

It may come as a surprise to many students entering law school that an entire course could be devoted to a single amendment of the United States Constitution. On the other hand, it may also come as a surprise to other students 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. The Supreme Court devoted very little attention to the First Amendment prior to World War I. Since that time, 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 jurisprudence, including cases relating to each of the major concerns of the modern amendment—freedom of speech, press, assembly, association, and religion. The right of petition, although one of the five main clauses of the First Amendment, has not (at least to date) played an important doctrinal or jurisprudential role in securing expressive and religious freedoms in the United States. The two modern cases that squarely address the meaning and scope of the Petition Clause both declined to articulate and apply a specific jurisprudence of the clause. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387-399 (2011) (holding that the Petition Clause does not confer any special protection on complaints by government employees about their treatment by their employers because “[p]etitions, no less than speech, can interfere with the efficient and effective operation of the government” and noting that the rights of petition and free speech “share substantial common ground”); *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985) (holding that the Petition Clause does not create any greater right of public comment that contains false factual assertions than do the Free Speech or Free Press Clauses because the Petition Clause is “cut from the same cloth” as these parallel rights). *But cf. Adderley v. Florida*, 385 U.S. 39, 52 (1966) (Douglas, J., dissenting) (arguing that the Petition Clause should be interpreted to provide enhanced access to government property, such as a county jail, when speech and assembly have a clear petitioning component). Indeed, the nontextual implied right to freedom of association plays a more central role in contemporary First Amendment law and

theory. Accordingly, the Petition Clause does not receive independent treatment in this book. However, should the Petition Clause come to play a more meaningful role in securing expressive freedoms in the United States, the authors will certainly include dedicated coverage of this clause in a future edition.

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, along with references to some lower court decisions regarding matters on which the Supreme Court has not yet spoken. The chapters all include Theory Applied Problems after major sections and subsections to help focus students' attention on the particular applications and internal conflicts of the doctrine. The Theory Applied Problems provide an easy and reliable way to assess students' mastery of the relevant governing legal rules, principles, and theory.

A few words about our approach to contextualizing First Amendment problems and jurisprudence 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. In sum, considering both history and how other nations address common legal problems can help to foster better understanding of contemporary U.S. First Amendment jurisprudence, and this book incorporates and reflects this point of view.

We have organized this casebook with the intention of first providing students with a general background of overriding First Amendment concepts before turning to more specific 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 secure 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 the Court's unusual willingness to consider facial overbreadth challenges to statutes impinging on free speech). The First Amendment even has special real estate rules for government property, which dictate when and how that property must be opened to speakers wishing to express themselves to other members of the public. 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 basic organization of the book divides the discussion of the First Amendment between the Speech Clauses, which are covered in Part I (the first twelve chapters), and the Religion Clauses, which are covered in Part II (the next ten chapters). Within the speech chapters, the discussion moves from an overview of the general theory and structure of the First Amendment to the specific doctrines that apply to particular areas of speech.

The first three chapters provide an overview of the history and theory of the First Amendment, along with a discussion of the basic rules regarding content and viewpoint regulation by the government. These chapters also provide a basic understanding of the government's role in regulating political expression, which is the topic that the Supreme Court addressed in its earliest First Amendment cases, and which remains at the heart of free speech jurisprudence. Chapter 4 examines two complications that have arisen under content neutrality principles – regulation of the “secondary effects” of speech and application of the First Amendment to “expressive conduct.” Chapter 5 discusses the general rules that apply to government when it acts as an owner or proprietor of public properties; the chapter also examines timely concerns about government's response to hostile audiences and the potential for violence in the public square. Chapter 6 covers the general rules regarding compelled and anonymous speech and also addresses First Amendment doctrines relating to “expressive association.” Chapters 7 through 12 move from the general to the particular, discussing a variety of different First Amendment doctrines that relate to specific types of speech, including commercial speech, media regulation, defamation, group libel, fighting words, erotica, government employees, and government-subsidized speech. In the Fourth Edition, we have worked diligently to update and streamline our coverage of the Supreme Court's principal free speech decisions, including the addition of new material on current constitutional controversies surrounding defamation reform and the regulation of new communications technologies, questions associated with the free speech effects of privately owned dominant social media platforms and search engines, revenge porn, the shrinking public space available for expressive activities, and the consistent and persistent growth in the constitutional protection afforded to various and sundry forms of commercial speech.

Part II discusses the Religion Clauses. The first chapter is an introduction to both clauses. The next four chapters discuss religious liberty protected by the Free Exercise Clause and statutes, and the remaining five chapters examine the Establishment Clause. In Chapter 13, Part II opens with a general overview of the history and theory of the Establishment and Free Exercise Clauses. Chapter 14 then 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 15 explores a new doctrine, namely the free exercise right to government funding. Chapter 16 considers statutory enactments that convey individual exemptions from neutral laws of general applicability when such laws impede religiously motivated conduct. Chapter 17 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.

Chapter 18 provides an introduction and overview to the Establishment Clause; this chapter considers the various general tests that the Supreme Court has deployed to prevent religious establishments. Chapter 19 examines how the Establishment Clause impacts efforts by the federal and state governments to accommodate religiously motivated beliefs and conduct. Chapter 20 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 21. Finally, Chapter 22 considers the constitutional limits applicable to government efforts to promote religion in other contexts. In sum, the Fourth 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 complexities of the interrelationships between the many First Amendment standards and doctrines are daunting. Fortunately, the entertainment value of cases raising First Amendment issues is quite high. The reader will find in the materials that follow a gallery of rogues and heroes, dissenters and visionaries, and more than a few simple oddballs. The cast of characters includes Communists and Ku Klux Klansmen, cross burners, funeral protestors, punk rock bands seeking edgy trademarks, draft-card burners and anti-war protestors, atheists and evangelicals, Eugene V. Debs and Richard Nixon, Larry Flynt and Catherine McKinnon, Reverend Fred Phelps and Madalyn Murray O'Hair, and devout Jehovah's Witnesses and the purveyors of violent video games. In one sense it is their First Amendment that this book discusses, but in a more important sense this colorful cast has helped the Court define 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. Whether we have succeeded in that task is for the reader to decide, but at the very least we feel certain that no one will find this material boring.

Ronald J. Krotoszynski, Jr.

Lyrissa Barnett Lidsky

Caroline Mala Corbin

Timothy Zick

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