

Essential Principles of Communications Law

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ESSENTIAL PRINCIPLES OF COMMUNICATIONS LAW

TO PAM AND RICO

Preface

The coursing of the law in general, as Justice Holmes once observed, is a function of logic and experience. Communications law, as a discrete body of legislative enactment, administrative regulation, and constitutional and statutory jurisprudence, reflects logic and experience that are especially fluid and reactive to new and rapidly evolving realities. The quickening and consequences of technology have generated media forms and legal issues that were barely conceivable when the twentieth century commenced, much less when the First Amendment was formulated.

Given an area of law so susceptible to continuous and even sudden redefinition, many textbooks that have occupied the field increasingly risk obsolescence. A primary aim of this book is to facilitate the study of communications law in the most comprehensive and contemporary sense. Coverage includes not only a focus upon print and broadcasting but extensive treatment of cable and unprecedented attention to common carriage.

As its title suggests, the book is intended to relate basic concepts and principles. Notwithstanding that fundamental aim, the text comprises materials carefully chosen to afford opportunity for in-depth discussion and sophisticated understanding of significant themes and topics.

A work of this nature, although attributed to the author, reflects the cumulative influences of some excellent teachers and colleagues in the academic world, some thoughtful practitioners in the professional world, and some insightful friends, acquaintances, and family in the real world. The research assistance of Barbara McCalla and Esther Jacobo-Rubio

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Part One

THE NATURE AND LAW OF MEDIA

The terms of the First Amendment were constitutionally fixed two centuries ago. Since then, the means for communicating information have multiplied in exponential fashion. Nearly 150 years after the First Amendment was ratified, the Supreme Court depicted the press in terms of newspapers, periodicals, pamphlets, and leaflets. Even that characterization is underinclusive and hence obsolete for modern purposes, given the subsequent development of broadcasting, cable, satellites, telecommunications, and computers.

Media law commences with the deceptively simple premise that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” Governance has become detailed, complex, and even contradictory as the media have been progressively redefined and augmented. Until this century, mass communication primarily was a function of the printing press. Technology in general and electronification in particular have accelerated the processing and movement of information. What until recently were recognized as unique and legally significant capabilities and characteristics of various media, and the basis for media-specific regulation, increasingly are suspect as methodologies of processing and disseminating information become increasingly fungible.

Communications law is as dynamic as the field it governs. Recent history has demonstrated that premises must be continuously scrutinized to guard against obsolescence. Until a few years ago, the notion that broadcasting used a scarce resource was the central premise for making the medium uniquely susceptible to official content control, as discussed

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in Chapter 10. Competing against and increasingly prevailing over the scarcity premise is the evolving reality of new and rival communications technologies, with the consequent implication that each medium is an element of a media universe composed of functional equivalents.

As the First Amendment approached the end of its second century, dominant concerns with the press included concentration of ownership and effects of the media especially upon children. Commencement of a third constitutional century intimated the prospect of decentralization and fragmentation of information processing and transmission attributable to computer networking, desktop publishing, telefacsimile, and other technological options. Such democratization of the information marketplace conceivably may accentuate or alleviate concern with the media's impact. Metamorphosis that is continual, rather than periodic or occasional, at minimum indicates that society's formulation of media policy remains no less critical than it was when the First Amendment itself was composed.

Chapter 1

The Origins and Nature of the First Amendment

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.

Abrams v. United States, 250 U.S. 616, 630 (1919)
(Holmes, J., dissenting)

The relationship between communications and the law is characterized generally by its variability. It is defined specifically by time, circumstance, and the nature of the message, medium, or both. Freedom of speech and of the press represents the extension of ideology that has evolved over almost an entire millennium. Constitutionalization of the principle, although now replicated in the charter documents of many other nations, is an originally American notion.

An explicit guarantee of expressive freedom by itself does not ensure that speech and press will be immune to official control or influence. Even in the United States, expression is routinely and constitutionally abridged for reasons considered compelling or substantial. As the English experience illustrates, an enumerated guarantee is not essential to the existence of significant expressive liberty. Constitutional enshrinement of principle nonetheless illuminates a culture's professed values and purported character. Even more revealing, when such formalization exists, may be the exceptions and qualifications that ultimately define the real nature and extent of constitutional freedom.

It is an elemental precept of American constitutional law, dating back to *Marbury v. Madison*, that the judiciary has the final responsibility for determining “what the law is.” The actual contours of the First Amendment thus are defined by accumulated jurisprudence that charts the boundary between expressive liberty and official control. Insofar as the First Amendment responds to new problems and is a basis for challenging official action that directly or indirectly affects expression, its actual meaning will remain a function of evolution rather than specific ordination.

I. PRELUDE TO THE FIRST AMENDMENT

A. SEMINAL CONCEPTS

Freedom of the press represents a relatively fresh and still-developing aspect of the media’s existence. For most of the press’s history, official suppression and control have been normative rather than exceptional governmental responses. Even before the advent of movable type, English law proscribed spoken criticism of the state. Seditious libel was criminalized in the thirteenth century, long before the capacity existed for mass dissemination of information and thought. The printing press thus was introduced in the late fifteenth century against a backdrop of official intimidation calculated to deter rather than facilitate technological maximization, expressive initiative, and viewpoint diversity.

The emergence of the printing press and its capacity to function as a mass medium presented both an opportunity and a risk for the established order. While the press afforded political and religious institutions an enhanced means to propagate their expectations and sentiments, it also possessed potential for effectively disseminating competing views and criticism. To account for such possibilities in England, the Crown introduced a system of licensing. The linchpin of official control was the creation of a special company to which all printing was assigned. Publication thus was a special privilege conferred upon a select few. Official control was effectuated not only by government franchise but by pre-publication review, harsh penalties for criticism of church or state, and proscription of obscene or immoral expression.

As media technology and usage evolved, regulation became increasingly sophisticated. By the seventeenth century, the methodology of suppression had expanded to include taxation and a well-developed system of previous restraint. Official efforts to control the flow and content of information were increasingly confounded, however, by a confluence of entrepreneurial initiative, emerging political ideology, and a quickening sense of the utility of instrumentalities for mass communication. Central to the philosophy of natural law, which propounded