . On the mischief side, radio defamation certainly would seem to be more like libel than like slander." ZOLLMANN, *LAW OF THE AIR* 125.

"If, indeed, the distinction between libel and slander truly lies in the fact that the former is more likely to cause mischief than the other, then it might seriously be argued that broadcasting defamatory statements constitutes a libel and not a slander. The time would indeed appear to be now ripe for the abolition of this distinction altogether." 70 *SOL. JOUR.* 613.

<sup>32</sup> U. S. Const., Art. I, §§ 8 (3), 8 (18).

tection to the commerce of the individual states and was treated with such jealous respect by each state that for more than thirty years following the adoption of the Constitution no question involving the Commerce Clause reached the Supreme Court for adjudication. The tendency of the states during this period was to encroach upon the powers of Congress; and at no time was it seriously charged that Congress sought by legislation to interfere with the rights of the individual states, with the exception that some of the states hesitated to conform strictly to the provisions of the Constitution with regard to national revenue.<sup>33</sup>

There followed, then, development in population, territory, and inventive genius. With the advent of the steamboat, the steam engine, cotton gin, telegraph, sewing machine, improved farm machinery, and many other mechanical devices of practical use our frontiers were no longer frontiers. Our Nation became the envy of the commercial world and this commercial development could not have occurred but for the harmonizing effect of the Commerce Clause upon the commercial relations among the states.

That harmonizing effect is not absent today. It is available and has been applied to paramount features of federal control of communications. It is also available for extending federal regulation to defamation by radio in order to accomplish, as is the early history of the Commerce Clause, a harmonizing effect which cannot be obtained in any other way. Certainly the states were more jealous of their powers and rights at the time that Chief Justice Marshall, in 1824, in the case of *Gibbons v. Ogden*,<sup>34</sup> handed down the decision of the United States Supreme Court stating that the Commerce Clause comprehends every species of commercial intercourse between the United States and foreign nations and

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<sup>33</sup> Vaught, *The Commerce Clause of the Constitution* (1935) 21 A. B. A. J. 153, 154.

<sup>34</sup> 9 Wheat. 1 (1824).



among the several states. It made possible commercial relations among the various states without the friction which had theretofore existed.

Raising the public cry that the federal branch of the government is encroaching more and more upon state powers is not new at this time, for Thomas Jefferson, on December 26, 1825, wrote to his friend Giles,

"I see, as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing toward the usurpation of all the rights reserved to the states and the consolidation in itself of all powers, foreign and domestic; and that, too, by construction which, if legitimate, leaves no limit to their power. Take together the decisions of the federal court, the doctrines of the President and the misconstruction of the Constitution compact acted on by the legislature of the federal branch, and it is but too evident that the three ruling branches of that Department are in combination to strip their colleagues, the state authorities, of the powers reserved by them, and to exercise themselves all functions foreign and domestic."

The United States Supreme Court has gone to great lengths to distinguish between intrastate and interstate commerce. In *Coe v. Errol*<sup>35</sup> the court laid down the test to be, when did logs cut in New Hampshire for final shipment to Maine commence their final movement for transportation from the state of their origin to that of their destination. and that moment they became interstate rather than intrastate commerce. Many other cases have been cited on this point.<sup>36</sup> Although some think that the Supreme Court has departed from the rule in *Gibbons v. Ogden*, the recent case of *Chassaniol v. Greenwood*,<sup>37</sup> decided in 1934, indicates no departure from the position taken in *Gibbons v. Ogden* in the construction of the Commerce Clause.

It is academic that our National Government is based upon the existence of individual states and the Constitution

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<sup>35</sup> 116 U. S. 517 (1886).

<sup>36</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918); *Mobile County v. Kimball*, 102 U. S. 691 (1881); *Kidd v. Pearson*, 128 U. S. 1 (1888); *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439 (1915).

<sup>37</sup> 291 U. S. 584 (1934).

not only recognizes their rights but after providing that certain powers shall be delegated to Congress, provides that the powers not so delegated to the United States nor prohibited by it to the states are properly vested within the states themselves. That the Constitution is elastic and meant to cover conditions as they arise is also academic. George Washington, the Father of our Country, has warned that if we are to preserve our Government we must "resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect in the forms of the Constitutional alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown."<sup>38</sup>

It is, however, not in a "spirit of innovation" that we venture to suggest federal control of defamation by radio. Abundant authority is at hand to demonstrate that Congress has the sole power to regulate radio transmission based on its constitutional power over interstate commerce.<sup>39</sup>

"Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission; and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission."<sup>40</sup> Again, it was held in the case of *Station WBT v. Poulnot*<sup>41</sup> that no state can tax radio sets because such would be a burden upon interstate commerce and is so reserved to the Federal Government.

The theory upon which the Commerce Clause is constantly applied is that the Federal Government assumes control in every instance where it will facilitate commerce between

<sup>38</sup> Washington's Farewell Address.

<sup>39</sup> *Brown v. Houston*, 114 U. S. 622 (1885). See, also, in this connection the recent case of *United States v. Gregg*, 5 Fed. Supp. 848 (S. D. Texas, 1934), in which District Judge Kennerly reviews the long line of cases in which the courts recognize the power of Congress to regulate interstate commerce and the cases in which radio broadcasting was held to be such commerce.

<sup>40</sup> *Whitehurst v. Grimes*, 21 Fed. (2d) 787 (E. D. Ky. 1927).

<sup>41</sup> 46 Fed. (2d) 671 (E. D. S. C. 1931).

the various states. It is already recognized that radio is interstate commerce and it remains but for us to recognize the extension of this federal authority to defamation by radio. The lawyer, the jurist and the legislator are by force of education and experience conservative in matters involving the Constitution. "It is not legal-like to announce dogmatically that radio . . . is to be ticketed and labelled an instrumentality of interstate commerce without the formality and dignity of a reasoned opinion accompanying the pronouncement. Radio presents novel obstacles which defy removal by the mere wave of the judicial hand. And while this analysis may confirm and perhaps fortify first impressions, the analysis should none the less be first made. Moreover, even if this initial query results in the conclusion that Congress has plenary power to regulate and control transmission, the proposed juristic journey may reveal other problems yet unsolved, problems which radiate, like wireless emissions themselves, from the main 'channel' of Constitutional Law. . . ." <sup>42</sup>

The United States Supreme Court has used extremely significant language as a demonstration of its complete willingness to extend the effect of the Commerce Clause of the Constitution whenever circumstance or scientific advancement warrants such an extension. Thus we read in a decision <sup>43</sup> in 1878:

"The powers thus granted [in the Commerce Clause] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth."

Radio's complete contempt for state boundaries, bringing it ultimately within the exclusive realm of federal jurisdic-

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<sup>42</sup> Kennedy, *Radio and the Commerce Clause*, 3 *AIR L. REV.* (1932) 16, 19.

<sup>43</sup> *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9 (1878).

tion, falls easily within one of these stated extensions of the federal authority. Aerial alien that radio now is, with its vagrant tendencies and no fixed domicile, is truly on trial and its future cannot but make certain increasing litigation. To forestall such multiplicity of suits of all kinds, to provide for one uniform law which will assure uniform determination of both civil and criminal responsibility, to provide one unified forum for such determination, in a word, to provide adequate federal control of defamation by radio seems a paramount necessity if we are to avoid the utter confusion which will exist under any other system of meeting this important problem. Indeed to refuse to act would be tantamount to deliberately placing an additional burden upon interstate commerce, which sooner or later must unquestionably demand the regulation and control of the central governmental authority. It is utter folly to delay the remedy until the situation has become so aggravated as to present increasingly difficult barriers in the path of a lasting solution.

Hesitancy in facing the clear-cut issue can find no basis in the claim that the courts would be unwilling to hold such an assumption of power by Congress a constitutional legislative act. In addition to the liberal language quoted above, we find federal courts today both willing and anxious to meet the exigencies of the day in regard to radio. Courts are experiencing a new concept of liberality, not one which loses complete sight of reason or common sense, but one which is thoroughly in step with current conditions, which is, in a word, in step with the times. That is amply illustrated in a recent opinion of Judge Bowen of the United States District Court of the Northern District of Washington:<sup>44</sup>

"Complainants and its newspaper members' facilities are not likely to pass into disuse as some news communication instrumentalities have in the past, but the service which complainants' facilities have rendered to the past or may render to the future cannot be employed to hinder the use of more modern means, including those of the defendant radio

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<sup>44</sup> *Associated Press v. KVOS, Inc.*, 9 Fed. Supp. 279, 288 (W. D. Wash. 1934).

station which, in some respects, surpass complainants' facilities to an extent comparable to the advantage of the airplane over those of the railroad train."

#### ATTEMPTED FEDERAL CONTROL

Congress has not been entirely unmindful of the need for federal regulation of defamation by radio. There were two things which prevented the passage of such an amendment when the Radio Act of 1927 was passed by Congress: (1) a parliamentary snarl with all the attendant confusion which has seen the early demise of similar worthy and needed legislation and which is undoubtedly one of the much-regretted weaknesses of our legislative system; and (2) a failure on the part of Congress to understand the authority under which such legislation clearly could be enacted.<sup>45</sup> Inasmuch as this particular phase of the subject wields such a powerful effect upon the problem we are discussing and since it has been nowhere discussed fully in this connection, we venture a rather exhaustive explanation of the circumstances which surrounded the first and only attempt of Congress to effect a federal control of defamation by radio, an attempt which, unfortunately, was doomed to failure.

When Congress undertook to write the Radio Act of 1927 the original bills were sponsored in the House of Representatives by Mr. White<sup>46</sup> and in the Senate by Mr. Dill,<sup>47</sup> father of modern radio legislation. The debate on the floor of the House of Representatives, led by Congressman Blanton of Texas, is of the utmost interest in this consideration. He it was who championed the first amendment looking to federal control of defamation by radio. The full terms of Mr. Blanton's amendment<sup>48</sup> are set out here as follows:

"Amendment offered by Mr. Blanton: Page 16, line 20, after the word 'corporation,' strike out the period and insert a colon and add

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<sup>45</sup> CONG. REC. 2567 (Statement of Mr. Scott) (1927).

<sup>46</sup> 67 CONG. REC. 5479 (1926).

<sup>47</sup> 67 CONG. REC. 12350 (1926).

<sup>48</sup> 67 CONG. REC. 5372 (1926).

the following: 'Provided, That any person who, over any radio, shall, affecting the character and standing of another, use derogatory language, which under the laws of any state into which such language is transmitted constitutes (a) slander, or (b) libel were such language in writing, shall constitute (1) the offense of criminal slander, which may be prosecuted either in the state from which such language was broadcast, or in any state into which such language was transmitted, and upon conviction, said offender shall be punished by a fine of not less than \$100 and not more than \$1,000, or by confinement in jail for a term not less than 30 days and not more than one year, or by both such fine and imprisonment; and (2) civil slander, for which the person aggrieved may make the offender respond in appropriate damages, under the measure of damages prevailing in such state.'

Mr. Lehlbach <sup>49</sup> requested Mr. Blanton to modify his amendment so as to make the law of the place where the utterance takes place applicable instead of where the voice may be heard, which Mr. Blanton refused to do, saying that he felt that it was better to have it in specific form, constituting a specific federal offense, with a specific punishment, than to have it uncertain.

Mr. Lehlbach engaged in an interesting discussion with Mr. Blanton regarding the possibility of the State of Indiana making laws to punish one for a statement made in the State of New Jersey. Mr. Blanton readily agreed that no state could make such a law, but, he said,

"The Federal Government of the United States can, and it should do it. Anyone in New Jersey, who for the purpose of injuring the good reputation and standing of some one living in Indiana, should not be permitted to hide behind the state line in New Jersey, and, by the use of a powerful radio, transmit into and throughout the State of Indiana false, slanderous and libelous statements which unjustly and wantonly ruin the good name and standing of a citizen of Indiana, and then escape punishment simply because the laws of New Jersey might permit it. The laws of Indiana might not permit such slander, yet without a federal statute there would be no way on earth for the Indiana citizen to hold the offender in New Jersey responsible . . . . One who deliberately, for the malicious purpose of injuring another, transmits by radio false and slanderous language affecting the good standing of another across state lines and into and throughout other

states, by federal statute ought to be punished, either in the place where it was uttered or the place to which it is sent, whichever takes jurisdiction of the man first."

Mr. Blanton, after stating that in his home state, Texas, it was not slander for anyone verbally by word of mouth to make false and slanderous charges about a man (although otherwise for a woman) refused, at first to change his amendment, at the request of Mr. Free, so as to make it an offense only in the state where the statement was made; later he consented to a change, but when Mr. Wingo objected to further amendment and to the entire amendment in principle as first stated, the vote was asked for, the Committee of the Whole agreeing to the amendment by a vote of 42 to 27.<sup>50</sup> All this occurred only after Mr. Blanton had used some persuasive argument in favor of his amendment, saying, in part:

"This modern radio broadcasting is not a state matter, for it goes into every state. It is bigger than any one state. There is one function of the Federal Government—to protect the citizens of one state against impositions unlawfully made upon them by citizens in other states, and to provide a federal tribunal where such interstate controversies may be heard. . . . This is one of the most important questions that can affect the whole people of this Government. . . . The only way to make such contemptible action a crime is to do it by federal statute, by such an amendment as I am now proposing. And I sincerely hope that my colleagues will adopt it. Is it not our intention to protect the citizens of every state against slander and libel which may come from others in other states into their own state about them? This is a national question and can only be settled by a federal law."

Mr. Blanton's amendment, it would appear up to this point, was defeated principally because the majority of the Congressmen thought that the common law and state statutes were sufficient to protect any individual. But how will Congress feel toward this question now that experience shows that common law and state statutes are not sufficient to protect any individual? How will the Congress feel in the face of mounting confusion and chaos in the inade-

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<sup>50</sup> 67 CONG. REC. 5573 (1926).

quate regulation of defamation by radio by the various states? How will Congress act when it perceives the crazy-quilt of state statutes on libel and slander scattered about in hopeless disarray, with conflicting and doubt-provoking judicial determinations and interpretations further adding to the bewilderment of those who would legitimately use the radio for useful, lawful purposes, but who are constrained to do so because of doubt as to the legal consequences and of those also who have been damaged by such insidious defamation and who are powerless to look to any ordered authority for relief from intolerable situations?

But let us continue with the fate of legislation controlling defamation by radio in the Senate and in the final adoption of the conference report. We hasten to do this in spite of the temptation to draw conclusions which mount steadily and which point more and more to the necessity for assumption of paramount federal control in this important field. When the Senate bill emerged from considerations in the Committee on Interstate Commerce, it, too, contained provision for federal control of defamation by radio. Senator Dill, in making public the committee report, described Section 7, which is in point here, as follows:

"This section provides that no person shall utter any false, fraudulent, libelous or slanderous communication by radio, and violation of this provision shall be punished by a fine of \$1,000 or one year in jail, or both."

Following this report to the Senate and adoption, the bill went to a conference committee, was referred again to both houses of Congress for action, and final action came on January 27, 1927. The further point which is germane to our question here, and the regrettable point, be it said in all sincerity, was that the so-called Blanton amendment, set forth in full above, had been stricken out in conference, with the explanation that the conferees doubted the legality of



the provision.<sup>51</sup> Even though this particular provision is admittedly not perfect in its construction, nor all encompassing in its scope, it would have been a start at least toward exclusive federal control of defamation by radio. As the matter now stands, it was only by the barest margin that the legislation missed enactment. If more definite provision had been made as to where the right of action would attach, the fate of the provision might have been happier. Had not Congress been bound to vote upon the conference bill in its entirety rather than upon individual sections, so that a separate vote on the Blanton amendment became quite impossible, the fate of the legislation might have been far different also. It does not seem logical to conclude that Congress did not truly admit of the legality of such legislation, yet the only concession to this stand can be found in Mr. Scott's<sup>52</sup> answer to Mr. Blanton, when asked why the amendment was lost in conference:

"When we reached conference the question presented itself as to the legality of such provision. I do not refer to the legality of the right of Congress to put it in, but as to where the right of action would attach."

Perhaps we were unduly hopeful in expecting Congress to undertake to cover such a diversity of subjects well as it undertook to determine in the Radio Act of 1927, embroiled as it was in bitter debates on the kind of regulatory body which should assume control, anti-monopoly provisions, freedom of speech and censorship questions and a host of other equally annoying problems.

One thing which the congressional debates did establish, however, is the incontrovertible fact that there is no such

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<sup>51</sup> 68 CONG. REC. 2567 (1927).

<sup>52</sup> 68 CONG. REC. 2567 (1927).

thing as an "intrastate libel" by radio. Any defamation does, or at least might, reach beyond state borders and, as such, present a problem pressing for federal regulation. Congressman Blanton's thundering query,<sup>58</sup> "Shall we let one state's citizens defame or injure citizens of another state?" reverberates today even louder so that some day it must be answered by Congress. It would be difficult to imagine a more clear-cut "federal question" than that we are discussing here.

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(To be continued.)

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<sup>58</sup> 67 CONG. REC. 5573 (1926).