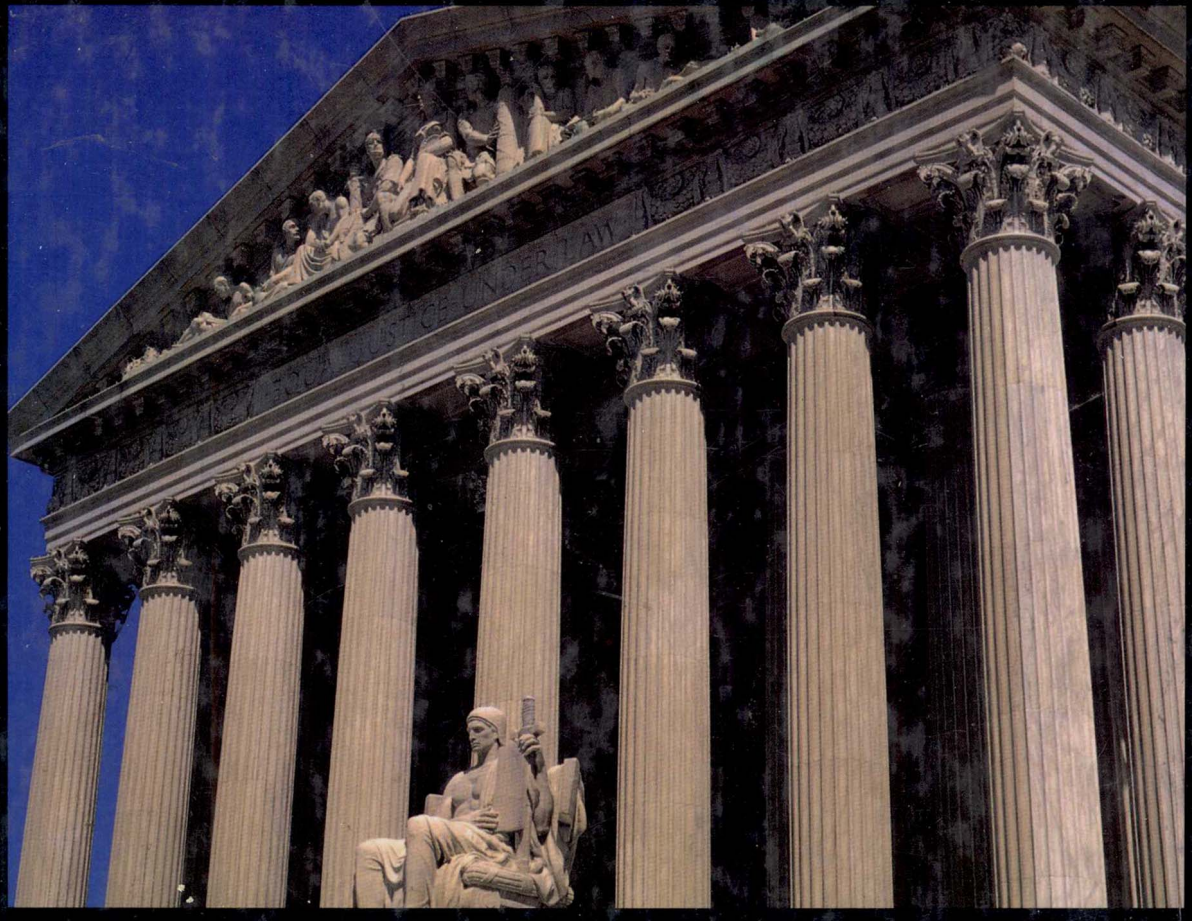
The Law of Public Communication

Kent R. Middleton • Bill F. Chamberlin



THIRD EDITION

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Kent R. Middleton • Bill F. Chamberlin
University of Georgia *University of Florida*

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Preface

As always, rapid change marked the last three years of communication law. Cable was re-regulated, *Soldier of Fortune* magazine was ordered to pay $2 million for publishing a murder advertisement, and journalists were held liable for violating promises to keep sources confidential. The third edition of *The Law of Public Communication* includes these developments as well as recent court decisions affecting newsracks, parodies, advertisements for lotteries, and the opening of files about the assassination of President John F. Kennedy. The book also covers the libel suit of Janet Malcolm and Jeffrey Masson and offers a new section on civil rights violations by the media.

Professors who have adopted *The Law of Public Communication* say they appreciate our recognition that communication law encompasses more than just the law of journalism and broadcasting. The text treats traditional journalism law comprehensively but also includes the law affecting new technologies, advertising, and public relation topics such as expression in elections, referenda, lobbying, labor-management relations, and securities trading. We offer separate chapters on corporate and advertising law and also integrate legal issues of interest to public relations and advertising practitioners throughout the text. Like the first two editions, the book reflects not only the breadth of communication law but also the composition of the student body at colleges of journalism and mass communication. Advertising and public relations majors frequently comprise 50 to 60 percent of the student body in communication programs.

As in the second edition, Chapter 12 explains the rationale for regulating broadcasting and provides extensive treatment of the regulation of political broadcasting. A new final chapter, Chapter 13, focuses on the expanding regulation of cable communications and the emergence of wireless, satellite, and other technologies.

Some material in the third edition is incorporated from the two updates published since the second edition. These well-received updates, with subject headings parallel to those of the text, spare professors and students from using a textbook that is two or three years out of date—an eternity in communication law. Longman Publishing Group and the authors are committed to publishing updates in 1995 and 1996 to supplement the third edition. The updates may be purchased with a new text at no additional cost, or separately for a modest charge. Longman will also offer a casebook to supplement the text.

As before, *The Law of Public Communication* is a practical book for students planning careers in communication. The text explains the law as it applies to the daily work of writers, editors, speakers, artists, and photographers. The innumerable statutes and cases are presented in a cohesive narrative that is understandable even to students studying law for the first time. While presenting much of the rich complexity of communication law, we strive for readability. To help ensure understanding, we reinforce the narrative with frequent summaries of major points. Always we hope to convey the fascination we maintain with the dynamic field of communication law.

Communication law is a liberal arts course. Students learn more than practical guidelines for using the law and avoiding lawsuits. Students also learn legal principles and methods of analysis necessary to evaluate and keep abreast of a rapidly changing subject. We try to discuss cases in sufficient detail—often with quotations—for students to understand legal issues, identify court holdings, and appreciate the court's rationale. We frequently relate cases to press theories and legal tests explained at the beginning of the text. As was true with earlier editions, the third edition contains extensive but unobtrusive footnotes to document the scholarship on which assertions are based and to suggest further reading for the student and professor.

The Law of Public Communication continues to focus on the law regulating the content of public communication, not on laws regulating the structure of corporate media, newsroom safety, or labor-management contracts. Thus, taxes on the media are important in this book only if they restrict what might be said or published. Business and economic issues that do not directly affect the content of the media are left to courses in business law and communication management.

We would like to thank the many people who have helped and encouraged us, particularly the scores of professors and students who have paid us the high compliment of saying our book is comprehensive, accurate—and interesting. We also appreciate our critics, both paid and unpaid, who have pointed out errors and offered many suggestions that we have incorporated into the text.

We would like to thank the many communication professors who suggested changes in the second edition or evaluated drafts of the third. Among them are

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Kent R. Middleton
Bill F. Chamberlin

Contents

CHAPTER 1

Public Communication and the Law

For a few weeks in 1991, Americans followed the Palm Beach rape trial of William Kennedy Smith on television and in newspapers and magazines. The trial involving one of the most publicized families in the country triggered a national debate over the prosecution of date rape. Few among the millions following the trial may have realized how much communication law affected what they learned about the trial. This book is about the laws and regulations affecting public communication, including the reporting of criminal trials.

The primary legal question in the Smith trial was obvious: Did he rape his accuser, Patricia Bowman? As in many high-profile trials, however, the case of William Kennedy Smith, a nephew of Massachusetts Senator Edward Kennedy, featured several legal struggles over the public's access to information about the case.

The nation could watch the trial, for example, because the state of Florida, like most states, permits cameras in courtrooms. In addition, the public learned details of the case before the trial because thousands of pages of police interviews, reports, and investigative summaries given to Smith as the defendant were, in Florida, a matter of public record. In an attempt to limit pretrial discussion of the case, Judge Janet Lupo restricted the police and lawyers from both sides from providing reporters with statements about such matters as the character and credibility of witnesses, physical evidence to be presented in the case, and results of tests used during the police investigation.

In spite of Judge Lupo's efforts, however, so much information about the case was widely circulated that many observers questioned whether Smith could receive a fair trial. The public knew, for example, that several women besides Bowman claimed to have been sexually assaulted by Smith, information not disclosed to the jury under court rules of evidence.

After Smith was acquitted, communication law was again an issue as officials attempted unsuccessfully to prosecute the *Globe,* a national tabloid, for printing Bowman's name before she had publicly identified herself. Florida courts, following the lead of the U.S. Supreme Court, declared unconstitutional a state law prohibiting the broadcast or publication of the names of rape victims.[1]

This book will discuss not only the communication law affecting trial coverage but also the law of libel, privacy, corporate speech, copyright, obscenity, and access to government-held information. The book focuses on the law affecting the content of public communication, including printed publications, electronic media, public relations, and advertising.

This chapter will examine legal concepts and procedures important to an understanding of the law of public communication. It will talk about the purpose and organization of law. It will also describe court procedures and discuss how communicators work with lawyers.

THE SOURCES OF LAW

Law can be defined in many ways, but for our purposes it is the system of rules that govern society. Law serves many functions in our society. It regulates the behavior of citizens and corporations, restricting, for example, what advertisers can say about their products. It pro-

[1]Florida v. Globe Communications Corp., 18 Fla. L. Weekly D1697 (Fla. Dist. Ct. App. 1993). *See also* Florida Star v. B.J.F., 491 U.S. 524, 16 Media L. Rep. 1801 (1989).

vides a vehicle to settle disputes, as in the William Kennedy Smith rape trial. And law limits the government's power to interfere with individual rights, such as the right to speak and publish.

The law in the United States comes primarily from six sources: constitutions, statutes, administrative rules and regulations, executive actions, the **common law,*** and the law of **equity.**

Constitutional Law

Constitutions are the supreme source of law in the United States and are the most direct reflection of the kind of government desired by the people of the country. Constitutions of both the federal and state governments supersede all other declarations of public policy. The Constitution of the federal government and the constitutions of the 50 states establish the framework for governing. They outline the structure of government and define governmental authority and responsibilities.

Frequently, a constitution limits the powers of government, as in the case of the Bill of Rights, the first 10 amendments to the U.S. Constitution. The Bill of Rights, printed in Appendix B of this book, protects the rights and liberties of U.S. citizens against infringement by government. The First Amendment, particularly its prohibition against laws abridging freedom of speech and the press, provides the foundation for communication law.

The federal constitution is the ultimate law of the land. Any federal law, state law, or state constitution that conflicts with the U.S. Constitution cannot be enforced; the U.S. Constitution prevails. Similarly, a state constitution prevails in conflicts with either the **statutory law** or the common law in the same state. However, federal and state laws that do not conflict with the federal constitution can provide more protection for communicators than is available under the First Amendment alone.

The U.S. Supreme Court, the nation's highest judicial authority, has the last word on the meaning of the federal constitution. Each state's supreme court is the interpreter of that state's constitution. Only the U.S. Supreme Court can resolve conflicts between the state and federal constitutions. The courts make constitutional law when they decide a case or controversy by interpreting a constitution. In 1980, the U.S. Supreme Court said the First Amendment required that the public and press ordinarily be permitted to attend trials.[2] Constitutional law can be understood only by reading the opinions of the courts.

The U.S. Constitution is hard to amend and, therefore, is changed infrequently. Amendments to the U.S. Constitution can be proposed only by two-thirds of the members of both houses of Congress or by a convention called by two-thirds of the state legislatures. Amendments must be ratified by three-fourths of the state legislatures or by state constitutional conventions in three-fourths of the states.

Statutory Law

A major source of law in the United States is the collection of statutes and ordinances written by legislative bodies—the U.S. Congress, the 50 state legislatures, county commissions, city councils, and countless other lawmaking bodies. Statutes set forth enforceable

*Definitions for the terms printed in boldface can be found in the Glossary beginning on page 591.

[2]Richmond Newspapers v. Virginia, 448 U.S. 555, 6 Media L. Rep. 1833 (1980).

rules to govern social behavior. Areas of communication law controlled by statutes include advertising, copyright, electronic media, obscenity, and access to government-held information.

Almost all of this country's criminal law, including a prohibition against the mailing of obscenity, is statutory. Statutes not only prohibit antisocial acts but also frequently provide for the oversight of acceptable behavior. For example, the federal Communications Act of 1934 was adopted so that the broadcast spectrum would be used for the public good.

The process of adopting statutes allows lawmakers to study carefully a complicated issue—such as how to regulate the use of the electromagnetic spectrum—and write an appropriate law. The process permits anyone or any group to make suggestions through letters, personal contacts, and hearings. In practice, well-organized special interests, such as broadcasters and cable television system operators, substantially influence the legislative process.

The adoption of a statute does not conclude the lawmaking process. Executive branch officials often have to interpret statutes through administrative rules. Judges add meaning when either the statutes themselves or their application are challenged in court. Judges explain how statutes apply in specific cases, as when the U.S. Supreme Court ruled in 1983 that the Copyright Act allows homeowners to tape television programs on their VCRs.[3] In 1989, the Court said a provision in the federal Freedom of Information Act allows the FBI to withhold from the public a compilation of an individual's criminal records stored in a computer data base. The Court said that giving the records to a reporter would constitute an "unwarranted" invasion of privacy, one of the exceptions to the disclosure requirements in the act.[4]

The courts can invalidate state and local laws that conflict with federal laws or the U.S. Constitution, including the First Amendment. In 1974, the U.S. Supreme Court declared unconstitutional a Florida statute that required newspapers to print replies to published attacks on political candidates.[5]

Sometimes federal laws **preempt** state regulation, thereby monopolizing governmental control over a specific subject. For example, under the Constitution, congressional regulation of the economy supersedes state law. In 1984, the U.S. Supreme Court nullified an Oklahoma statute banning the advertising of wine on cable television because it conflicted with federal law prohibiting the editing of national and regional television programming carried by cable systems. The Supreme Court said federal law preempts state television regulation.[6]

Administrative Law

Administrative law, the rules and decisions of administrative agencies such as the Federal Communications Commission and the Federal Trade Commission, has mushroomed in the last few decades and now dominates several areas of communication law. Administrative agencies are created by legislatures to supervise specialized activities that require more

[3]Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).
[4]Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 16 Media L. Rep. 1545 (1989).
[5]Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 1 Media L. Rep. 1898 (1974).
[6]Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 10 Media L. Rep. 1873 (1984).

attention than legislators can provide. Agencies such as the Federal Communications Commission adopt rules and **adjudicate** disputes as authorized by statute.

Congress established the FCC in the 1934 Communications Act to regulate telephone, telegraph, and radio communications. Other agencies that oversee communications include the Federal Trade Commission (FTC), which regulates advertising; the Securities and Exchange Commission (SEC), which controls the communication of corporations registered to sell securities; the Federal Election Commission (FEC), which regulates political campaign contributions and expenditures; the National Labor Relations Board (NLRB), which regulates communication between labor and management; and the Copyright Royalty Tribunal (CRT), which distributes user fees to copyright owners.

Administrative agencies develop detailed regulatory plans and procedures, monitor industry practices, and penalize undesirable behavior. For example, the FCC has declared that broadcasters must provide programming on issues important to their communities. In a few cases, the FCC has refused to renew a broadcaster's license because the station's local programming inadequately served the public interest.

Congress has provided administrative agencies with two kinds of legal authority: **rule making** and conflict adjudication. Through rule making, agencies can establish legally enforceable rules and regulations by following procedures established by law. The Federal Trade Commission told companies in a rule making to measure the size of television screens diagonally for the purpose of advertising claims. Rule making will be explained later in chapters on advertising and electronic media. In addition to rule making, administrative agencies can also adjudicate disputes, resolving complaints initiated by business competitors, the public, or the agency itself. Each side in the dispute has a chance to be heard. In recent years, the FCC has fined several broadcasters for violating indecency regulations after reviewing the complaints of listeners and asking for the response of the broadcast licensees. Federal agency regulations and decisions can be challenged in federal courts.

Executive Actions

The president and other governmental executive officers can also make law. The president exercises power by appointing regulators, issuing executive orders and proclamations, and forging executive agreements with foreign countries. Much of the presidential authority derives from Article II of the U.S. Constitution, requiring the president to "take Care that the Laws be faithfully executed."[7] The Supreme Court has allowed the chief executive broad regulatory powers under the clause. In addition, Congress often grants the president the authority to administer statutes.

Perhaps the president's greatest influence on communication law comes from the power to nominate judges to the federal courts, including the U.S. Supreme Court. The political and judicial philosophies of the judges, and particularly their interpretation of the First Amendment, determine the boundaries of freedom for communicators. The president also nominates the members of several administrative agencies, including the Federal Communications Commission, the Federal Trade Commission, and the Securities and Exchange Commission. The president seldom issues executive orders that directly affect the law of public communication. An exception is the order that determines the documents that should

[7] *See also* U.S. Const. art. II, sec. 2 (appointment power).

be "classified," and thereby withheld from public disclosure, in order to protect national security.

Common Law

The common law, often called judge-made law, was the most important source of law during the early development of this country. Unlike the general rules adopted as statutes by legislatures, the common law is the accumulation of rulings made by the courts in individual disputes. Judges, not legislatures, created the law of privacy that allows individuals to collect damage awards for media disclosure of highly offensive personal information.

Common law in the United States grew out of the English common law. For centuries, judges in England, under the authority of the king, decided controversies on the basis of tradition and custom. These rulings established **precedents** that, together, became the law of the land. When the English colonized America, they brought the common law, including the precedents, with them.

Common law is primarily state law. Each state has its own judicial traditions. Long ago the U.S. Supreme Court ruled that there is no federal common law.

The common law recognizes the importance of stability and predictability in the law. The common law is based on the judicial policy of ***stare decisis,*** which roughly means "let past decisions stand." In the common law, a judge decides a case by applying the law established by other judges in earlier, similar cases. The reliance on precedent not only provides continuity but also restricts judicial abuse of discretion. Thus, editors can know whether a picture they want to publish is likely to be considered a violation of someone's privacy.

While the common law promotes stability, it also allows for flexibility. The common law can adjust to fit changing circumstances because each judge can interpret and modify the law. Judges have five options when considering a case. They can (1) apply a precedent directly, (2) modify a precedent to fit new facts, (3) establish a new precedent by distinguishing the new case from previous cases, (4) overrule a previous precedent as no longer appropriate, or (5) ignore precedent. In most cases, precedent is either followed or adjusted to meet the facts at hand. Judges only rarely overrule previous precedents directly. Ignoring precedents greatly increases the risks of an opinion being overturned by a higher court. In the William Kennedy Smith rape case, Judge Janet Lupo was following Florida court precedent when she allowed cameras to monitor the proceedings.

Constitutional law and statutory law have a higher legal status than the common law, and, therefore, the common law is relied upon only when a statute or constitutional provision is not applicable. The people and their representatives in the legislatures, and not the courts, have the task of lawmaking in a representative democracy. Sometimes legislatures incorporate portions of the common law into a statute, a process called "codification." For example, in 1976, Congress rewrote the federal copyright statute to reflect a judicially created exception to a copyright owner's absolute control of a book, film, or musical score.

Sometimes, people confuse the common law with constitutional law. Both are created, in part, by judicial opinions based on precedent. However, constitutional law is based on judicial interpretation of a constitution, while common law is based on custom and practice.

The common law is not written down in one book. It can be understood only by reading recorded court decisions in hundreds of different volumes. While the 1976 copyright statute is located in one volume of the *United States Code,* the common law of privacy can be discovered only by synthesizing numerous state and federal judicial opinions.

Law of Equity

The sixth source of law, equity, is historically related to the common law. Although *equity* is a legal term, it means what it sounds like. The law of equity allows courts to take action that is fair or just.

The law of equity developed because English common law allowed individuals only to collect monetary compensation awards after an injury had occurred. Under the law of equity, a **litigant** could petition the king to "do right for the love of God and by way of charity."[8] The law of equity allowed for preventive action and for remedial action other than monetary compensation. Although judges sitting in equity must consider precedent, they have substantial discretion to order a remedy they believe fair and appropriate.

Unlike England, the United States and most of the 50 states have never had separate courts of equity. Equity developed in the same courts that decided common law cases. However, juries are never used in equity suits.

Equity is significant in communication law primarily because of the preventive possibilities it provides. Judges, for example, might use equity to halt the publication of a story considered a danger to national security. Punishment after publication would not protect national security.

SUMMARY

Law in the United States comes from constitutions, statutes, administrative agencies, executive orders, common law, and equity. Constitutions outline the structure of government and define governmental authority and responsibilities. In the United States, the First Amendment to the federal constitution protects the right to free speech and to a free press. Statutes are enforceable rules written by legislative bodies to govern social behavior. Administrative agencies make law as they adopt rules and adjudicate disputes, as authorized by statute. Executive orders are issued by the top officer in the executive branch of government. The common law is a collection of judicial decisions based on custom and tradition. Equity provides alternatives to the legal remedies available through the common law.

THE COURTS

Although agencies in all three branches of government in the United States make law, the judiciary is particularly important to a student of the law of public communication.

There are 52 court systems in the country: the federal system, a system for each state, and another in the District of Columbia. The structures of the 52 systems are similar, but the state systems operate independently of the federal system under the authority of the state constitutions and laws.

Most court systems consist of three layers (see Figure 1.1). On the bottom are the trial courts, where the facts of each case are evaluated in light of the applicable law. The middle layer for both the federal system and many states is an intermediate **appellate court.** Fi-

[8]Henry J. Abraham, *The Judicial Process* 14 (1986).