

It may surprise some law students to learn that an entire course could be devoted to a single amendment of the U.S. Constitution. Many more will be surprised to see that most of the jurisprudence discussed in this casebook is of relatively recent vintage—much of it dating back to the Warren and Burger Courts. Before World War I, the Supreme Court devoted very little attention to the First Amendment. Since then, however, the First Amendment has become one of the most frequently litigated components of the Constitution. In fact, during the current Roberts Court era, the First Amendment has become a powerful tool to challenge federal, state, and local regulations that affect communication in any conceivable way, including, for example, restrictions on the sale of physicians' prescription data and offering consumers discounts for cash purchases. From the modern perspective, the First Amendment has become such a central part of our social, political, and religious interaction in the United States that it is difficult to envision an American society without it. In an increasingly diverse culture, which is witnessing an explosion of new media through which conflicting opinions can be disseminated, the First Amendment will almost certainly remain an important—indeed central—focal point of constitutional litigation.

This casebook surveys a broad range of contemporary First Amendment law, including cases relating to each of the major concerns of the modern amendment—freedom of speech, press, assembly, association, and religion. Why not “petition” as well? In the modern era, the right of petition, although one of the five main clauses of the First Amendment, has not played much of a role (if any) in securing expressive and religious freedoms in the United States. The Supreme Court, since its ruling in *McDonald v. Smith*, 472 U.S. 479 (1985), consistently has held that the Petition Clause is “cut from the same cloth” as the Speech, Assembly, and Press Clauses and, accordingly, does not provide any enhanced or targeted protection for speech that arguably constitutes a “petition [to] the Government for a redress of grievances.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387–99 (2011) (reaffirming and applying *McDonald* by holding that the Petition Clause lacks any jurisprudential effect separate and distinct from the Free Speech Clause). If this should change in the future—meaning that the Supreme Court decides to enforce the Petition Clause in a meaningful way—we will, of course, provide targeted coverage of this clause.

This casebook is organized around substantial excerpts of the Supreme Court's most significant First Amendment decisions. We have edited the cases relatively lightly in an effort to let the Justices' own words lead students through the doctrine. In addition to the main cases, notes after many of the cases provide short excerpts or summaries of other relevant Supreme Court decisions and important academic commentary and also flag emerging issues on which the Supreme Court has not yet spoken. The chapters also include problems to help focus students'

attention on the particular applications of, and internal conflicts in, the doctrine. These problems provide an easy and reliable way to assess mastery of the relevant legal rules, principles, and theory.

A few words about our approach to contextualizing First Amendment topics are in order. First, we have made a conscious effort to address the interplay of historical and political events and First Amendment doctrine. In our view, consideration of the historical and political context of free speech and religious freedom cases helps to illuminate the concerns that can motivate judges to accept or reject constitutional claims. Second, in several important areas, we incorporate decisions from foreign constitutional courts because we believe that these materials provide a helpful contrast with the U.S. approach to common legal problems. Looking at a problem from a comparative perspective often yields useful insights into the often-unstated policies and objectives of contemporary First Amendment jurisprudence.

We have organized this casebook to begin with a general background of over-riding First Amendment concepts before turning to areas in which the Supreme Court has developed and applied specialized rules. Modern First Amendment law can be very frustrating for the uninitiated because the lines between the various specialized rules and standards are often unclear. Indeed, the Supreme Court's consistent drift from general, open-ended principles to frame and decide First Amendment cases toward a vast sea of three- and four-part tests that apply only in very specific, limited circumstances provides one of the larger themes of this casebook. As you explore these materials, you should consider whether highly context-specific, complex, multipronged balancing tests better protect fundamental liberties than would more general, open-ended tests.

In some respects, attempting to understand First Amendment law is like learning to play three-dimensional chess. In many situations raising First Amendment issues, more than one set of rules will seem to apply. Any given case may raise generalized First Amendment concerns (such as the rule that the government may almost never engage in content or viewpoint regulation), coupled with specific rules developed for particular factual scenarios (such as the rules regarding obscenity, fighting words, threats, or government-subsidized speech), which are further complicated by special procedural rules (such as the expedited litigation requirements of *Freedman v. Maryland*), special remedial rules (such as the Court's strong discouragement of injunctive prior restraints), and even special statutory-construction mandates (such as constitutional avoidance). Learning to navigate the often-conflicting crosscurrents of First Amendment law is one of the student's main tasks in a First Amendment course, and this casebook is designed to make that task easier.

The book is divided into two parts. Part I (the first 16 chapters) mainly covers the Speech Clause, plus the rights of press, assembly, and association. Part II (the next 10 chapters) covers the Religion Clauses. Within Part I, we begin with an overview of the general theory and structure of the First Amendment, then move to core concepts and tests that apply in a range of contexts, and end with doctrines that apply in more specialized areas. In the Fifth Edition, we have reorganized some materials to improve the book's teachability, including by adding new chapters on discrete topics that can be covered within a single class period.

The first three chapters provide an overview of the history and theory of the First Amendment, along with fundamental concepts regarding the scope of the First Amendment's coverage and content and viewpoint regulation by the government. These chapters also provide a basic understanding of the government's role in regulating political expression, a topic the Supreme Court addressed in its earliest First Amendment cases and that remains at the heart of free speech jurisprudence. New in the Fifth Edition, discrete chapters cover "time, place, and manner" regulations (Chapter 4) and regulation of expressive conduct (Chapter 5). Chapter 6 turns to the rules that apply to government when it acts as an owner or proprietor of public properties and also examines timely concerns about government's response to hostile audiences and the potential for violence in the public square. Chapter 7 is conceptually related to Chapter 6; it addresses the First Amendment issues that arise when government acts as employer, manager, or educator, as well as the limits of the government's ability to leverage its own spending to influence speech. Chapters 8 and 9 cover compelled speech and free association, including the right not to associate—a topic that is again in flux. And Chapter 10 discusses the intersection of free speech and tort law, including current constitutional controversies surrounding defamation reform.

Chapters 11 through 16 move from the general to the particular. After Chapter 11 covers the First Amendment rights of the press and mass media, a new chapter (12) turns to the rapidly evolving First Amendment principles limiting the regulation of social and other new media. Then, Chapters 13 and 14 address two areas in which First Amendment rights have been expanding in recent decades: commercial speech and campaign speech and spending. Chapter 15 considers the thorny questions that arise when government regulates speech that imposes dignitary or identity-based harms. Finally, Chapter 16 returns to the First Amendment's boundaries, focusing on obscenity and other sexually explicit speech.

Part II discusses the Religion Clauses. Chapter 17 opens with a general overview of the history and theory of the Establishment and Free Exercise Clauses. The next four chapters discuss religious liberty protected by the Free Exercise Clause and statutes. Chapter 18 turns to the meaning of "free exercise" and considers whether the Free Exercise Clause should protect religiously motivated conduct no less than it protects religious belief, noting how the answer has changed over time. Chapter 19 explores a new doctrine, namely the free exercise right to government funding. Chapter 20 considers statutory enactments that convey individual exemptions from neutral laws of general applicability when such laws impede religiously motivated conduct. Chapter 21 examines the ability of religious entities, such as churches, temples, and mosques, to seek and obtain exemptions from generally applicable laws through doctrines such as the ministerial exemption.

The remaining five chapters examine the Establishment Clause. Chapter 22 provides an introduction and overview to the Establishment Clause; that chapter considers the various general tests that the Supreme Court has deployed to prevent religious establishments. Chapter 23 examines how the Establishment Clause impacts efforts by the federal and state governments to accommodate religiously motivated beliefs and conduct. Chapter 24 discusses cases involving government financing of religion, including indirect financing of religious K–12 schools through voucher programs, as well as direct financing via government grants to

religious organizations that provide social services. The distinct problems and issues associated with bringing religious beliefs and practices into the K–12 public schools receive sustained coverage in Chapter 25. Finally, Chapter 26 considers the constitutional limits applicable to government efforts to promote religion in other contexts. In sum, the Fifth Edition provides a completely updated and comprehensive survey of the Supreme Court’s complex and fast-evolving Religion Clauses jurisprudence.

As this brief summary indicates, the complex interrelationships between the many First Amendment standards and doctrines are daunting. Fortunately, the cases tend to be engaging. The reader will find in them a gallery of menaces and heroes, dissenters and visionaries, and more than a few oddballs. The cast of characters includes Wobblies and neo-Nazis, cross-burners and civil-rights protestors, boundary-pushing artists and parents who aim to separate their children from the modern world; for every Daniel Ellsberg, there is a peddler of misinformation. In these pages, you will find both Eugene V. Debs and Richard Nixon; Larry Flynt and Catherine McKinnon; Reverend Fred Phelps and Madalyn Murray O’Hair. In one sense, it is their First Amendment that this book discusses, but in a more important sense, this colorful cast has staked out the scope of expressive and religious freedom enjoyed by the entire society. The authors of this casebook believe that we have rendered the story of the First Amendment in a way that makes it both coherent and digestible. But even if some readers come away thinking we have fallen short of that goal, we feel certain that no one will find this material boring.

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