Law for Advertising, Broadcasting, Journalism, and Public Relations

A Comprehensive Text for Students and Practitioners

Michael G. Parkinson • L. Marie Parkinson
Law for Advertising, Broadcasting, Journalism, and Public Relations

A Comprehensive Text for Students and Practitioners
LEA's COMMUNICATION SERIES
Jennings Bryant and Dolf Zillmann, General Editors

Selected titles include:

Berger • Planning Strategic Interaction: Attaining Goals Through Communicative Action

Bryant/Zillmann • Media Effects: Advances and Theory in Research, Second Edition

Ellis • Crafting Society: Ethnicity, Class, and Communication Theory

Fortunato • Making Media Content: The Influence of Constituency Groups on Mass Media

Greene • Message Production: Advances in Communication Theory

Parkinson/Parkinson • Law for Advertising, Broadcasting, Journalism, and Public Relations: A Comprehensive Text for Students and Practitioners

Reichert/Lambiase • Sex in Advertising: Perspectives on the Erotic Appeal

Shepherd/Rothenbuhler • Communication and Community

Singhal/Rogers • Entertainment Education: A Communication Strategy for Social Change

Zillmann/Vorderer • Media Entertainment: The Psychology of Its Appeal

For a complete list of titles in LEA's Communication Series, please contact Lawrence Erlbaum Associates, Publishers at www.erlbaum.com
Law for Advertising, Broadcasting, Journalism, and Public Relations

A Comprehensive Text for Students and Practitioners

Michael G. Parkinson, Ph.D., A.P.R., Attorney at Law
Texas Tech University

L. Marie Parkinson, J.D., Attorney at Law
Texas Tech University
Dedication

In loving memory of our deceased parents:
John Willis Dillon, Helen Francis Parkinson, and Donna Smith Stotts
who taught us the value of education
and
to our surviving parents and stepparents
Jean Carr Dillon and Richard Wesley Parkinson,
who inspired us to persevere
and to
Robert Hawkins Stotts,
who is a major contributor to higher education, especially ours!
Michael G. Parkinson is the associate dean for graduate studies in the College of Mass Communications at Texas Tech University. He is accredited by the Public Relations Society of America and is licensed to practice law before the Supreme Courts of Illinois and Oklahoma as well as the U.S. District Court for the Southern District of Illinois and the U.S. Court of Appeals for the Eighth Circuit. He has taught communication and mass communications for more than 30 years and practiced law for 12 years. He has won awards for both his legal writings and his works in mass communications. He also has been recognized by the American Bar Association for excellence in appellate advocacy.

L. Marie Parkinson teaches in both the Department of Political Science and the College of Mass Communications at Texas Tech University. During her 18-year teaching career, she has taught courses in mass communications law, constitutional law, juvenile law, corrections, and the judicial process. She practiced law for more than 20 years and is licensed to practice law before the Supreme Court of Illinois and the U.S. District Court for Southern Illinois. She has been a state prosecutor, a criminal defense attorney, and a civil lawyer, and has tried more than 1,000 cases ranging from traffic tickets to major felonies.
# Table of Contents

List of Exhibits  ix  
Acknowledgments  xi  
Preface  xiii  

1  
Introduction to the Legal System  1  
This chapter provides a background to help the reader understand legal concepts presented in other chapters. It covers government and court structures, sources of law, and legal jurisdiction.  

2  
Legal Procedure  28  
Building on the background provided in chapter 1, this chapter covers legal procedures including categories of law. It describes criminal pretrial, trial, and posttrial procedures, as well as juvenile, civil, and appellate procedure.  

3  
The First Amendment: History and Application  60  
This chapter describes the difference between liberties and rights. It also explains philosophies used to interpret the First Amendment and explains what rights described in the Bill of Rights must be honored by the states. Standards of judicial review are also introduced here.  

4  
The First Amendment: Limitations  83  
This chapter explains when other legal interests outweigh First Amendment liberties. It introduces time, place, and manner restrictions. It also explains conflicts between free speech and national security and legal control of obscenity. This chapter, and each subsequent chapter, includes a practice note. The practice note here describes some areas of mass communications practice wherein expression may be regulated and also gives some suggestions for how practitioners may anticipate and address conflicts between their interests and laws or ordinances regulating communications.  

5  
Electronic Media Regulations  111  
The history and status of broadcast regulation, with a focus on the trend to deregulation, are described here. Regulation of the business of broadcast is described, as are the prescriptive and proscriptive laws addressing broadcast content. The chapter contains a discussion of indecency control that builds on chapter 4’s description of obscenity regulation. The chapter also addresses regulation of cable, satellite, telco, and Internet media. The practice note in this chapter describes the requirements for reporting public service announcements.  

6  
Access to Places and Information: What You Can Get From Government, It Can Probably Get From You  154  
Chapter 6 describes the legal limitations on access by media to governmental facilities and information. A section of this chapter carefully explains the terms privilege and immunity. The chapter also explains why reporters are subject to subpoenas. The practice note focuses on how to avoid and deal with subpoenas.  

7  
Access to Trials and Judicial Proceedings  194  
Building on concepts introduced in the previous chapter, this chapter explains rules governing access to trials and other judicial proceedings. The chapter includes a specific discussion of changes in access to deportation hearings and the use of secret courts since September 11, 2001.
This chapter concludes with three practice notes that address practical suggestions for reporters seeking access to courthouses, guidelines for reacting to closure orders, and litigation public relations.

8
Means of Access: Law as Entertainment 232
Chapter 8 uses a theatrical analogy to describe the impact of electronic media in courtrooms. Interpretations of current laws covering media access to both trials and executions are addressed. The practice note in this chapter offers suggested legal arguments for media counsel to improve public access to governmental proceedings.

9
Communication Torts 259
Chapter 9 describes the traditional actions in libel, slander, and defamation. It then addresses the modern communication torts of private facts, false light, appropriation, and intrusion. This chapter has two practice notes. The first addresses the misperception that opinion is a defense to defamation. The second explains how employee communication may be a defense to communication torts.

10
Copyright and Trademark 297
Intellectual property law is introduced in chapter 10. The discussion focuses on the impact of copyright and trademark on mass communications professionals. The practice note here addresses works for hire.

11
Contract and Employment Law 327
Chapter 11 begins with an overview of contract law. It then focuses on employment and agency law and explains how those laws create obligations for mass communications professionals and their employers. The chapter concludes with practice notes on an employee’s duty to obey and covenants not to compete.

12
Commercial Communication: Rights and Regulations 367
Commercial communication laws are presented to help the reader understand that they regulate more than advertising. Federal Trade Commission regulations are explored, along with cases that apply commercial communications law to advertisers, journalists, and public relations practitioners. We conclude with practice notes describing media, client, and agency liabilities for false or dangerous advertising, and restrictions on political advertising and lobbying.

13
Investor Relations and Financial Press Regulations 407
Chapter 13 begins with a brief introduction to concepts in securities law. It then focuses on specific laws and regulations that impact reporters, public relations practitioners, and advertisers who deal with stock sales. In the practice note we describe legal liabilities of financial reporters and practitioners in investment relations.

Appendices
A How to Find and Brief a Case 433
B Sample Case Brief of Branzburg v. Hayes, 408 U.S. 665 (1972) 440
C Sample Documents 470
D Sample Jury Instructions 478
E The Constitution of the United States 481

Table of Cases 501
Index 507
List of Exhibits

Exhibit 1.1. Equitable Remedies 8
Exhibit 1.2. U.S. District and Circuit Court Locations 10
Exhibit 1.3. Example of Fragmented Court System. Court Structure of Texas 13
Exhibit 1.4. The U.S. Federal Courts: A Consolidated System 14
Exhibit 2.1. Summary of Legal Systems 30
Exhibit 2.2. Funnel Effect 36
Exhibit 2.3. Illinois Juvenile Court Act, Purpose 46
Exhibit 2.4. Texas Juvenile Justice Code Purpose 46
Exhibit 3.1. Principles of Incorporation 64
Exhibit 3.2. Selective Incorporation 67
Exhibit 3.3. Speech and Non-Speech 71
Exhibit 3.4. Standards of Judicial Review 73
Exhibit 4.1. Philosophies of Constitutional Interpretation 85
Exhibit 4.2. Forum-Based Review 90
Exhibit 4.3. Incitement Standard 94
Exhibit 4.4. Elements and Relief for Torts 95
Exhibit 4.5. Modified Miller Test 102
Exhibit 5.1. Six Major FCC Bureaus and Their Functions 116
Exhibit 5.2. FCC Licensing Processes 121
Exhibit 5.3. Fairness Doctrine and Corollaries 133
Exhibit 6.1. Elements and Defenses for Trespass 157
Exhibit 6.2. Access to Government Property 166
Exhibit 6.3. Federal Sunshine Act 169
Exhibit 6.4. Freedom of Information Act 172
Exhibit 6.5. Electronic FOIA Sites 174
Exhibit 6.6. Legal Privileges 179
Exhibit 7.1. Elements for Closure 199
Exhibit 7.2. Illinois Juvenile Court Right of Access 210
Exhibit 7.3. Texas Access to Juvenile Proceedings 210
Exhibit 7.4. Presumption of Openness 213
Exhibit 7.5. New Colossus 214
Exhibit 7.6. Court Statement 224
Exhibit 7.7. Permitted and Prohibited Statements in Litigation PR 226
Exhibit 9.1. Elements of Defamation 261
Exhibit 9.2. Requirement for Proof of Harm in Defamation Actions 265
Exhibit 9.3. Malice Rule 269
Exhibit 9.4. Example of “Fair” Comment 272
Exhibit 9.5. Statute of Limitations for Defamation Actions 274
Exhibit 9.6. Elements of Private Facts 275
Exhibit 9.7. Elements of False Light 280
<table>
<thead>
<tr>
<th>Exhibit</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exhibit 9.8.</td>
<td>Elements of Appropriation</td>
<td>283</td>
</tr>
<tr>
<td>Exhibit 9.9.</td>
<td>Elements of Intrusion</td>
<td>285</td>
</tr>
<tr>
<td>Exhibit 10.1.</td>
<td>Requirements to Create and Enforce a Copyright</td>
<td>299</td>
</tr>
<tr>
<td>Exhibit 10.2.</td>
<td>Prohibited Acts</td>
<td>305</td>
</tr>
<tr>
<td>Exhibit 10.3.</td>
<td>Copyright Infringement Elements</td>
<td>307</td>
</tr>
<tr>
<td>Exhibit 10.4.</td>
<td>Considerations in “Fair Use” Defense to Copyright Infringement</td>
<td>309</td>
</tr>
<tr>
<td>Exhibit 10.5.</td>
<td>Trademark Infringement Inquiries</td>
<td>316</td>
</tr>
<tr>
<td>Exhibit 10.6.</td>
<td>Requirements for “Works for Hire.”</td>
<td>319</td>
</tr>
<tr>
<td>Exhibit 11.1.</td>
<td>Elements Required to Create a Contract</td>
<td>328</td>
</tr>
<tr>
<td>Exhibit 11.2.</td>
<td>Statute of Frauds: Contracts That Must be in Writing</td>
<td>333</td>
</tr>
<tr>
<td>Exhibit 11.3.</td>
<td>Defenses to Contract Obligations</td>
<td>338</td>
</tr>
<tr>
<td>Exhibit 11.4.</td>
<td>Terms of Art in Agency Law</td>
<td>343</td>
</tr>
<tr>
<td>Exhibit 11.5.</td>
<td>Elements Required to Create an Agency Relationship</td>
<td>344</td>
</tr>
<tr>
<td>Exhibit 11.6.</td>
<td>Factors to Identify Independent Contractors</td>
<td>347</td>
</tr>
<tr>
<td>Exhibit 11.7.</td>
<td>Factors Used to Determine if Covenant Not to Compete is Overbroad</td>
<td>359</td>
</tr>
<tr>
<td>Exhibit 12.1.</td>
<td>The Bolger Test Used to Determine if a Message is Commercial Communication</td>
<td>372</td>
</tr>
<tr>
<td>Exhibit 12.2.</td>
<td>The Central Hudson Test Used to Determine Whether Commercial Speech May Be Subjected to Government Regulation</td>
<td>379</td>
</tr>
<tr>
<td>Exhibit 12.3.</td>
<td>FTC Elements of Deceptive Advertising</td>
<td>382</td>
</tr>
<tr>
<td>Exhibit 12.4.</td>
<td>Elements of Lanham Act Suit</td>
<td>388</td>
</tr>
<tr>
<td>Exhibit 12.5.</td>
<td>Advertisements From Soldier of Fortune</td>
<td>396</td>
</tr>
<tr>
<td>Exhibit 12.6.</td>
<td>Federal Campaign Expenditure Limitations</td>
<td>399</td>
</tr>
<tr>
<td>Exhibit 13.1.</td>
<td>Family Resemblance Test to Determine What is a Security</td>
<td>410</td>
</tr>
<tr>
<td>Exhibit 13.2.</td>
<td>Characteristics of Corporations</td>
<td>413</td>
</tr>
<tr>
<td>Exhibit 13.4.</td>
<td>Elements or Cause of Action under Section 14(a)</td>
<td>421</td>
</tr>
<tr>
<td>Exhibit 13.5.</td>
<td>Subjects Included in Proxy Solicitations</td>
<td>423</td>
</tr>
<tr>
<td>Exhibit 13.6.</td>
<td>Earnings Restatements prior to Sarbanes–Oxley</td>
<td>425</td>
</tr>
</tbody>
</table>
Acknowledgments

We particularly want to thank Marijane Wernsman who graciously proofread many drafts. Her contributions convinced us that most legal documents would be improved if all lawyers were required to have their work reviewed by a journalist.
A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

This is not your grandmother's mass communications law book! In fact, we made a deliberate decision not to use the phrase mass communications law in the title. The book includes several subjects not usually thought of as mass communications law, but these subjects are important to communications practitioners.

Our more than 40 years of combined teaching experience in several fields motivated us to include background material on history, political science, and legal logics. Laws are not created in a vacuum. To understand law, one must also understand the historical contexts and political pressures that mold its creation and interpretation.

We also have not focused on any one subfield of mass communications, but have tried to respect and present the interests and concerns of four major areas — advertising, broadcasting, journalism, and public relations. If the book has a professional focus, that focus is law. We are both practicing attorneys with more than 30 years' total experience in a wide range of both criminal and civil cases. In this book we present the kind of information and advice we would give a communications practitioner who is a client. We have, for example, included information that may challenge traditional views of journalists' rights and we were careful to include an explanation of laws that may create conflict between advertisers, public relations professionals, and journalists. We have written this book thinking of our readers as we have often thought of our clients—those we would inform, not coddle. Therefore, when the truth is unattractive to one subfield of media practitioners, we do not sugarcoat it. We believe that knowledge and truth make a practitioner and an industry stronger. Shared mythology does not.

Rather than giving multiple examples of individual laws or cases for the reader to memorize, the explanation of legal logics and political philosophies is presented so the reader will understand why our laws were created and what they mean. We believe that a reader who understands the political logics that guide the creation of our laws will be able to interpret law, and a communications practitioner who can interpret law will be able to understand new laws and changes in existing laws without the requirement to memorize individual laws or cases.

Obviously, we do have a point of view and occasionally our commitment to communication liberty is obvious. But, we have focused primarily on what the law is, not what we think it should be. For example, in our approach to briefing cases we advocate ignoring concurring and dissenting opinions that are not part of the law and that often serve only to obfuscate courts' decisions.

While we do present an overview of relevant law, it is important to note that the law differs from jurisdiction to jurisdiction. Furthermore, we can only present a limited
Preface

introduction to the laws that impact mass communications practitioners; many very important subjects, topics, and areas of the laws have been omitted. This book was written as a survey of the subject, not to provide in-depth coverage of every area of the law. Throughout the book, we repeatedly recommend that communications practitioners should consult a licensed attorney in their jurisdiction who specializes in a relevant area of law.

Text Structure

Footnotes and References

Because of our focus on law, we deliberately chose to use the Uniform System of Citation. This is the style and citation guide used universally in legal documents.

Magic Words and Phrases

Because the law is so jargon-driven, each of the chapters includes a list of what we have called “magic words and phrases.” To assist the reader in defining and understanding these terms, they are identified in the text in bold type.

Cases

Each chapter contains a list of cases. The cases were chosen because they demonstrate or expand on the points made in the chapter and we suggest the conscientious reader brief them. Instructions for finding and briefing the cases are in appendix A and a sample brief is in appendix B.

Practice Notes

Beginning with chapter 4, each chapter has a section titled “Practice Notes.” These sections provide information that is applicable to practitioners in one or more of the specific subfields of mass communications or that amplify or explain a concept introduced in the chapter. They are not consistent in their format or content, but all include either very practical suggestions for applying principles from the chapter or an expansion of ideas presented in the chapter.

Underlying History, Political Philosophy, and Questions for Discussion

Rather than providing large numbers of examples and hypothetical legal situations, we have included detailed information on the political philosophies and logics used by governments and courts to establish and interpret law. By applying the legal logics and political philosophies described early in the text to the questions for discussion, the reader should develop a far better understanding of the law than could be achieved by reading examples or hypothetical cases.
Repeated Information

Some readers will notice information from one chapter is often repeated in another and that significantly more detail is included than is presented in books designed exclusively as course texts. The repetition here is not the product of sloppy editing, rather, some information is repeated because we assume some readers will read only those chapters that deal with their interests or that some instructors using the book will assign readings in a different order than they are presented here. Information may be repeated because we want to ensure that someone who reads one chapter can understand the information therein without having to have read the entire book.

We respectfully submit this book with the hope that it will provide a perspective from which mass communications students and practitioners can gain an understanding of the laws and regulations they face every day. Our goal is to provide students, teachers, and professionals alike with greater knowledge of how laws are selected and applied in our system of jurisprudence. We also want to inspire our readers with new insights into the political philosophies that continue to mold and shape the legal terrain that we all must navigate as media practitioners and as citizens in a democratic society.

Notes

Introduction to the Legal System

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

—Chief Justice John Marshall

Overview
Background of Government and Court Structures
Sources of Law in the United States
Other Legal Systems
Types of Courts
Jurisdiction and Venue
Legal Hierarchy and Authorities
Rules for Justiciability

Overview
This chapter begins with an explanation of the legal system and sources of law in the United States. This information is essential to any understanding of the laws that impact the practices of advertising, broadcasting, journalism, and public relations. It also helps the reader interpret and apply the laws described later.

We begin with a brief comparison of governmental systems and a description of sources of law. We then describe legal systems and the types of courts that function both at the federal level and in the individual states. Included in the description of the courts are an introduction to the ideas of jurisdiction and legal authority. We conclude by describing the different types of opinions rendered by the U.S. Supreme Court and the rules of justiciability the court uses to avoid making unnecessary decisions and to avoid interfering with the states and other branches of the U.S. government.
Background of Government and Court Structures

Laws are the principles that structure the relationships between government and the governed and among the people within a society. To understand law, one must first have a feel for the government itself. Therefore, we begin with a cursory explanation of the structure of government so you will have a foundation for a later explanation of our legal system.

Systems of Government

There are three types of governments: the unitary, the confederal, and the federal. The differences among the three are based on how power is distributed and on the placement of sovereignty.

Under a unitary government, power rests in a centralized source, which is superior to all citizens and subunits of government. The sovereign, whether it is a single person or a body of rulers, has power over all matters in the society from education to garbage collection.

A confederal government, sometimes called a confederacy, is a fairly loose association of sovereign states or units that have joined together for specific purposes. Power in a confederacy flows from the sovereign units to a centralized unit that has very limited authority.

A federal government is theoretically a combination of the unitary and confederal systems. Ostensibly, power in a federal system flows both from many sovereign states to a centralized government and from the centralized government to the states. Certain powers are given to the central government by the member states through their subscription to a written constitution. The constitution not only gives sovereign powers to the centralized government, it also binds the member states together. The compact requires subscribing members to accept the delegated authority of the central government.

Most countries today operate under a unitary system of government. These include France, Great Britain, Israel, Egypt, and Sweden. By contrast, a few countries operate or have operated using a confederal system. The United States, as it existed for a short period under the Articles of Confederation, and the southern states under the American Confederacy during the Civil War are historic examples. Switzerland operates under a confederation of sovereign "cantons," and a number of former republics of the Soviet Union have formed a confederal government system called the Commonwealth of Independent States. For more than 200 years, the United States has had a federal government.

It is also important to understand the concepts of power and authority in connection with systems of governance and sovereignty. Power is the ability to cause others to modify their behavior and to conform to whatever the power holder wants. Authority is given to a leader or institution by the holders of power. Authority allows a leader or institution to compel obedience because of the legitimate position given by the power holders. In the United States, for example, the ultimate power rests with the people. The people can elect or reject all government officials and they have the power to change the form and nature of their government and its Constitutions. However, the government and its officials are given the legitimate authority to compel obedience to our laws.
Sovereignty is the source of power in government. Based on the U.S. Constitution, there are three sovereigns in the U.S. governmental system. These are the national government, commonly called the federal government; the states; and the often overlooked but absolute source of power in a democratic republic, the people. The people have the ultimate power to elect representatives to govern themselves and to change the form and nature of their government and its Constitution.

In the U.S. Revolution, the people of the original 13 colonies took the sovereign power from the British King. Initially, they chose to collectively invest their former colonial governments with this sovereignty in units called “States” and band together under Articles of Confederation. They had effectively moved from a unitary to a confederal government. To further consolidate power and to defend the new country from foreign encroachment, the people, through their state representatives, finally formed the federal democratic republic that is today known as the United States.

The United States is federal in the sense that it operates under two tiers of governance, both of which are sovereigns, the national central government and the individual states. It is democratic in the sense that its leaders are granted authority to act through election by its citizens, and it is a republic in the sense that the people elect representatives who are granted authority to engage in constitutionally specified activities of governance on behalf of their constituents, collectively known as the people.

Under the U.S. Constitution, the people, as sovereigns, gave the central government authority for six specific purposes.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The People, through the Constitution, then separated the components of sovereign power into three branches of government. Article I of the U.S. Constitution created a legislative branch. “[A]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Article II created an executive branch. “[T]he executive power shall be vested in a President of the United States of America.” Finally, Article III created a judiciary. “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”

What is often called the “Supremacy Clause” of the Constitution sets out the hierarchy of laws. It says:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution of laws of any state to the contrary notwithstanding.
Article VI also binds the legislative, executive, and judicial officers of both the national and state governments to support the U.S. Constitution.

The Senators and Representative before mentioned, and the Members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation to support this Constitution.10

Our legal system exists within the federal democratic republic established by the U.S. Constitution.

**Legal Systems**

There are basically two types of legal systems in the world today: code law and common law.

The foundation of code law is in statements of religious dogma or in the compilations of written laws, edicts, or decrees from rulers or strong religious leaders. Examples of code law systems include (a) the code of Hammurabi, which is named for the king of Babylonia about 2,000 BC; (b) the Justinian Code, which is the body of Roman law systematized during the reign of the Byzantine Emperor, Justinian 1, who reigned from 527 to 565; and (c) the Napoleonic Code, which was the collection of French laws compiled during the reign of Emperor Napoleon Bonaparte from 1804 to 1815. Other types of code laws are those statements of religious laws and principles of living found in the Muslim Quran or in the Christian Bible.

Common law is a more recent legal phenomenon than code law. Common law refers to the system of jurisprudence developed in England from the time of William the Conqueror, approximately 1066, to the present. British common law is based on evolution over time of legal rules, customs, and maxims created by the judiciary. It evolves and changes over time as courts wrestle with and apply the concepts of precedent and stare decisis. Once the jurisdiction of the British Courts of Law was established by the Magna Carta in 1215, those involved in deciding cases came to the conclusion that cases with similar facts and issues should all have similar results. Courts began consulting older decisions to ensure their decisions followed the principles used before. This consultation of older cases is called “following precedent.”

Following precedent means relying on previously decided cases to determine the choice and application of laws for current cases. The concept of stare decisis, literally to “let the decision stand,” is the very foundation of following precedent. Under the principle of stare decisis, judges look for an historic case with facts and issues similar to the one now being adjudicated. The court does not change the laws but applies the holdings from the previously decided cases to the case currently before the court. Although courts can develop new interpretations and applications of the common law to adapt to current situations, real changes in the law are rare. Therefore, the common law is quite stable and sometimes even antiquated.

This text focuses on the common law principles applicable in the United States. But, the distinctions between code and common law remain important today because
the global market for mass communications puts practitioners in both code and com-
mon law jurisdictions. If one works in any international market, one simply cannot
assume activities that are lawful in one’s own jurisdiction will be permitted in
another. In general, countries that have historically been British colonies have
adopted a common law system. Those countries that have histories of strong theo-
cratic governance or intensely centralized governance generally subscribe to code
laws. France and a majority of middle-Eastern countries have legal systems based on
code laws, while the former and current members of the British Commonwealth,
including the United States, use common law as the basis for their legal systems.
Even within the United States there is some variation. Louisiana, for example, has a
tradition of code law and deference to the Napoleonic Code that influences how some
legal decisions are made.11

Sources of Law in the United States

Now that we have presented a brief description of our government and legal system
we can move to more specific information on law in the United States. At the most
basic level, there are four sources of law in the United States: (a) the Constitutions of
the United States and of the 50 states, (b) the Statutes of the United States and of the
50 states, (c) treaties made under the authority of the United States, and (d) case law.
The distinction between these four sources of law has practical implications for mass
communications practitioners. Modification of the U.S. Constitution requires an
amendment to be supported by two thirds of both houses of Congress and ratified by
three fourths of the states. Therefore, laws based on Constitutional provisions are very
stable and difficult to change. Case law, on the other hand, may change relatively
easily and quickly.

We should note here that equity, regulations, and ordinances are not sources of law.
We address all three of these concepts later, but for now we simply point out that regu-
lations, rules, and ordinances are directives issued by executive agencies or subordinate
units of government. They are not laws or sources of law but, in fact, must be permitted
or “enabled” by laws. Equity is not a source of law; it is merely a system of remedies.
Because rules and regulations are not laws, they may be changed very quickly and prac-
titioners in areas that are heavily regulated must be constantly alert for changes that
affect them.

Case law is the most complex source of law and the source that is most pervasive in
mass communications. Therefore, we focus our discussion on its three basic compo-
nents: statutory interpretations, judicial review, and common law.

Statutory Interpretation

Although our elected legislators have been granted the power to enact laws, rather often
the statutes they pass are so general or so ambiguous they must be interpreted before
they can be applied to real human situations. The onerous task of interpreting statutes
has traditionally been left to the courts. If a state legislature, for example, passes and a
governor signs into law a statute saying, “[w]hen two trains shall approach each other on the same track, both shall stop and neither shall proceed until the other has passed by,” what does that mean? Answering this and the thousands of other questions about the meaning of laws is called statutory interpretation. Decisions regarding the meaning, choice, and applications of our often conflicting or unintelligible laws are presented to the courts by the people being affected.

**Judicial Review**

There are national statutes, more commonly called federal statutes, and state statutes. **Statutes** are the laws enacted by legislatures and endorsed by the appropriate chief executive. To be valid, all statutes, whether federal or state, must be constitutional. In other words, they must be made in accordance with the U.S. Constitution. State statutes must also be consistent with the appropriate state’s constitution.

Judicial review is an action by a court to evaluate whether a statute is consistent with the constitution. The authority for judicial review is implicitly granted by the U.S. Constitution Articles III and VI. The U.S. Supreme Court first enunciated the doctrine of judicial review in 1803. Since that decision, the U.S. Supreme Court has been the arbiter of the constitutionality of governmental actions at both the national and state level. It has become the practice of state supreme courts to decide their own state constitutional issues. If a litigant raises a question regarding the compliance of state action with the U.S. Constitution, then the matter may be heard within the federal court system, possibly by the U.S. Supreme Court.

**Common Law**

In addition to interpreting statutes and determining the constitutionality of laws, the federal and state courts also develop common law. Common law is based on the system of precedent or stare decisis, a system of using earlier court rulings to provide guidance for current decisions. For a long period in history, most courts looked to English common law as a source because the state legislatures had not yet enacted public laws or statutes in many areas. Thus, continuity between the British Common Law of the 1700s and 1800s and much of the civil law in the United States is particularly apparent in very traditional legal fields like real estate, torts, contracts, commercial paper, and sales of goods. However, over the years, many legal scholars and state legislatures came to the conclusion that the common law needed to be updated and made more relevant and applicable to the U.S. experience. In many cases, both statutes in the United States and the court decisions that are the foundation for common law have altered and superceded the older common laws.

**Other Legal Systems**

Although equity, rules, regulations, and ordinances are not law, they do impact enforcement of law and have the authority of government. Therefore, it is important for any mass communications practitioner to understand them.
Equity

Equity is a system of remedies that was developed in England. It is close to the antithesis of common law because it permits deviations from rigid enforcement and allows significant judicial discretion. Equity, or more specifically equitable remedies, was developed as a response to the often harsh, unfair, or unjust decisions that resulted from strict application of common law. Where the common law courts could not or would not give truly fair relief, there could be an appeal for justice to the King’s Chancellor. The rules and remedies originally applied in these situations have been structured and are now applied in what are called Courts of Chancery. The courts that hear cases in equity are called Courts of Chancery because these actions were originally heard by the King’s Chancellor.

Equitable rights and remedies were developed independently from common law. Civil courts of law are limited to awarding money damages, but Courts of Chancery have the authority to grant other remedies to dispense justice. In the United States today, all courts of general jurisdiction are permitted to grant equitable remedies when the appropriate types of cases present themselves. Examples of equitable relief include temporary restraining orders; temporary and permanent injunctions; writs of mandamus; writs of habeas corpus; orders of protection, peace bonds, and specific performance. These remedies are summarized in Exhibit 1.1.

Rules, Regulations, Codes, and Ordinances

In addition to the four sources of law previously discussed, there are several special large bodies or categories of authoritative rules, regulations, codes, and ordinances that often have the force and effect of law. Because of how these rules, regulations, and ordinances originate, they do not rise to the level of law.

Rules and Regulations

When the U.S. Congress or the state legislatures pass laws, they generally designate, within the statutes themselves, a specific executive agency that will be responsible for implementing the law. The specified agency is responsible for creating and enforcing rules and regulations that give impetus to public policy enunciated in the statute.

Public laws, also called statutes, can only be passed by elected representatives of the people. Rules and regulations are created by executive agencies and may have the force and effect of law, but are not law. The constitutions of the United States and of the individual states give the power to create laws only to the democratically elected representatives of the people. Therefore, only legislators can create law. Executive agencies, appointed by either the president or a state’s governor, only have the authority given to them by legislative bodies in statutes. The promulgation, content, purview, and enforcement of rules and regulations are often called “administrative law,” although the term law used in this context is a misnomer.

Ordinances

As discussed previously, the U.S. Constitution created a federal system of governance. Under this system, the states as original sovereigns possess power over all
### Exhibit 1.1. Equitable Remedies.

<table>
<thead>
<tr>
<th>Remedies</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temporary restraining order (TRO)</td>
<td>Emergency order of the court, obtained without the defendant being present, which imposes some requirement or restriction on the actions of the defendant. The requirement has only a short duration.</td>
</tr>
<tr>
<td>Temporary injunction</td>
<td>Order of the court restricting the behavior of either party. Usually used to maintain the status quo during the pendency of a court action at law.</td>
</tr>
<tr>
<td>Permanent injunction</td>
<td>Order of the court without specified time limit restricting the actions of one party at the request of another party.</td>
</tr>
<tr>
<td>Mandamus</td>
<td>Order of a court ordering a public official (or judge of a lower court) to take a specific action that is part of their public office or duties.</td>
</tr>
<tr>
<td>Habeas corpus</td>
<td>&quot;Have you the body.&quot; A court order to a jailer commanding him or her to bring an inmate before the court and prove the inmate is not held unjustly.</td>
</tr>
<tr>
<td>Order of protection</td>
<td>Very similar to a temporary restraining order. It is a court order developed specifically as a remedy for domestic violence.</td>
</tr>
<tr>
<td>Peace bond</td>
<td>Remedy developed to prevent future illegal acts. It may require payment of surety to guarantee future good conduct. Violations may also be punished as contempt of court.</td>
</tr>
<tr>
<td>Specific performance</td>
<td>A court order directing a party to perform a contractual obligation where money damages do not provide an adequate remedy.</td>
</tr>
</tbody>
</table>

matters within their borders as long as those powers are not granted to the national government by the Constitution. Therefore, each state has a unitary government with a single sovereign and only one source of power. All units of local government are subordinate to the state. Counties, cities, municipalities, wards, parishes, and special districts have no independent authority, power, or existence other than what is specifically granted to them by the state constitution or state law. The type of county government and whether a local government has "home rule," as well as the exact scope of local government is determined by the state constitutions and by the
legislatures of the various states. Therefore, directives of local government designated as ordinances or codes are similar to the administrative rules and regulations discussed previously. They do not have an autonomous existence of their own and they are not laws.

**Types of Courts**

In the United States there are two basically independent court systems: the national court system, usually referred to as the federal courts; and the individual state courts. Thus, at any one time there are 51 separate and distinct court systems operating within the United States. Each of these court systems has its own separate power basis or constitution, which describes its structure and authority.

**Federal Courts**

The U.S. Constitution provides for two types of courts in the national court system: the Article III courts, also known as “constitutional courts” and the Article I courts, also known as “legislative courts.” The Constitution creates Article III courts with the following language:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹⁵

Article I courts are created in Article I, Section 8, which says: “The Congress shall have Power... To constitute Tribunals inferior to the supreme Court.”¹⁶ Federal judges are appointed by the president with the advice and consent of the Senate.¹⁷ Judges appointed under Article III hold their offices for life, during good behavior, and their compensation may not be reduced during their time in office. However, judges in Article I courts do not have similar protection. Therefore, magistrates appointed to serve in legislative courts serve terms with set limits and could conceivably have their compensation reduced or terminated at the whim of Congress.

**Article III Courts**

The national court system is a three-tiered, consolidated court system. At the lowest level, there are 94 trial courts, called courts of original jurisdiction, where all cases qualified to enter the “federal courts” are originally filed. The number and location of these courts is determined by Congress. The number of these district courts is increased from time to time, based on factors such as the population and the number of cases filed. All states have at least one federal district court. They are identified by the state or the geographic area within a state where they preside. For example, the federal trial court that meets in southern California is referred to as the U.S. District Court for the Southern District of California. In citations this is abbreviated “S.D. Cal.”
At the intermediate level of the national court system is the U.S. Court of Appeals. This court is divided into 13 circuits. There are 11 numbered U.S. Court of Appeals circuits, a U.S. Court of Appeals for the D.C. Circuit, and a U.S. Court of Appeals for the Federal Circuit. The number and location of the 11 circuits is again determined by Congress based on geography, population, and number of cases filed. Many of the circuits encompass several states. Each of these courts is properly referred to as The U.S. Circuit Court of Appeals for the ________ Circuit. The U.S. Circuit Court of Appeals for the Fifth Circuit for example, presides over federal appeals for the states of Texas, Louisiana, and Mississippi; and the U.S. Circuit Court of Appeals for the Seventh Circuit covers federal appeals for the states of Illinois, Wisconsin, and Indiana. The U.S. Court of Appeals has appellate jurisdiction. In other words, it can review and possibly overturn decisions made by the federal district courts.

At the top level of the national court system is the U.S. Supreme Court, which has original jurisdiction and is the trial court for two categories of cases: those affecting ambassadors and consuls and those in which one of the 50 states is a party. The Supreme Court also has final appellate jurisdiction over virtually all cases presenting issues, based on the U.S. Constitution, federal laws, or treaties.
Other Federal Courts and Tribunals

There are three courts of original jurisdiction, which are lesser or inferior courts whose judges are appointed by the courts they serve, for specific terms. These Article I or legislative tribunals are the bankruptcy courts, which have special and limited jurisdiction only; the U.S. Court of Federal Claims, which is also a specialized and limited court; and the U.S. Magistrates courts. Judges in these courts are generally called magistrates, and help to reduce the workload of cases of the federal district courts.

There are also several extra-judicial or quasi-judicial bodies, boards, and commissions, which serve the federal government, but are not part of the national court system. These are the military courts, both trial and appellate; the Court of Veterans Appeals; the U.S. Tax Court; and hearing officers, referees, or arbiters who work for administrative agencies. These courts, boards, or commissions adjudicate disputes between a government agency and individuals or businesses over the choice and application of the agency’s rules and regulations. These hearing boards and commissions are extra-judicial or quasi-judicial in that they are not impartial judges, but work specifically for the various government entities and are paid from agency funds. Although they conduct hearings, they do not follow the rules of evidence and other procedures designed to protect individual rights. Furthermore, rules allow a person or business aggrieved by an agency ruling to sue the agency in the federal court system as a form of appeal. This appeal to the regular courts is typically not available until all administrative remedies have been exhausted. These administrative tribunals function to resolve disputes but are not part of the system of either constitutional or legislative courts, which are the backbone of the U.S. national judicial system.

State Courts

The 50 states each have their own judicial system, which play a significant role in the lives of people in the United States. There are important variations between the individual state judicial systems, making it impossible in one text to explain the composition and function of each state’s courts. However, it is vital for the student of mass communications law to have some understanding of the role of the state court systems and their potential impact on the practice of mass communications. Therefore, we present a very general description of state judicial systems, which we hope will help readers understand how their own state court system differs from the federal courts. There are three categories of court systems in the United States today: fragmented, consolidated, and unified. These categories are based on the simplicity or complexity of court structure and on the uniformity of judicial coordination or “voice.”

Fragmented Court Systems

Fragmented court systems have more than three layers or tiers of courts, each layer of which can have more than one level within it. Often, the courts within these layers are referred to as major and minor courts. At the bottom tier are several levels of minor courts such as municipal courts, justice of the peace courts, magistrate courts, or small claims courts. Jurisdiction of these courts is limited. They may only rule on specific subjects or
they may be limited to hearing cases based on local or municipal ordinances. Often, they can only impose limited penalties or fines. Furthermore, the magistrate overseeing these courts often has no formal legal training and no license to practice law. Often, the next level of minor courts within this lower tier will be county courts of limited jurisdiction. These courts usually administer county ordinances, and some uncontested matters such as probate or property disputes. They also hear civil matters where small amounts of money are at issue and may hear appeals de novo from the courts below.

**Appeals de novo** refer to cases taken from a court in which no record was made of the proceedings into a court in the next higher level, which will hear the matter again so it may render a decision supported by a record or transcript. Judges in these intermediate trial court levels may or may not be required to have legal training or licenses.

At the upper level of the lower tier of trial courts are often the state district or circuit courts. These courts may be divided into civil and criminal courts, but they are often free to rule on civil matters involving unlimited amounts of money or to impose criminal penalties including incarceration in a state penitentiary or capital punishment. These courts apply state law, not municipal or county ordinances.

Fragmented court systems also have one or more intermediate levels of appellate courts. The lower level appellate courts are often courts of mandatory jurisdiction that are required by state constitution or statute to hear specific types of cases. Some cases may be appealed from these lower appellate courts to the next higher level of appeal, which may also have mandatory jurisdictions. At the top tier of most state court systems will be a state appellate court of last resort, usually called the State Supreme Court. In some states, there is even a division or fragmentation at this highest level of appeal. This division usually requires that civil and criminal cases are heard by two different "supreme courts." Texas and Oklahoma, for example, have this type of **bifurcated supreme court.** In both states, these courts are called the Court of Criminal Appeals and the Supreme Court. The Court of Criminal Appeals exercises final appellate jurisdiction on criminal matters and the Supreme Court hears all final civil and juvenile appeals. Although in most states the highest state court is called the Supreme Court, in New York one set of lower tier trial courts is referred to as Supreme Courts. New York's highest level appellate court is called the Court of Appeals.

As can be seen from this discussion, fragmented court systems, like the one shown in Exhibit 1.3, present some disadvantages, not the least of which is confusion about the court in which a particular type of case should be filed and heard. These courts also are costly to administer because of the duplication of work and caseload.

**Consolidated Court Systems**

Consolidated court systems, like the U.S. system shown in Exhibit 1.4, have a three-tiered or layered arrangement. The federal courts are a consolidated court system. The courts of original jurisdiction make up the lowest tier, the courts of intermediate appellate jurisdiction are the second tier, and the State Supreme Court sits at the top tier. However, states may rearrange or change the names of these three levels. Illinois, for example, changed its fragmented court structure to a consolidated court system in the 1950s. Each county has its own trial court called a circuit court, which is a court of general
Exhibit 1.3. Example of Fragmented Court System. Court Structure of Texas.

COURT STRUCTURE OF TEXAS

SEPTEMBER 1, 1998

SUPREME COURT

- Statewide Jurisdiction
- Final appellate jurisdiction in civil cases and juvenile cases.

COURT OF CRIMINAL APPEALS

- Statewide Jurisdiction
- Final appellate jurisdiction in criminal cases.

DISTRICT COURTS

(Established in 196 Districts Containing One or More Counties)

- Jurisdiction
- Original jurisdiction in civil actions over $200, divorce, title to land, contested elections, and contested probate matters.
- Original jurisdiction in felony criminal matters.
- Juvenile matters.
- 10 District Courts are named Criminal District Courts; others are directed to give preference to certain specialized areas.

COUNTY-LEVEL COURTS

(304 Counties - 304 Judges)

Constitutional County Courts (284)

- Jurisdiction
- Original jurisdiction in civil actions between $200 and $5,000.
- Probate (contested matters transferred to District Court).
- Exclusive original jurisdiction over misdemeanors with fines greater than $500 or jail sentences.
- Appeals de novo from lower courts or on the record from municipal courts of record.

County Courts at Law (181)

- Jurisdiction
- Limited jurisdiction over civil matters, most under $100,000.
- Limited jurisdiction over misdemeanor criminal matters.
- Appeals de novo from lower courts or on the record from municipal courts of record.

Probate Courts (16)

- Jurisdiction
- Limited primarily to probate matters.

MUNICIPAL COURTS

(95 Cities - 1,722 Judges)

- Jurisdiction
- Criminal misdemeanors punishable by fine only (no confinement).
- Exclusive original jurisdiction over municipal ordinance criminal cases.
- Limited civil jurisdiction in cases involving dangerous dogs.
- Magistrate functions.

JUSTICE OF THE PEACE COURTS

(Established in Precincts Within Each County)

- Jurisdiction
- Civil actions of not more than $5,000.
- Small Claims.
- Criminal misdemeanors punishable by fine only (no confinement).
- Magistrate functions.

- Local Trial Courts of Limited Jurisdiction

- State Trial Courts of General and Special Jurisdiction

- State Intermediate Appellate Courts

- State High Court Appellate Courts

- County Trial Courts of Limited Jurisdiction

Office of Court Administration
Post Office Box 12056
Austin, Texas 78711-2056

These circuit courts are arranged into 21 numbered circuits by grouping several counties together according to the population to be served or the caseload. Jurisdiction by the intermediate appellate court level, which are called district courts of appeal, is accomplished by grouping several of the numbered trial court circuits together. The boundaries of the five numbered district courts of appeal are based on population and caseload served, and each encompasses several circuit trial courts. The Illinois State Supreme Court sits as the court of last resort at the top of this type of consolidated court system.
Unified Court System

The federal court system is a consolidated, three-tiered court system that is also unified. A court system is unified if its appellate courts at all levels attempt to speak with a unified or single “voice.” Under a unified court system, once an intermediate-level appellate court has delivered an opinion on a legal issue all the other intermediate appellate courts treat that holding as mandatory precedential authority and apply it to similar cases. Occasionally, when several of the circuit courts of appeals appear to disagree on the appropriate ruling, the Supreme Court will take the opportunity to set the circuits straight by hearing the next case or group of cases dealing with the issue. The intermediate courts then must defer to the Supreme Court’s mandatory authority.

Although the Illinois court system is consolidated, it is not a unified court system. While all five of their district courts of appeal must take as mandatory authority any decision on point made by the Illinois State Supreme Court, or the U.S. Supreme Court, the five individual district courts of appeal treat the opinions of the other four district courts as persuasive authority only. In the federal system, on the other hand, a decision by any court of appeals circuit is deferred to by the other circuits.

Jurisdiction and Venue

The term jurisdiction refers to the scope of power granted to a court or other governmental entity. There are many types of jurisdiction, which are discussed below. Venue refers to a specific place, court, or judge. Often, these terms are used interchangeably with somewhat confusing results. Venue rules govern where a trial may be held or what court may hear a case. The rules are usually predicated on either where one of the parties resides or where the event that is the subject of the case occurred. Although the U.S. Constitution does not use the term venue, it does say criminal trials must be held in the state where the crime occurred. If a crime did not occur entirely within one state, Congress may, by law, direct a location.

When a defendant requests a change of venue, she or he is asking the court to move the location of the trial from the location or court where the case was originally filed to another court or another location. Usually, this is done in order that an impartial jury may be found to try the case.

Types of Jurisdiction

Venue refers to the court or judge who hears a case or to the location where the trial takes place. Jurisdiction is more complex. It may be useful to think of jurisdiction as the power or authority of a court to decide a case. If a court lacks jurisdiction, it lacks any power or authority to make a decision in a case. A lack of jurisdiction compels a court to transfer a case to another court with appropriate jurisdiction or, in some situations, to dismiss the case completely. Any decision a court makes without jurisdiction is void for lack of power or authority. Jurisdiction is one of the few matters that can be raised at any time during the trial or appeal of any case.
In order to try a case, a court must have jurisdiction over the subject matter of the trial and the parties involved and jurisdiction in the appropriate geographic area.

**Subject Matter Jurisdiction**

Subject matter jurisdiction can be subdivided into two types: general and special or limited jurisdiction. Courts of general jurisdiction may hear any type of case regardless of its subject matter and have the broadest powers. They typically hear and decide both criminal and civil cases. Courts of special or limited jurisdiction may hear and decide only those cases within the authority granted to them by constitution or law. Examples of courts of limited jurisdiction at the national level are the U.S. Bankruptcy Courts, the U.S. Court of International Trade, and the U.S. Tax Courts. State courts of limited jurisdiction include those that hear only juvenile matters, family law matters, county, and/or municipal courts.

**Geographic Jurisdiction**

The power or authority of a court will also be circumscribed by geographic jurisdiction. For example, the authority of each U.S. District Court is limited to the state or district where it is located. Except for bankruptcy and magistrate courts, the federal courts have general subject matter jurisdiction. However, they are all subject to the geographical limitations of the state or district they serve. Therefore, unless a change of venue has been granted, no court may hear any case in which the cause of action or subject matter of the case took place outside the district of that particular court.

**Personal Jurisdiction**

Restrictions also apply to a court’s jurisdiction over the parties to a case. A defendant cannot be sued or prosecuted in just any court. He or she must have some legal connection to the geographic territory served by the specific court. In other words, the defendant must have engaged in some act or omission that can legally be said to have occurred within that court’s geographical jurisdiction. This requirement for personal connection with the court’s authority can be met if the defendant contracted to be amenable to suit within a court’s boundaries. In addition, before a court has personal jurisdiction over anyone, that person must have been served with notice of the case. There are specific requirements for how such notice must be delivered or “served” on the defendant. Failing to meet any of these requirements means the court does not have personal jurisdiction and it, therefore, cannot render judgment against the defendant.

**Federal Court Jurisdiction**

There are only three types of federal court jurisdiction: (a) subject matter jurisdiction, (b) federal party jurisdiction, (c) diversity jurisdiction. In order to have a case brought in the U.S. federal court system, a party must present a situation that falls into one of these three categories. To meet the requirement for subject matter jurisdiction, the questions or issues raised in the case must involve the U.S. Constitution, a U.S. treaty, or a federal criminal or civil statute. In order to have federal party jurisdiction, a lawsuit or case
must be either brought by or against the federal government, its agents, or officers. The third type of federal jurisdiction is based on diversity.

**Diversity jurisdiction** was established by Congress in 1789 because it recognized that state courts would be biased against citizens from other states or countries or would be biased in favor of their own citizens. Diversity jurisdiction has two requirements, both of which must be present in order for a case to be brought in federal court. The first requirement is based on the citizenship or domicile of the parties. To meet this requirement of diversity of citizenship, the parties to the court action must be from two or more states and/or countries. The second requirement is based on the amount in controversy. To meet this requirement, the amount of damages requested in the case must be at least $75,000.\textsuperscript{21}

**Original and Appellate Jurisdiction**

The Constitution not only sets out the subject matter jurisdiction of the Supreme Court and inferior courts, it also describes original jurisdiction and appellate jurisdiction.\textsuperscript{22} **Original jurisdiction** refers to a court’s authority to accept initial filings or pleadings. Lawsuits or legal actions must begin in courts with original jurisdiction. These courts are called trial courts because they try cases and decide their outcome.

In the federal court system, the U.S. District Courts are usually the courts of original jurisdiction, which serve as the trial courts. The exceptions are cases involving foreign diplomats and cases wherein one of the 50 states is a party. In these two situations the U.S. Supreme Court exercises original jurisdiction.\textsuperscript{23}

**Appellate jurisdiction** refers to the authority of a court to review decisions of the trial courts. Courts with appellate jurisdiction review lower court decisions to determine whether those decisions are in accordance with the U.S. Constitution, or whether the other applicable laws and rules were properly employed by the trial courts. There are two major functions of appellate courts: (a) to correct errors in the choice, interpretation, or application of the laws to individual litigants, and (b) to make the laws clearer and more consistent.\textsuperscript{24}

Trial court orders are often written and lengthy documents. Frequently, they summarize the issues raised by the pleadings, the evidence presented at trial, the findings of fact, and the laws applied by the trial court to reach its decision. These written decisions are always sent to the attorneys and litigants in the case; however, state trial court decisions are not collected and published. In the federal court system, only some of the more important decisions made by the U.S. District Courts are collected and published. On the other hand, appellate decisions at both the state and federal court levels are, with some minor exceptions, collected and published so they may be used as precedents in the future. There are three major purposes for publication of appellate court opinions: (a) to justify the decision to the parties and any other audience, (b) to instruct the lower court on what it must do when reconsidering the case, and (c) to announce the rules of law that determined this decision. Subordinate courts are bound to follow the rule of law or holding in the future.\textsuperscript{25}

Appellate jurisdiction is generally based on geography and sometimes the subject matter of the issues being raised on appeal. In the federal court system, appellate
INTRODUCTION TO THE LEGAL SYSTEM

Jurisdiction is set by Congress. Appellate jurisdiction in each state court system is governed by the appropriate state’s constitution.

Appellate jurisdiction can be categorized as mandatory or discretionary. Mandatory jurisdiction over specific subjects or issues or from specific trial courts means the appellate court must hear those cases when they are appealed. If the appellate jurisdiction is discretionary, that means the court may choose whether or not to hear certain cases. This discretionary jurisdiction is exercised by means of an order or writ of certiorari issued to the lower court. In order to comply with a writ of certiorari, the lower court is required to certify its complete record of the case and deliver it to the appellate court for review.

Trial and appellate courts can also be categorized based on the number of decision makers at each level. In most trial courts, both in the state and federal systems, a single judge presides over a case. Usually, the judge sits as an impartial “referee” who is responsible for the atmosphere and decorum of the courtroom. The judge also makes decisions relating to motions and objections made by the litigants’ attorneys, the choice of law, jury instructions, and the final sentence or judgment in the case. Because jury trials are relatively rare, these single trial court judges usually hear cases as both the trier of fact and the legal decision maker. The major exception to the single judge at the trial court level occurs in the federal court system when three-judge district courts are required to convene by law. These special courts hear three types of cases: (a) certain civil rights cases, (b) cases challenging drawing of legislative districts, and (c) challenges to the constitutionality of “must carry rules” regulating cable television.

Appellate court judges, on the other hand, generally sit in groups of three, five, seven, or nine. The number of judges depends on statute, location, and the type and importance of the case being heard. At the federal level, the number of judges available to sit in these smaller groups varies from 6 judges in the U.S. Court of Appeals for the First Circuit to 28 judges in the Ninth Circuit. The number of judges assigned is based on caseload. Regardless of the number of judges appointed in each circuit, the law provides that cases may be heard by separate three-judge panels, unless the rules of the circuit provide otherwise. The U.S. Supreme Court determines its own rules for the number of justices hearing cases, depending on the type and subject matter of the case. Their panels can range from hearings by one justice to hearings en banc by all nine justices. The term en banc when used by either state or federal statute or court rules is derived from French meaning “in the bench” and refers to those cases where the entire membership of a court will sit to hear a case. Because of the case and workloads of the appellate courts, decisions to hear cases en banc are controlled by the rules of the court. Only cases that address important subjects or have significant precedential value are heard en banc.

The U.S. Court of Appeals has appellate jurisdiction over three kinds of cases: tax court appeals, appeals from orders of certain federal administrative agencies, and appeals from the federal district courts, except three-judge district court decisions. Decisions made by three-judge panels in the district courts may be appealed directly to the Supreme Court. The appellate jurisdiction of the U.S. Supreme Court is described in the Constitution. Its review of lower court decisions is almost entirely determined by the court itself. Most cases heard by the high court must be granted permission by the Supreme Court through
a writ of certiorari. For a case to move from the highest court of any state to the U.S. Supreme Court, it must present one of three kinds of issues. Such cases must involve interpretation of a provision of (a) the U.S. Constitution, (b) a U.S. treaty, or (c) a federal statute; and the Supreme Court must have granted certiorari.

**Additional Types of Jurisdiction**

There are two other terms used to describe jurisdiction in the federal and state courts. These concepts help determine whether state or federal courts have jurisdiction over a case. The two terms are federal law and police powers. Police powers refer generally to the power and authority retained by the states as sovereigns. This power and authority allows the states to determine their own laws in relation to the safety, health, and general welfare of their own citizens. These state powers include control of education, public safety, health, and welfare matters. Federal law refers to those situations where powers have been specifically vested in Congress by the U.S. Constitution or that have been specifically prohibited to the states. In these matters, the national government is said to have exclusive jurisdiction and "federal law" supercedes any state laws. There are also some areas involving the states' police powers, where they have exclusive jurisdiction. Examples of exclusive federal jurisdiction include matters of international trade and treaties; regulation of commerce; coining, regulating, and protecting the money supply; establishing and regulating postal service; declaration and financing of wars; establishing uniform rules of naturalization; and uniform laws on bankruptcy. Examples of exclusive state jurisdiction include the establishment and maintenance of systems of general public education; public hospital systems; laws and rules relating to obtaining drivers licenses and driving laws; liquor laws, following repeal of prohibition; laws and rules relating to marriage; and dissolution of marriages, child custody, and distribution of property rights.

Concurrent jurisdiction refers to those subjects and laws wherein both the national government and state governments may exercise simultaneous power to enact and enforce laws. These include pornography, obscenity, indecency, and numerous criminal laws. Prior to the Copyright Act of 1976, both the states and federal government exercised concurrent jurisdiction for the protection of original works of authorship, even though the U.S. Constitution grants power to Congress "(T)o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..." Through the use of common law precedents and statutes, states also attempted to protect rights of original authors and creators of artistic expressions. However, Congress took exclusive jurisdiction and control of copyright matters through the Copyright Act of 1976, effectively preempting all state laws on the subject. There are many situations in which both federal and state laws overlap. Under these circumstances, one individual or group engaging in an activity prohibited by both state and federal law could be prosecuted in either state or federal courts or both. The conspiracy and bombing of the Murrah Federal Building in Oklahoma City by Timothy McVey and Terry Nichols in 1995 is one such example.
Legal Hierarchy and Authorities

Judicial Hierarchy

It may help you understand judicial hierarchy under Articles III and VI, and Amendment X of the U.S. Constitution to think of the courts in this order of significance: (a) the U.S. Supreme Court; (b) the supreme courts of the 50 states; (c) the U.S. Circuit Courts of Appeal; (d) the various courts of appeal for the 50 states; (e) the U.S. District Courts; and (f) the various trial courts and trial levels within the various state court systems. Decisions of courts near the top of this order have greater legal authority than do decisions by lower courts.

Legal Authority

In addition to the “level” of the court, four concepts help determine whether a statement in a court’s decision creates a precedent that must be followed in the future. These concepts are mandatory authority, persuasive authority, primary authority, and secondary authority.

**Mandatory authority** means that a case being cited is dispositive on an issue before a court. Mandatory authority is a statement of law or a holding from a superior court speaking on the same issue. Faced with mandatory authority, lower courts have no discretion at all; they must follow the legal precedent.

It is important to note that mandatory authority “flows” within a single judicial system. For example, for the state trial courts in New York, appellate decisions from the New York courts are mandatory authority. Decisions from an appellate court, or even the supreme court, of another state are not mandatory authority. In both the state and the national court systems, decisions from the appropriate supreme court are mandatory authority over all intermediate courts of appeals and trial courts.

**Persuasive authority** refers to decisions on points of law from a court on the same level in the hierarchy or from another jurisdiction. Persuasive authority is used only when no higher level court has spoken on the issue.

**Primary authority** means the law being cited or used to decide a case comes from one or more of the four sources of law: (a) constitutions, (b) statutes, (c) treaties, or (d) case law. In this context, case law includes interpretations, judicial review, and common law precedent.

**Secondary authority** means the source being cited has persuasive value only and comes from something other than one of the four sources of law. Secondary authority can include such things as learned books and treatises on legal topics, law review articles, or even scholarly studies from outside the legal community. These sources are used only when there is no primary or mandatory authority on point.

Types of Opinions and Their Authority

Because the majority of cases we discuss in this textbook come from the U.S. Supreme Court, it is important to understand how the judgments of that court are reported. The U.S. Supreme Court uses several terms to identify its judgments and the actual disposi-
tion of appellate cases, terms usually found at the end of the written opinion of the court. They are almost the very last word or words used by the appellate court in its judgment. In this context, it may be helpful to note that the opinion of the court is reported before any concurring or dissenting opinions. These terms always refer to the decision or judgment of the lower trial or appellate court from whom either certiorari or mandatory appeal was taken and they describe how the lower court’s decision is to be treated.

There are five terms used to indicate the legal result of the appeal. The appellate court can uphold or affirm the lower court decision. It can reverse the lower court’s decision. Reverse means to overturn the lower court completely. The appellate court can modify the lower court’s decision by affirming in part and reversing in part; and it can remand the case by sending it back to the lower court for further consideration or action. A case is usually remanded with instructions to conduct a new trial or hearing. The appellate court can also vacate or totally void a lower court’s decision. When the appellate court vacates the lower court’s ruling, it dismisses the case completely and nullifies all actions and orders of the lower court. In such a situation, for example, an injunction granted by the lower court would be unenforceable. Often, the terms reversed and remanded are used together with specific instructions to the lower court about what it must do to correct its errors. Specific instructions are also used when an appellate court modifies or affirms in part and reverses in part the lower court’s decision. Often the terms modify or modifies are not used at all in this context.

**Types of U.S. Supreme Court Opinions**

While the decisions of the U.S. Supreme Court are mandatory authority over all lower courts, gradations or variations in weight are ascribed to these decisions. The major factor that determines the precedential authority of U.S. Supreme Court decisions is whether a majority of the justices concur with both the holding and the judgment.

Prior to the term of Chief Justice John Marshall, which began in 1801, the High Court delivered seriatim opinions. In a seriatim opinion each justice, in sequence, gave his or her own views on a case and its outcome. Justice Marshall, who was a federalist, initiated the practice of disposing of Supreme Court cases with a single written opinion representing the views of the entire Court. He thought such an opinion would give greater credence and power to the Court as it spoke with one voice, and would minimize the potential for misunderstanding of the Court’s decision and reasons. Recently, appointments to the Supreme Court have been politicized. Justices have been appointed by presidents with the specific intention that they will rule consistently with the political or social philosophies of the chief executive who appointed them. Therefore, it has become politically important for justices to indicate when they do not agree with the majority view of the Court. The result of these political influences was the creation of several different types of Supreme Court opinions. Terms used to label Supreme Court opinions include unanimous opinion, majority opinion, dissenting opinion, per curiam opinion, plurality opinion, and concurring opinion.

A unanimous opinion is one in which all justices agree on the result, the judgment, and the reasoning. Reasoning is the choice, interpretation, and application of law to the
issues in the case. A **majority opinion** is one in which at least five of the nine justices agree on the judgment and the reasoning. When a unanimous or majority opinion is written, one of the justices who most supported the opinion will be assigned to write the opinion and the case will begin with: “J. ________ delivered the Opinion of the Court.” However, following a majority opinion, there will be at least one written **dissenting opinion** in which one justice, who disagreed both with the judgment and with the reasoning in the case, will state his or her reasons for opposing the majority opinion. A **per curiam opinion** is unsigned and signifies either the decision is obvious and no explanation is needed, or the Court is so split over the choice, interpretation, and application of the law they could agree on the result only. It is important to note that in a per curiam decision, the justices do agree on the result or judgment. They simply may not be able to agree on the legal reasoning that supports the judgment. A **plurality opinion** occurs when fewer than a majority subscribe to both the judgment and reasoning in a case. The judgment in a plurality opinion must then be supported by one or more **concurring opinions**, which must agree on the judgment. The concurring opinions may have totally different or additional reasoning to support the judgment.

Per curiam opinions of the second type mentioned and plurality opinions are not supported by the majority of justices. Therefore, they do NOT bind the Court as a statement of policy, constitutional interpretation, or common law. Furthermore, such decisions are NOT mandatory authority on the lower courts and they do not serve as precedent. They are persuasive authority only and usually are used only to guide decisions in that specific case or situation. Per curiam decisions are specifically labeled. Several concurring and dissenting opinions will follow plurality opinions. In some of the more recent cases, it almost appears the Court is returning to the days of seriatim opinions, with concomitant loss of directive power and prestige on the lower courts. On the other hand, majority opinions, regardless of the vote count, are mandatory authority and do bind the courts as policy, constitutional interpretation, and common law.

### Rules of Justiciability

Over time, the U.S. Supreme Court has developed special rules of justiciability. These rules are often based on political pressures and are sometimes based upon the need to curtail its own workload. **Rules of justiciability** are used to guide the Court and others to determine whether a case is amenable to judicial decision and if it is in the proper forum. There are six major rules of justiciability. Each one imposes some limit on what cases may be heard by the federal courts. The six rules are labeled case and controversy, mootness, ripeness, standing, political questions, and the abstention doctrine.

The rule that the Court will not make decisions based on hypothetical situations nor give “advisory opinions” is called the **case and controversy rule**. The federal courts will not hear cases or decide issues unless they are between real litigants with a legal cause of action.

With some rare exceptions, the federal courts will not hear cases that are moot. **Mootness** has to do with whether the dispute or controversy has already reached a final determination and is no longer subject to resolution by any court. For example, prior to
Roe v. Wade, federal courts had often refused to rule on abortion challenges because by the time the issue came to court more than the 9-month human gestation period had elapsed. The issue was moot because the plaintiff had either obtained an abortion or the pregnancy had gone to term.

The Court will also not take cases where the controversy has not become ripe. A case is not ripe if the issues in the case have not yet come to a legal impasse. The concept of ripeness thus is the opposite of mootness. A case is not ripe if the parties still have opportunities, outside of the courts, to resolve their dispute. For example, in some situations, the Court has refused to take cases challenging the constitutionality of a federal statute because the statute was not yet in effect, because the attorney general had not yet used the statute to charge anyone, or because no violation of the statute had yet occurred.

The federal courts will not take cases where any of the named parties has not been harmed or does not have a personal stake in its outcome. This concept is called standing to sue. Historically, for example, the Courts refused to take cases brought by groups such as the Sierra Club who sought to protect the national forests and national parks from logging or other encroachment. The Courts ruled the members of the organization did not and could not personally own these public lands and therefore they were not personally injured by the actions they sought to challenge. Eventually, the Court did change its reasoning and granted standing to groups like the Sierra Club. Standing, in this instance, was based on the members of the organization losing their ability to hike or camp in the parks or view them in pristine, undefiled condition.

Cases covered by the political questions rule, more than any others, present perplexing problems for the federal courts. The rule helps sort out the division of powers among the three branches of government. It is also used to protect the Courts’ authority and prestige when they will not be able to enforce their decisions because they must rely on the executive branch and willingness of The People to abide by its decisions. The three categories of cases covered by the political questions rule are textual commitment of the issue to another branch of government, lack of judicial standards, and judicial imprudence.

Textual commitment of the issue to another branch of government simply means that the case under consideration presents an issue that is assigned by law or constitution to one of the other three branches of government. Lack of judicially manageable standards means that there is no existing rule or standard by which the Court can resolve the dispute presented to it. A number of factors guide the Court’s determination of what makes a matter judicially imprudent. Colloquially put, judicially imprudent means the question presents a political “hot potato” the Court would rather avoid. The sixth rule of justiciability developed by the U.S. Supreme Court is called the abstention doctrine. This rule might also be called the federalism rule because it has been used when appeals were made from the highest state court, and when a litigant is seeking review of the state court’s decision by the U.S. Supreme Court. As we have seen previously in this chapter, there are only three possible ways to enter the federal courts. For a case to be heard in the federal courts, it must (a) present a claim based on a provision of the U.S. Constitution, a U.S. treaty, or a federal statute, (b) involve
the national government or one of its agents or officers as a party, or (c) involve diversity of citizenship.

Where only a state question is presented in a case that involves only interpretation of a state’s constitution or statutes, the decision of the state’s highest court is usually final and review by the U.S. Supreme Court is precluded. In these situations, the U.S. Supreme Court abstains from granting certiorari. An exception to the abstention doctrine is made when a case in which a decision made by a state supreme court involves both state and federal questions. In such cases, the U.S. Supreme Court will accept the state court’s findings regarding its own constitution and laws, but it will address issues that involve the U.S. Constitution, treaties, or statutes.

### Magic Words and Phrases

<table>
<thead>
<tr>
<th>Abstention doctrine</th>
<th>Justiciability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirm</td>
<td>Major courts</td>
</tr>
<tr>
<td>Appeals de novo</td>
<td>Majority opinion</td>
</tr>
<tr>
<td>Appellate judgments/dispositions</td>
<td>Mandatory authority</td>
</tr>
<tr>
<td>Appellate jurisdiction</td>
<td>Mandatory jurisdiction</td>
</tr>
<tr>
<td>Authority</td>
<td>Minor courts</td>
</tr>
<tr>
<td>Bifurcated supreme courts</td>
<td>Modify</td>
</tr>
<tr>
<td>Case and controversy</td>
<td>Mootness</td>
</tr>
<tr>
<td>Case law</td>
<td>National/federal court system</td>
</tr>
<tr>
<td>Codes</td>
<td>Ordinances</td>
</tr>
<tr>
<td>Common law</td>
<td>Original jurisdiction</td>
</tr>
<tr>
<td>Concurrent jurisdiction</td>
<td>Per curiam opinion</td>
</tr>
<tr>
<td>Concurring opinion</td>
<td>Personal jurisdiction</td>
</tr>
<tr>
<td>Consolidated court system</td>
<td>Persuasive authority</td>
</tr>
<tr>
<td>Constitution</td>
<td>Plurality opinion</td>
</tr>
<tr>
<td>Discretionary jurisdiction</td>
<td>Police powers</td>
</tr>
<tr>
<td>Dissenting opinion</td>
<td>Political question</td>
</tr>
<tr>
<td>Diversity jurisdiction</td>
<td>Power</td>
</tr>
<tr>
<td>Equitable remedies</td>
<td>Precedent</td>
</tr>
<tr>
<td>Equity</td>
<td>Primary authority</td>
</tr>
<tr>
<td>Exclusive jurisdiction</td>
<td>Regulations</td>
</tr>
<tr>
<td>Extra-judicial tribunals</td>
<td>Remand</td>
</tr>
<tr>
<td>Federal democratic republic</td>
<td>Reverse</td>
</tr>
<tr>
<td>Federal governmental system</td>
<td>Ripeness</td>
</tr>
<tr>
<td>Fragmented court system</td>
<td>Rules</td>
</tr>
<tr>
<td>General jurisdiction</td>
<td>Secondary authority</td>
</tr>
<tr>
<td>Intermediate appellate courts</td>
<td>Seriatim opinion</td>
</tr>
<tr>
<td>Judicial review</td>
<td>Sovereignty</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Special or limited jurisdiction</td>
</tr>
</tbody>
</table>
Questions for Discussion

1. Why is it important for a mass communications practitioner to understand the distinctions between code law and common law legal systems? What consequences can the international practitioner expect if she or he ignores these differences?

2. Why are the provisions of Article VI, Clause 2 and 3 together with the Amendments IX and X of the U.S. Constitution so vital to the U.S. federal democratic republican system of governance? Why would these provisions be important in understanding the concepts of federal preemption, exclusive, and concurrent jurisdiction?

3. Why is it important to clearly understand the subordinate position of administrative rules, regulations, and the quasi-judicial boards and commissions that administer them? What is their relation to the four sources of law and the judicial systems of both the national and state governments?

4. What are the basic differences between “constitutional” and “legislative” courts? Why did the framers of the U.S. Constitution believe it was so important to grant lifetime tenure to federal judges and justices appointed to administer the “constitutional” courts? What kinds of problems might result if such officials were elected to serve for only 4- or 6-year terms?

5. List and define all the different types of jurisdiction you can, discuss why each is important and whether a different terminology might be developed to distinguish each.

Suggested Cases to Read and Brief

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1937)
Coglevroe v. Green, 328 U.S. 549 (1946)
Roe v. Wade, 410 U.S. 113 (1973)
Holtzman v. Schlessinger, 484 F.2d 1307 (2d Cir 1973)
De Funis v. Odegaard, 416 U.S. 312 (1974)
6. Discuss the limited jurisdiction given by Congress to the three-judge district courts and how the three types of cases within their purview relate to each other in importance or to the administration of justice and U.S. public policy.

7. Discuss the components of the judicial hierarchy in relation to mandatory and persuasive authority. Relate these concepts to the types of Supreme Court opinions and the problems that are created when the Court renders less than a majority opinion on a question of national importance.

8. Discuss the concepts of fragmented, consolidated, and unified court systems. How is your state’s court system composed? Who is actually served best by each of these systems?

Notes

3. U.S. Const. amends. IX & X.
4. U.S. Const. amends. IX & X.
5. U.S. Const. pmbl.
7. U.S. Const. art. II, § 1.
9. U.S. Const. art. VI, cl. 2.
10. U.S. Const. art. VI, cl. 3.
14. U.S. Const. art. I § 10 & amend. X.
17. U.S. Const. art II, § 2, cl. 2.
20. U.S. Const. art III, § 2, cl. 3 & amend. VI.
21. This amount has been changed by Congress several times and is subject to being modified in the future.
22. U.S. Const. art III § 2, cl. 2.
23. U.S. Const. art III § 2, cl. 2.
32. For a summary of these general rules of engagement by Justice Brandeis, see Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1937); Also see Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), for Justice John Marshall’s original views on judicial review and justiciability issues.
34. See, e.g., Powell v. McCormack, 395 U.S. 486 (1969), addressing the power of the House of Representatives to expel but not to exclude a duly elected member; but see Bush v. Gore, 531 U.S. 98 (2000), wherein the Supreme Court, not the House of Representatives, decided the 2000 presidential election.
35. See, Colegrove v. Green, 328 U.S. 549 (1946); but see, Baker v. Carr, 369 U.S. 186 (1962), regarding whether malapportionment violated the guarantee of U.S. CONST. art. IV, § 4 which states: “(t)he United States shall guarantee to every State in this Union a Republican Form of Government.”
36. See, e.g., Holtzman v. Schlessinger, 484 F.2d 1307 (2d Cir. 1973), regarding use of Congressional appropriations, in violation of the War-Force-Military Procurement Act of 1971, to provide military support and assistance to the governments of Cambodia and Laos; and Goldwater v. Carter, 444 U.S. 996 (1979), regarding the constitutionality of President Carter’s unilateral action in notification of termination of military defense treaty with Taiwan in preparation for normalization of diplomatic relations with the People’s Republic of China.