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A Law Antecedent and Paramount

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A Law Antecedent and Paramount

Fred H. Cate*

I

“Congress shall make no law . . . abridging freedom of speech or of the press.” Whatever else the First Amendment may mean, the Supreme Court has interpreted it to forbid the government from restricting expression because it disagrees with the sentiment expressed;¹ restricting expression prior to its utterance or publication;² and making impermissible distinctions by content,³ compelling speech⁴ or access to the expressive capacity of another,⁵ without demonstrating that the abridgement is narrowly tailored to serve a compelling governmental interest. These First Amendment principles restrict not merely Congress, but all federal and state governmental agencies, and apply to expression that the Court has determined does not independently warrant protection,⁶ conduct that involves no speech,⁷ and activities ancillary to expression.⁸

Despite the force and breadth of the Supreme Court’s interpretation of the First Amendment, its application has not been uniformly consistent. When confronted with restrictions on telegraph and telephone communications and on over-the-air radio and television broadcasting, the Court has assumed—often with little explanation—that “differences in the character-

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1. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989).
2. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931).
3. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (plurality opinion).
4. *See, e.g.*, *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943).
5. *See, e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
6. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
7. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989).
8. *See, e.g.*, *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

istics of new media justify differences in the First Amendment standards applied to them."⁹

Telegraph companies, for example, were routinely treated by courts as common carriers, analogous to the railroads that their lines so often ran along, rather than to the press or other speakers whose messages their lines carried. As common carriers, telegraph companies were subject to significant legislative and judicial regulation. They were required to serve all who requested carriage at a reasonable price and subject to reasonable regulations, without discriminating among customers or other carriers. The First Amendment played no role in the evaluation of these restrictions on telegraph companies.

Laws governing the telegraph were the obvious model for the telephone. In 1910, Congress passed the Mann-Elkins Act,¹⁰ classifying telephone companies as common carriers and subjecting them to the regulations of the Interstate Commerce Commission. In 1934, Congress passed the Communications Act,¹¹ the legislation that this *Journal* issue commemorates. Title II of the Act, regulating common carriers, was taken almost intact from the Mann-Elkins Act. As with regulation of the telegraph, there was no mention of the First Amendment; a law designed for regulating the nation's railroads had been given a new name and applied to the nation's largest communications industry.

The First Amendment rights of broadcasters have fared only marginally better. In the Radio Act of 1927,¹² Congress restricted broadcasting to persons licensed by the federal government, and then only on the frequencies and during the times assigned to them. Broadcast licensees which carried the advertisements of one political candidate were required to give or sell equal time to opposing candidates. In a single provision, the Act forbade censorship of broadcast programming while it banned obscene, indecent, or profane language. Finally, the 1927 Act created a new administrative body—the Federal Radio Commission—to oversee the licensing process.

Under the guise of remedying interference with military, particularly naval, transmissions, and among commercial and amateur stations, the Radio Act of 1927 permitted the newly created Commission to deny use of the broadcast spectrum to anyone whose future expression the Commission

9. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

10. Pub. L. No. 61-218, § 7, 36 Stat. 539, 544-45 (1910) (superseded by the Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064).

11. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064 (codified as amended in scattered section of 47 U.S.C.).

12. Radio Act of 1927, ch. 169, 44 Stat. 1162.

believed might not serve the “public interest, convenience, or necessity.” As with common carriers, all would-be broadcasters became subject to a prior restraint, unless and until the Commission chose to remove the bar created by the Act. The Act compelled licensed broadcasters to grant access to their transmission capacity to candidates for public office. The significance of this incursion is only enhanced by the fact that the people who passed and signed the law were and would be again candidates for public office. The 1927 Act also required censorship of broadcast programming, at least to the extent necessary to enforce the Act’s ban on “obscene, indecent, or profane language,” while purporting to forbid government control over the content of broadcast expression. The First Amendment was nowhere to be found.

The 1927 Act was soon replaced by the Communications Act of 1934, Title III of which, covering broadcasters, was taken virtually intact from the 1927 Act. When broadcasters challenged the 1934 Act’s restrictions on their First Amendment rights, they were told by the Supreme Court that “[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”¹³ The Court’s reasoning, which was to become the basis for half a century of future cases, began with the concept of electromagnetic spectrum scarcity, where there are more potential broadcasters than there was broadcast spectrum to accommodate their transmissions.

The Supreme Court expanded on the reasons why the First Amendment applies with less force to broadcasting than to print media in *Red Lion Broadcasting Co. v. Federal Communications Commission* (FCC or Commission).¹⁴ Justice White, writing for the unanimous Court, stressed that “[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees.”¹⁵ As a result, broadcasters owe a duty to the public to provide them with “suitable access to social, political, esthetic, moral, and other ideas and experiences.”¹⁶ Rather than occupy the spectrum for their own expressive purposes, broadcasters are to serve the interests of the public as identified by the FCC and enforced by the courts. Like other trustees, broadcasters can be restrained from, or compelled to, action to serve the interest of their trust beneficiaries. “It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community,

13. *NBC v. United States*, 319 U.S. 190, 226 (1943).

14. *Red Lion*, 395 U.S. 367 (1969).

15. *Id.* at 390.

16. *Id.* (citations omitted).

obligated to give suitable time and attention to matters of great public concern."¹⁷

Red Lion demonstrates the power of the scarcity doctrine. It has been found to justify not only licensing broadcasters and setting standards for picking and choosing among applicants, but also compelling broadcasters to cover subjects they might not otherwise have selected and permitting the expression of others in response to that coverage. Only five years after *Red Lion* was decided, the Court would unanimously strike down a far more limited intrusion into the First Amendment rights of newspaper publishers. The interests of the public in a competitive and responsible press in *Miami Herald* could not justify "[c]ompelling editors or publishers to publish that which "reason" tells them should not be published."¹⁸ In *Red Lion*, similar interests were used by the unanimous Court to justify obliterating the independent First Amendment interests of broadcasters. The only difference between the two cases was the medium involved.

II

Today, spectrum scarcity is widely recognized as having little relevance to broadcast regulation. Moreover, the Supreme Court recognized in *Turner Broadcasting System, Inc. v. FCC*,¹⁹ that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation,"²⁰ the technology through which most Americans today view video programming.

Telephone companies, too, are beginning to be recognized by courts as First Amendment speakers. Four federal courts in the past year have enjoined enforcement of the telephone-cable cross-ownership ban²¹ on the basis that it is "facially unconstitutional as a violation of plaintiffs' First Amendment right to free expression."²² Almost a century of regulations

17. *Id.* at 394.

18. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

19. *Turner Brdcast.*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

20. *Id.* at 2458.

21. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b), 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(b) (1988)) ("It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.').

22. *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 932 (E.D. Va. 1993), *aff'd*, No. 93-2340 (4th Cir. Nov. 21, 1994); *see also* *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994); *BellSouth Corp. v. United States*, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994); *Ameritech Corp. v. United States*, Nos. 93C6642, 94C4089, 1994 U.S. Dist. LEXIS 15512 (N.D. Ill. Oct. 27, 1994).

that ignored the First Amendment rights of communications common carriers and undervalued the First Amendment rights of broadcasters is under attack and the pace of change, while slow, is escalating. The 1934 Communication Act's disregard for the First Amendment applied in the context of electronic media is finally being reversed.

A new medium of communication, however, is attracting the attention of regulators and once again calling into question the role of the First Amendment. This new battleground for fundamental First Amendment freedoms is the network of computer networks, the so-called information superhighway, and its dramatically expanding precursor, the Internet. Growing at a rate of 750,000 new users per month, the Internet today connects more than 45,000 separate networks and 25 to 30 million users in more than 100 countries.²³ The fastest growing sector of the Internet is commercial information providers, which is not surprising given that corporate spending on information technology in the United States in 1993 reached \$200 billion, up from just over \$150 billion in 1992.²⁴

The Clinton administration has responded to charges that the power, scope, and enormous potential of information technologies warrant government regulation by launching an ambitious information policymaking initiative focused on the National Information Infrastructure (NII). Set forth on September 15, 1993, in the *Agenda for Action*, the administration's initiative addresses the "essential role" of the government in promoting and controlling the nation's information infrastructure.²⁵ The central component of this initiative is the Information Infrastructure Task Force, chaired by Ron Brown, Secretary of Commerce.

Absent from the current policymaking debate about electronic information is any mention of the First Amendment. Neither the legal constraints imposed by the First Amendment on government regulation of expression, nor the importance of free expression, appear in the *Agenda for Action*, are the subject of any NII Task Force committee or working group, or even warrant mention in a single speech on the NII by any senior administration official. The silence is reminiscent of the 1934 Act's regulation of telegraph and telephone companies, and radio and television broadcasters.

The absence of the First Amendment is of substantially greater consequence in the case of electronic information than it was with

23. *Latest Estimates of Internet Growth*, ONLINE NEWSLETTER, Nov. 1994, available in LEXIS, News Library, Nwsltr File.

24. *Massive Outlays*, WALL ST. J., Nov. 14, 1994, at R18.

25. INFORMATION INFRASTRUCTURE TASK FORCE, NATIONAL INFORMATION INFRASTRUCTURE AGENDA FOR ACTION 6 (1993).

telegraphy, telephony, and broadcasting, because the vast majority of communication in the United States today is electronic. This is not a peripheral issue. Text is composed on word processors, stored in computer memories, transmitted via local networks, telephone lines, and satellites, and captured on printers, facsimiles, and computer monitors. Images and sounds are captured by cameras, scanners, microphones, and other sensors, stored on tape or disc, broadcast over the air or through coaxial cables or optical fibers, and displayed on television or computer screens or heard on radio. Data and voice signals are collected by telephones, computers, and remote sensors, and transmitted via pairs of copper wires, optical fibers, and satellites, or beamed through the air. Documents are printed, photocopied, facsimiled, scanned, and increasingly stored electronically.

No form of communication other than face-to-face conversation and hand-written, hand-delivered messages, escapes the reach of electronic information technologies. As those exceptions indicate, no communication that bridges geographic space or is accessible to more than a few people exists today without some electronic component. And the dominance of electronic communication is growing. E-mail, computer bulletin boards, national and even global networks, truly portable telephones, digital facsimile machines, voice mail, nationwide paging services, interactive television, video telephones, and countless other technologies are decreasing our reliance on those few remaining non-electronic communication systems, such as the post office, and forever changing the way we communicate. If the First Amendment does not apply to these media, it has little relevance today, and even less in the twenty-first century.

The omission of the First Amendment is all the more significant in light of the substantial regulatory role that the administration anticipates the government should play. In his first address on the NII after publication of the *Agenda for Action*, Vice President Al Gore—the intellectual and political force in the administration pushing the NII—analyzed the current information marketplace to the environment that, in his view, permitted the sinking of the *Titanic*. The Vice President asked why the *Titanic*'s radio operators did not receive the warnings about icebergs in the vicinity and why so few ships responded to the *Titanic*'s distress signals.

The answer is that—as the investigations proved—the wireless business then was just that, a business. Operators had no obligation to remain on duty. They were to do what was profitable. When the day's work was done—often the lucrative transmissions from wealthy passengers—operators shut off their sets and went to sleep. . . .

Ironically, that tragedy resulted in the first efforts to regulate the airwaves.

Why did government get involved? Because there are certain public needs that outweigh private interests.²⁶

The Vice President's focus on regulating "private interests" to serve "public needs," however worthy, raises special concerns when those private interests are involved in providing information services and products. The complete absence of the First Amendment from the policymaking debate exacerbates those concerns because it suggests that they have not been identified and resolved, but rather ignored by the government.

The First Amendment and the judicial opinions and commentary interpreting it are more than just limits on government action; they reflect principles and aspirations which, while inconsistent and even flawed, offer important guidance for regulation or regulatory forbearance. In short, the First Amendment is central to the information policymaking process not only because compliance with its terms is constitutionally required of every law or regulation emanating from that process, but also because the First Amendment, and the discussion surrounding it, contribute something positive and valuable to the process—a constitutional commitment to free expression and to reaping the benefits of free expression without government interference.

If sixty years experience with the Communications Act of 1934 has taught us nothing else, it must caution against excluding powerful communications media from the full protection of the First Amendment. To do so with today's electronic information technologies would create an exception that would make the rule of freedom of expression meaningless.

26. Vice President Al Gore, Remarks at the National Press Club (Dec. 21, 1993) (copy on file with the *Federal Communications Law Journal*).

