



THE LAW OF

*Public Communication*

2005 EDITION

KENT R. MIDDLETON

WILLIAM E. LEE

BILL F. CHAMBERLIN

# The Law of Public Communication

**2005 Edition**

**Kent R. Middleton**

*University of Georgia*

**William E. Lee**

*University of Georgia*

**Bill F. Chamberlin**

*University of Florida*

**USED BOOK**

MAY 16 2005

*Sold to Aztec Shops, Ltd.*



Boston New York San Francisco  
Mexico City Montreal Toronto London Madrid Munich Paris  
Hong Kong Singapore Tokyo Cape Town Sydney

*Series Editor:* Molly Taylor  
*Editorial Assistant:* Michael Kish  
*Senior Marketing Manager:* Mandee Eckersley  
*Manufacturing Buyer:* JoAnne Sweeney  
*Composition and Prepress Buyer:* Linda Cox  
*Cover Administrator:* Joel Gendron  
*Electronic Composition:* Omegatype Typography, Inc.  
*Editorial-Production Coordinator:* Mary Beth Finch

Copyright © 2005, 2004, 2003, 2002 Pearson Education, Inc.

All rights reserved. No part of the material protected by this copyright notice may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without written permission from the copyright owner.

To obtain permission(s) to use material from this work, please submit a written request to Allyn and Bacon, Permissions Department, 75 Arlington Street, Boston, MA 02116 or fax your request to 617-848-7320.

Between the time Website information is gathered and then published, it is not unusual for some sites to have closed. Also, the transcription of URLs can result in typographical errors. The publisher would appreciate notification where these errors occur so that they may be corrected in subsequent editions.

### **Library of Congress Cataloging-in-Publication Data**

Middleton, Kent.

The law of public communication / Kent R. Middleton, William E. Lee, Bill F. Chamberlin. — 6th ed.

p. cm.

Includes bibliographical references and index.

ISBN 0-205-34350-3 (alk. paper) (Sixth Edition)

ISBN 0-205-41893-7 (2005 Edition)

1. Press law—United States. 2. Mass media—Law and legislation—United States. 3. Freedom of the press—United States. I. Lee, William E. (William Eyre) II. Chamberlin, Bill F. III. Title.

KF2750.M53 2004

343.7309'98—dc21

2003044424

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1 RRD-VA 08 07 06 05 04

**For Margaret and Hillary;  
for Theresa;  
for Jeanne and for Evelyn Thayer.**

# Preface

---

**E**ach edition of *The Law of Public Communication* demonstrates the law's ability to reflect, accommodate, and sometimes anticipate technological changes. This edition is no exception. Nearly every chapter is either touched or shifted by the dynamic emergence of electronic communication. The Supreme Court has ruled the Internet will enjoy the strongest constitutional protection from government regulation, perhaps even stronger than the formidable First Amendment barrier between the print media and government regulators. The Electronic Freedom of Information Act provides faster, cheaper access to information housed by the federal government. The Digital Millennium Copyright Act limits the liability of innocent Internet service providers for the illegal transmission of copyrighted expression on their electronic systems. The Supreme Court ruled that cable operators may be required to carry the programs of local broadcasters.

This edition presents a significant change in the book's organizational structure. Earlier editions of *The Law of Public Communication* featured two chapters dealing with the regulation of broadcasting, cable, and other electronic media. Several years ago, to provide a coherent treatment of the regulation of sexual expression, the material on broadcast, cable, and Internet indecency was moved into the obscenity chapter. This edition builds upon our belief that electronic media should be discussed along with other media, rather than separately. Thus, material on electronic media has been assimilated into chapters throughout the book. For example, the discussion of licensing in Chapter 3 includes public assemblies, motion pictures, broadcasting, and cable. The regulation of political broadcasting is discussed in Chapter 7 along with other laws affecting political communication such as campaign finance and lobbying. The regulation of children's television advertising is now part of the analysis of commercial speech regulation in Chapter 8.

In this edition, we report the Supreme Court's ruling that the Bipartisan Campaign Reform Act's prohibition of "soft money" donations to national political parties was constitutional. We also describe the Supreme Court's ruling upholding the Bipartisan Campaign Reform Act's ban on corporate-sponsored broadcast ads referring to federal candidates in preelection periods. The FCC's recent indecency rulings, and the agency's new emphasis on profanity, are also reviewed. We also discuss a freedom of information case in which the Supreme Court allowed the federal government to withhold the death-scene photographs of a White House official to protect the privacy of the official's family. We also address a decision upholding a federal do-not-call telephone registry and enactment of a federal law to prohibit the deceptive commercial e-mail messages known as spam.

As before, the authors recognize that publishers, broadcasters, and other media owners are not the only speakers with First Amendment rights. Thus, we continue to cover the law of public relations and advertising as it affects political campaign coordinators, corporate spokespersons, and commercial advertisers. We continue to offer separate chapters on

commercial and political speech while integrating issues of commercial communication into traditional chapters of libel, privacy, copyright, and access to courts, executive branch meetings, and records. We also describe significant challenges to the ability of journalists to accompany officials and medical personnel into private domains and challenges to student press freedoms.

*The Law of Public Communication* is still designed primarily for an undergraduate liberal arts class in which professors wish to teach legal principles, demonstrate methods of analyzing cases, and provide practical knowledge for future communicators. The text explains the law as it applies to the daily work of writers, broadcasters, advertisers, cable operators, Internet service providers, public relations practitioners, photographers, and other public communicators. The many 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.

Besides acquiring practical knowledge, students 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 courts’ rationale. We explain theories of media regulation and judicial tests in Chapter 2. A new chapter addressing prior restraints, post-publication penalties, and content-neutral regulations appears as Chapter 3. The theories and tools presented in Chapters 2 and 3 are applied repeatedly throughout the text. As was true in earlier editions, this 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, for example, taxes on the media are discussed only if they restrict what might be said or published. Important 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 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 appreciate our critics, paid and unpaid, who have pointed out our errors and offered many suggestions that we have incorporated into the text. We would also like to thank our reviewers: Kirk Stone, College of Charleston; John O. Omachonu, William Paterson University; Robert Drechsel, University of Wisconsin; and Gary H. Mayer, Stephen F. Austin State University.

Kent R. Middleton  
University of Georgia  
kmiddlet@uga.edu

William E. Lee  
University of Georgia  
weyreelee@uga.edu

Bill F. Chamberlin  
University of Florida

# Contents

---

Preface viii

---

## *Chapter 1*

### **Public Communication and the Law**

**1**

The Sources of Law 2

The Courts 9

The Litigation Process: Civil and Criminal 16

Working with the Law 20

Limitations of Law 23

---

## *Chapter 2*

### **The First Amendment**

**24**

Theory of Freedom of Expression 25

Regulating Expression 31

Tests 39

Scope of the First Amendment: The Hierarchy  
of Protected Expression 43

Who Is Protected? 51

---

## *Chapter 3*

### **Methods of Control**

**67**

Prior Restraints and Postpublication Punishment 68

Content-Neutral Regulations 86

*Chapter 4***Libel****92**

- Libel Terminology 95
- The Plaintiff 97
- The Plaintiff's Burden of Proof 99
- The Defendant's Case 151
- Preventing Libel Suits 175
- Ideas for Reform 177

*Chapter 5***Privacy and Personal Security****180**

- Private Facts 182
- Intrusion and Trespass 192
- False Light 207
- Commercialization 214
- Emotional Distress and Personal Injury 225

*Chapter 6***Intellectual Property****236**

- Copyright 237
- Unfair Competition 268

*Chapter 7***Political Speech****279**

- Referenda and Other Public Issues 280
- Elections 286
- Regulation of Political Candidate Broadcast Programming 296
- Regulation of Public Issues Programming: The Fairness Doctrine 311
- Lobbying: The Right to Petition 314



*Chapter 8***Commercial Speech****317**

- First Amendment and Advertising 318
- Unfair and Deceptive Advertising 333
- Federal Remedies 346
- Other Federal Regulations 357
- Media's Right to Refuse Advertising 364
- Self-Regulation 365
- Securities Transactions 369

*Chapter 9***Obscenity and Indecency****388**

- Obscenity 389
- Indecency 403
- Violent Pornography 420
- Controlling Nonobscene Sexual Expression 425

*Chapter 10***The Media and the Judiciary****435**

- Defining Jury Bias 437
- Remedies for Prejudicial Publicity 444
- Controlling Conduct in Court 450
- Controlling Prejudicial Publicity 457
- Voluntary Cooperation 484
- Contempt Power 487

*Chapter 11***Protection of News Sources, Notes, and Tape****493**

- Protection under the Common Law 495
- Protection under the First Amendment 496

Protection under State Statutes	508
Protection under Federal Statutes and Regulations	516
Congressional Authority	518
Search Warrants	518
Breaching Confidentiality	522

---

*Chapter 12***Access to Information****525**

Access and the Constitution	526
Access to Events	532
Access to Records	536
Access to Meetings	566
Obtaining Access: A Final Word	572

---

*Appendix A:***Finding and Reading the Law****574**

---

*Appendix B:***The First Fourteen Amendments to the Constitution****581**

Glossary	585
Case Index	593
Subject Index	605

# Public Communication and the Law

## THE SOURCES OF LAW 2

Constitutional Law 2  
Statutory Law 3  
Administrative Law 4  
Executive Actions 7  
Common Law 7  
Law of Equity 8

## THE COURTS 9

The Federal System 10  
The State Systems 15

## THE LITIGATION PROCESS: CIVIL AND CRIMINAL 16

A Civil Suit 17  
A Criminal Case 19

## WORKING WITH THE LAW 20

Finding and Reading the Law 20  
Working with Lawyers 21

## LIMITATIONS OF LAW 23

**M**edia professionals, as well as the rest of the public, frequently found themselves attracted to the pervasive media coverage of the O. J. Simpson trial. Journalists, commentators, and public relations specialists, however, were drawn by more than the spectacle of a football hero on trial for a brutal murder and the issues of racial controversy and spouse abuse. For professional communicators, the televised trial provided a year-long laboratory for legal issues affecting the mass media.

Many journalists were interested not only in Los Angeles detective Mark Fuhrman's racial slurs and Simpson's struggle with a glove, but also in Judge Lance Ito's attempts to

balance Simpson's right to a fair trial under the Sixth Amendment with the rights of reporters and commentators to cover a trial with a worldwide audience. Journalists watched carefully when Judge Ito sealed documents, closed hearings, and sequestered the jury. Journalists also noted that Ito was prohibited by a California law from citing a television reporter for contempt of court when she refused to reveal her source for a story about the bloody socks found in O. J. Simpson's bedroom.

Journalists are governed by statutes that shield journalists who refuse to reveal confidential sources and court rulings that protect defendants' Sixth Amendment rights. This book is concerned with law that affects journalists covering the courts, as well as law that affects other professional communicators such as advertising and public relations professionals. 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 that are 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, law is the system of rules that govern society. The system of rules serves many functions in our society, including regulating the behavior of citizens and corporations. Law prohibits murder and restricts what advertisers can say about their products. It provides a vehicle to settle disputes, such as when a reporter refuses to testify in court. Furthermore, 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**,<sup>1</sup> 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. 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 fifty 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 ten 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 infringe-

---

<sup>1</sup>Definitions for the terms printed in boldface can be found in the glossary at the end of the book.

ment 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 country's ultimate legal authority. Any federal law, state law, or state constitution that contradicts the U.S. Constitution cannot be implemented; 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. For example, several state statutes, including California's, shield journalists from revealing confidential news sources in more circumstances than the First Amendment as interpreted by the U.S. Supreme Court.

The Supreme Court, the nation's supreme judicial body, 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 federal and state 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 requires that the public and press ordinarily be permitted to attend trials.<sup>2</sup> 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 fifty state legislatures, county commissions, city councils, and countless other lawmaking bodies. Statutes set forth enforceable 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, cable television system operators, and telephone companies 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

---

<sup>2</sup>*Richmond Newspapers v. Virginia*, 448 U.S. 555, 6 Media L. Rep. 1833 (1980).

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.<sup>3</sup> 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 database. The Court said that giving the records to a reporter would constitute an "unwarranted" invasion of privacy.<sup>4</sup>

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.<sup>5</sup>

Sometimes federal laws **preempt** state regulation, thereby monopolizing governmental control over a specific subject. Article VI of the U.S. Constitution, known as the "supremacy clause," provides that state law cannot supersede federal law. In addition, 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.<sup>6</sup>

## Administrative Law

Federal agencies such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) develop rules and decisions known as **administrative law**. These agencies dominate several areas of communication law. The FCC regulates the broadcast, cable, satellite, and telephone industries. The FTC regulates advertising and telemarketing. Other agencies overseeing communication include the Securities and Exchange Commission (SEC), which controls communication related to the securities industry, the Federal Election Commission (FEC), which regulates political campaign contributions and expenditures, and the Food and Drug Administration (FDA), which regulates prescription drug and medical product advertising. Table 1.1 lists these agencies, their areas of regulation, and key regulations.

Administrative agencies are often founded on the premise that they would be independent bodies of experts who set policy solely by analyzing facts. However, regulation by administrative agencies is an intensely political process involving complex interactions among the regulatory agency, the regulated industry, Congress, the President, and public interest groups. The President influences an agency by naming commissioners, subject to approval by the Senate, and designating an agency's chair. Through the Office of Management and Budget, the executive branch reviews proposed regulations to determine consistency with the President's policies. Congress shapes regulation by telling agencies what industries or practices they can regulate. Moreover, Congress controls the budget of agencies, and Congressional committees closely monitor the actions of agencies. Regulated industries, such as telecommunications, are among the largest contributors to political campaigns. These industries use their ties to elected officials to influence regulatory agencies.

<sup>3</sup>Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

<sup>4</sup>Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 16 Media L. Rep. 1545 (1989).

<sup>5</sup>Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 1 Media L. Rep. 1898 (1974).

<sup>6</sup>Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 10 Media L. Rep. 1873 (1984).

**TABLE 1.1** Federal Regulatory Agencies

AGENCY	AREAS OF REGULATION	KEY REGULATIONS
Federal Communications Commission (FCC)	Radio, television, cable, satellite, telephone	Political broadcasting rules, indecency regulations, children's television regulations
Federal Election Commission (FEC)	Federal elections	Contribution limits and prohibitions, disclosure of campaign finances, campaign expenditures
Federal Trade Commission (FTC)	Advertising (except prescription drugs and medical devices), telemarketing	Deceptive advertising, product labeling, unfair consumer practices, children's online privacy, tobacco health warnings
Food and Drug Administration (FDA)	Food, drugs, medical devices, cosmetics	Prescription drug advertising, medical device advertising, food, drug, cosmetic labels
Securities and Exchange Commission (SEC)	Securities brokers, investment advisors, stock exchanges	Insider trading, false/misleading information

Successful nominees for agency positions have close ties to powerful political leaders. Michael Powell, chair of the FCC, is the son of Secretary of State Colin Powell; Michael Copps, another FCC commissioner, was formerly chief of staff for Senator Ernest Hollings, former chair of the Senate Commerce Committee, which oversees the FCC. The nominating process, like other aspects of agency regulation, involves the tug and pull of political factions. For example, because of a political stalemate, the position of FDA commissioner was vacant for nearly two years after President George W. Bush took office.<sup>7</sup> Senate Democrats insisted that the nominee not be tied to the pharmaceutical industry. The drug industry spent heavily on advertising in favor of Republican candidates in the 2000 and 2002 elections.<sup>8</sup> In return for its support of Republicans, the drug industry expected to influence President Bush's selection of a nominee. In July 2001, Senate Democrats rejected a nominee as being too closely tied to the industry; in February 2002, the drug industry complained to the Bush administration that a potential nominee would be too aggressive a regulator. Finally, the Bush administration found a nominee who was acceptable to both sides.<sup>9</sup> In October 2002, the Senate approved Mark McClellan as FDA Commissioner. McClellan, whose brother is President Bush's press secretary, comes from a prominent Texas political family.

Congress creates administrative agencies to supervise activities or industries that require more attention than legislators can provide. Administrative agencies serve a variety of functions, unique in the American system of government. First, agencies engage in **rule making**, a process that is similar to the legislative function. For example, the FCC developed a rule prohibiting a company from owning a television station and a newspaper

<sup>7</sup>Alan Murray, "Partisanship Leaves FDA Leaderless at Crucial Juncture," *Wall Street Journal*, June 18, 2002, at A4.

<sup>8</sup>Tom Hamburger, "Drug Industry Ads Aid GOP," *Wall Street Journal*, June 18, 2002, at A4.

<sup>9</sup>Sheryl Gay Stolberg, "After Impasse, F.D.A. May Fill Top Job," *Washington Post*, Sept. 25, 2002, at A18.



in the same city. Second, agencies **adjudicate** disputes, resolving complaints initiated by business competitors, the public, or the agency itself. Administrative law judges conduct hearings resembling judicial proceedings at which evidence is submitted and witnesses are examined and cross-examined. After a hearing, an FTC administrative law judge found that advertisements for Extra Strength Doan's pills were deceptive because they contained an unsubstantiated claim that Doan's pills relieved pain more effectively than competing brands such as Tylenol. Third, agencies perform executive branch functions when they enforce rules against a firm or individual. In recent years, the FCC has fined broadcasters for violating indecency regulations by broadcasting sexual language. Before making its ruling, the agency reviewed the complaints of listeners and responses of broadcast licensees.

Regulatory agencies are bound by the requirements of the Administrative Procedure Act (APA).<sup>10</sup> This statute specifies the procedures that must be employed when an agency enacts rules or enforces regulations. For example, the APA requires that parties have the opportunity to comment on proposed rules. Parties may also petition an agency to issue, amend, or repeal a rule. And the APA establishes the procedures governing a hearing conducted by an administrative law judge, such as a party's right to cross-examine witnesses. Finally, under the APA, a party may seek judicial review of an agency action on a number of grounds, such as the agency has exceeded its statutory authority. Federal judges reviewing agency actions ensure that administrative agencies act within the boundaries set by the Constitution and statutory law.

An administrative action may be challenged on the ground that the agency has exceeded its statutory authority. For example, the Supreme Court agreed with tobacco manufacturers that the FDA exceeded its authority when the agency banned outdoor tobacco advertisements near schools and playgrounds. Although the Supreme Court agreed that tobacco poses a serious health threat, the Court found Congress excluded tobacco products from the FDA's jurisdiction. The Court stated, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."<sup>11</sup>

An agency's action may be challenged on the ground that it is arbitrary and capricious. A federal appeals court recently ruled that the FCC was arbitrary and capricious when it decreed that one company could own two television stations in the same market but not a television station and a cable system.<sup>12</sup> The court said it was illogical for the FCC to conclude that television station and cable system ownership was harmful when the agency found that multiple television station ownership was in the public interest.

An agency's action may also be challenged as unconstitutional. The Supreme Court ruled that the FEC acted unconstitutionally when it sought to punish the Colorado Republican Party for purchasing radio advertising in a political campaign.<sup>13</sup> The Supreme Court ruled that a political party's advertising expenditures, like those of other individuals or groups, are constitutionally protected speech that cannot be limited as long as the expenditures are not coordinated with any candidate. "The independent expression of a political

---

<sup>10</sup>5 U.S.C. §§ 551 et seq. (2002).

<sup>11</sup>FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 161 (2000).

<sup>12</sup>Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002).

<sup>13</sup>Colorado Republican Campaign Committee v. FEC, 518 U.S. 604 (1996).



party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees," the Court stated.

## 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 president's authority derives from Article 2 of the U.S. Constitution, requiring the President to "take Care that the Laws be faithfully executed."<sup>14</sup> 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 be "classified" and thereby withheld from public disclosure 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, which 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. The U.S. Supreme Court has 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 use previous case

---

<sup>14</sup>See also U.S. Const. art. 2, § 2 (appointment power).