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Introduction

There are many sources of communication law in the United States. Chief among the United States Constitution's relevant provisions are the Free Press and Free Speech clauses of the First Amendment, which tell the Congress that it shall "make no law" abridging either one. Individual state constitutions also have provisions that mirror the First Amendment, although sometimes these have been interpreted so as to give a state's residents more rights than Americans in general enjoy (such as a right to leaflet on the grounds of privately owned shopping malls).

The legislative branch of government, whether a city council, a state legislature, or Congress itself, also has an important role to play in the creation of communication law. This mechanism is the one that produces everything from federal copyright law and state libel and obscenity laws to local ordinances governing how many newspaper racks may be placed on public streets. Some areas of communication law involve more than one level of legislation. Advertising is regulated both at the federal and state level. The cable television industry is regulated by a complicated mosaic of federal legislation and contracts entered into between cable franchisees and local governments.

The executive branch also creates communication law, in several ways. The president (with the consent of the Senate) appoints federal judges, as well as the top officials at such agencies as the Federal Communications Commission (FCC), the Federal Election Commission (FEC), and the Federal Trade Commission (FTC). By the simple act of signing an executive order, presidents can greatly affect the flow of information, such as by creating new rules governing how aggressively and timely officials will declassify once-secret documents.

This book, however, focuses exclusively on published decisions from the judicial branch, mostly the United States Supreme Court, but also lower federal and state courts. That focus can be justified in two ways. First, judges are often called upon to rule on the constitutionality of the other governmental

branches' actions. In *Citizens United v. Federal Election Commission*, for example (see chapter 10), the Supreme Court struck down portions of the Bipartisan Campaign Reform Act, while in *Johanns v. Livestock Marketing Association* (chapter 2), the Court upheld key provisions of the Beef Promotion and Research Act. The Fourth Circuit Court of Appeals, in *Baltimore Sun v. Ehrlich* (see chapter 7), told the governor of Maryland that the First Amendment does not require him to return disfavored reporters' phone calls, as long as he treats them fairly when it comes to invitations to press conferences otherwise open to all. By reading court opinions, then, we see the machinations of the other branches of government as well.

The second reason for focusing on court decisions is that they are the most revealing and rhetorical among legal documents. Judges have to make arguments just as much as do the opposing counsel who appear before them. Lower court judges have to word their decisions clearly and defensibly, so as not to be overturned on appeal. Appellate courts, consisting as they do of anywhere from three to almost two dozen judges, especially must produce rhetorically compelling opinions to attract enough votes to form a majority. To a large extent, this is why court decisions are generally more comprehensible to non-lawyers than are statutes themselves.

The U.S. Judiciary

We should first realize that there is not one judicial system in the United States, but rather a federal system, a system for each of the states, and one for the District of Columbia. That is fifty-two systems in all, without even counting the courts governing such places as Puerto Rico or the Virgin Islands.

The structure of the judiciary itself need not be a source of complete bewilderment, however. Indeed, the hierarchy of courts in the states is almost without exception modeled after the federal system. There are three layers. At the bottom are the trial courts. In the federal system they are called federal district courts. The names of the trial courts vary greatly from state to state, but are most frequently (and somewhat counterintuitively) called superior courts.

Litigants who are unhappy with the trial court result have the option of bringing an appeal to the next layer of the judiciary. In the federal system, and in that of most states, these are called, intuitively enough, appellate courts. In the federal system these appellate courts govern a specific region of the country, called a federal circuit. There are thirteen such circuits. Eleven of them are given numbers. The Appellate Court for the Eighth Circuit, for example, governs the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

There is also an appellate court for the District of Columbia. That particular court has jurisdiction over most appeals from decisions of the FCC and other federal agencies. The thirteenth federal appellate court is the one for the Federal Circuit, a special court created by Congress in 1982 to handle such specialized appeals as patent and trademark cases.

Litigants who are not satisfied with an appellate ruling can sometimes take their grievance one step higher. The pinnacle of the judiciary in both the federal and state systems is also an appellate court, but it goes by a special name. The highest federal court is, of course, the United States Supreme Court. The highest court in almost every state is also referred to as a supreme court, although there are some exceptions. New York's highest court, for example, is its Court of Appeals.

Although we often hear aggrieved parties vow that they will take their cases "all the way to the Supreme Court if necessary," in fact this is romantic fancy because the justices of the Supreme Court have tremendous latitude about which of the thousands of appeals filed there annually will be heard. In recent years, the justices have issued only about seventy-five or so decisions—seventy-three in the 2009–2010 term. Many state supreme courts have similar discretion to determine which cases they will hear. As such, often litigants are realistically limited to having their grievances heard in two, rather than three, rungs of the judicial system. In the federal system, two rungs often becomes three even without Supreme Court intervention, in that litigants unhappy with a three-judge panel of a Circuit Court of Appeals can sometimes persuade all of the judges in that circuit—this can be as many as two dozen or so—to rehear the case. This is called a rehearing *en banc*.

Of the sixty-four cases represented in this volume, forty are United States Supreme Court decisions, fifteen are federal appellate decisions, and seven were decided at the federal district court level. The book also includes two state supreme court cases. Nineteen of the cases presented here are new to this edition. Cases that needed to be discarded from the previous edition in order to make room are still easily available on my website, www.paulsiegelcommlaw.com.

Understanding Legal Citations

Each of the court cases excerpted in this book has not only a name but also a citation. The citation tells you a fair amount of information about the legal dispute, not the least of which is where you can find the full text of the opinion, should you decide to read further.

Although there are several published (and online) sources for the full text

of Supreme Court decisions, the citation format provided in this book except for very recent cases refers to the Court's own official volumes, called *United States Reports* (abbreviated *U.S.*). The very first case appearing in these pages is *Brandenburg v. Ohio*, the citation for which is 395 U.S. 444 (1969). This tells us that the full text of the Court's opinion can be found in volume 395 of the *United States Reports*, beginning on page 444. The case was decided in 1969.

Federal district court opinions, when they are published at all, appear most conveniently in a series from West Publishing Company, based in Saint Paul, Minnesota, called *Federal Supplement* (or F. Supp., with more recent cases in the second series of the *Federal Supplement*, abbreviated F. Supp. 2d).

Federal appellate decisions are found in another West publication called the *Federal Reporter* (abbreviated simply as *F.*) This publication went into its second series (F.2d) in 1924, and began its third series (F.3d) in 1994. Some federal appellate decisions appear instead in a publication called *Federal Appendix* (Fed. Appx.).

Each state's judiciary publishes its own case reports. Thus we may see references, for example, to the *Wisconsin Reporter* or the *New York Supplement.* Academic libraries at most colleges without law schools do not bother to subscribe to each and every state's reporters. Rather, they tend to subscribe to yet another West series of publications. West's regional reporters conveniently break down the states into seven separate areas—the Atlantic (*A.*), the Pacific (*P.*), the Northeastern (*N.E.*), the Northwestern (*N.W.*), the Southern (*So.*), the Southeastern (*S.E.*), and the Southwestern (*S.W.*). Some of the regional reporters are in their second editions, some in their third.

You have probably figured out already that the generic format of legal citations is volume number, name of publication, first page number where the court case can be found, and date (preceded, if needed, by a shorthand label for the actual court). There are some further complications you may encounter. For example, sometimes when cases are not destined to be officially published, or if they are too new to find their way into a real volume, we provide instead a citation given by the LEXIS database. Indeed, it is fair to say that researchers read court cases and other legal documents online far more frequently than they do in an official printed reporter. Thus the volume numbers and page numbers from traditional citations, while still the preferred usage, are becoming somewhat fictional—"if I went to the shelves, this is where I would have found it."

A Word about the Editing of This Volume

The editing of this volume could aptly be described as *purposefully heavy-handed*, and necessarily so. Most of the court cases found in this volume, if

read in their entirety, would take up five to ten times as many pages as the excerpts offered here. Yet the publisher's intention and my own were to expose you to a fair sampling of court cases within each chapter's areas of case law.

How were the cases cut down to size? Several strategies were used. It was helpful to delete the footnotes from the original cases. In those few instances where the information found in the footnotes was essential to understanding the case, that information was moved up to the main text instead.

Whole lines of arguments deemed distracting from the main point of a court case were also deleted. Some of these were rather generic. Courts often have to consider whether one or more parties to a lawsuit are eligible to sue or can be excused from a lawsuit, or indeed whether they came to the right court to state their claims. These arguments of standing, immunity, and jurisdiction have been surgically removed from the cases here.

Sometimes issues that are related to communication law are nonetheless distractions from a case's main point. In *New York Times v. Sullivan*, for example—the landmark libel case excerpted in chapter 4—one of the plaintiff's arguments was based on the Supreme Court's not-yet-evolved doctrines applicable to commercial speech. That argument was excised. Similarly, it is hoped that the detailed excerpts offered in chapter 9 from *Branzburg v. Hayes*—involving a *Louisville Courier Journal* reporter's subpoena to appear in front of a grand jury—will suffice to teach the case's main lessons, even though the Court's discussion of the facts surrounding two companion cases involving other media outlets has been deleted.

Beyond these strategies, a heavy hand was taken to any jurists' long-winded prose or unnecessary redundancy. Internal quotations to earlier cases were generally omitted. These interventions sometimes resulted in sentence fragments that had to be combined, and to portions of text that had to be moved up several paragraphs. To aid readability, the use of ellipses and other editors' tools to alert readers of deletions has been generally eschewed.

Users of this volume, especially if they have occasion to compare one or more of the case excerpts offered here with the original, full-text versions, will be in the best position to assess whether the purposely heavy-handed editing succeeded.