# First Amendment Law

# First Amendment Law

## Freedom of Expression and Freedom of Religion

FOURTH EDITION

**Arthur D. Hellman**
Sally Ann Semenko Endowed Chair
University of Pittsburgh School of Law

**William D. Araiza**
Professor of Law
Brooklyn Law School

**Thomas E. Baker**
Professor of Law
Florida International University College of Law

**Ashutosh A. Bhagwat**
Martin Luther King Jr. Professor of Law
University of California at Davis
School of Law

Carolina Academic Press
Durham, North Carolina

LCCN: 2018933299
ISBN: 978-1-5310-0940-3
eISBN: 978-1-53100-941-0

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

To Bonnie, Jerry, Roberta and Walter, ADH

To Stephen, WDA

To Jane Marie, TEB

To Shannon, Uma and Declan, AAB

# Contents

**Table of Cases** xix
**Preface to the Fourth Edition** xxix
**Preface to the First Edition** xxxiii
**Acknowledgments** xxxvii

**Part One**
**Freedom of Expression**

**Chapter 1 · The Problem of Subversive Advocacy** 3
A. First Encounters 3
*Schenck v. United States* 3
Note: *Schenck* and Its Antecedents 5
Note: The "Unrevised Holmes" and *Baltzer v. United States* 7
*Frohwerk v. United States* 8
*Debs v. United States* 9
Note: *Frohwerk* and *Debs* 11
B. The *Abrams* Case and the Holmes Dissent 12
*Abrams v. United States* 12
Note: The *Abrams* Dissent and Seditious Libel 15
C. Learned Hand and the *Masses* Case 16
*Masses Publishing Co. v. Patten* 16
Note: The Opinion in *Masses* 20
Problem: Protesting a U.S. Military Action 21
D. *Gitlow, Whitney*, and the Cases of the Thirties 22
*Gitlow v. New York* 22
Note: *Gitlow* and *Lochner* 26
*Whitney v. California* 27
Note: Why Protect Freedom of Speech? 32
Note: Organizational Advocacy and Individual Responsibility 33
E. The Smith Act Prosecutions 36
*Dennis v. United States* 36
Note: *Dennis* and Revolutionary Speech 45
Note: *Yates*, *Scales*, and *Noto* 45
Problem: "Warriors for Earth" 49
F. *Brandenburg v. Ohio* and Its Implications 50

*Brandenburg v. Ohio* 50
Note: *Brandenburg* and Its Antecedents 53
*Hess v. Indiana* 53
Note: The Summary Reversal in *Hess* 55
*NAACP v. Claiborne Hardware Company* 55
Problem: Encouraging Participation in a "Jihad" 58
Problem: Advice to a Street Gang 59
G. The "True Threat" 60
Note: *Watts, Black,* and the "True Threat" 60
Problem: Anti-Abortion Website 62
H. A Last Word from Justice Holmes 63
*United States v. Schwimmer* 63
Note: "Freedom for the Thought that We Hate" 65

**Chapter 2 · Unprotected Speech: The *Chaplinsky* Exclusions** 67
A. "Fighting Words" 67
*Chaplinsky v. New Hampshire* 67
Note: *Chaplinsky* and Its Implications 69
Note: "Fighting Words" Today 70
Problems: The "Callahan Epithet" and Other Expletives 71
B. "The Libelous"—or Otherwise Tortious 75
[1] The Constitutionalization of Defamation 76
*New York Times Co. v. Sullivan* 76
Note: The Holding of *New York Times* 85
Note: Proving "Malice" 87
Note: "Public Officials" and "Official Conduct" 89
Note: Beyond "Public Officials" 91
[2] "Public Figures" and Private Plaintiffs 93
*Gertz v. Robert Welch, Inc.* 93
Note: Who Is a "Public Figure"? 102
Note: "Public Figures" in the Lower Courts 105
Note: Suits by Private Plaintiffs 106
Note: "Fact" and "Opinion" 108
[3] "Outrage" and Emotional Distress 110
*Snyder v. Phelps* 110
Note: Intentional Infliction of Emotional Distress and the First Amendment 119
Problem: An Obsessive Blogger 121
[4] Invasion of Privacy 122
Problem: A Wrestler and a Sex Tape 123
C. "The Lewd and Obscene" 124
[1] Initial Development of the Law 124
*Roth v. United States* 124
*Alberts v. California* 124

Note: *Roth* and Its Antecedents 132
Note: "Ideas" and "Entertainment" 132
Note: "I Know It When I See It"? 133
*Stanley v. Georgia* 134
Note: The Implications of *Stanley* 137
[2] Current Doctrine 138
*Miller v. California* 138
*Paris Adult Theatre I v. Slaton* 142
Note: The 1973 "Restatement" 149
Note: "Community Standards" and the Internet 151

**Chapter 3 · New Candidates for Categorical Exclusion or Limited Protection** 155
A. Offensive Language and Images 155
*Cohen v. California* 155
Note: The Implications of *Cohen* 160
*Rosenfeld v. New Jersey* 160
Note: "The Willful Use of Scurrilous Language" 162
Note: Protecting the Unwilling Audience 163
Problem: Foul Language in a Neighborhood Park 164
Problem: The Cursing Canoeist 164
*FCC v. Pacifica Foundation* 165
Note: The Medium and the Message 173
Problem: The Over-Excited Actress 174
B. Child Pornography 175
*New York v. Ferber* 175
Note: A New Category of Unprotected Speech 181
Note: Private Possession of Child Pornography 182
Problem: "Child Pornography" in a Journal 184
*Ashcroft v. Free Speech Coalition* 185
Note: "Virtual Child Pornography" 194
Note: *U.S. v. Williams* and "Purported" Child Pornography 194
C. Commercial Speech 197
*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 197
Note: First Amendment Protection for Commercial Speech 204
*Central Hudson Gas & Electric Corp. v. Public Service Commission* 205
Note: Identifying Commercial Speech 209
Problem: "Commercial" Speech and Public Debate 211
Note: *Discovery Network* and the "Reasonable Fit" 212
*Lorillard Tobacco Co. v. Reilly* 215
Note: The Normalization of Commercial Speech 226
Problem: Attacking Childhood Obesity 227
Note: *Sorrell* and the Continued Ferment over Commercial Speech 228

Note: A Return to *Lochner*? 231
D. The End of Categorical Balancing 232
*United States v. Stevens* 232
Note: The Implications of *Stevens* 237
*Brown v. Entertainment Merchants Association* 238
Note: Violence, Interactivity, and the Protection of Children 248
*United States v. Alvarez* 249
Note: Knowingly False Statements of Fact 261
Problem: The Stolen Valor Act of 2013 263

**Chapter 4 · Trans-Substantive Doctrines** 265
A. Prior Restraints 265
Note: An Introduction to Prior Restraints 265
[1] Licensing 266
*Lovell v. City of Griffin* 266
Note: Licensing Schemes and the *Freedman* Requirements 268
[2] Injunctions and Other Remedies 274
*Near v. Minnesota* 274
Note: The Decision in *Near* 278
Problem: A Recalcitrant Defamer 280
*New York Times Co. v. United States* (The "Pentagon Papers" Case) 281
Note: Injunctions Against Speech 292
Note: "The H-Bomb Secret" 292
Problems: Disclosure of NSA Monitoring 293
B. Overbreadth and Vagueness 294
*New York v. Ferber* 294
*City of Houston v. Hill* 297
*Ashcroft v. Free Speech Coalition* 301
Note: The Overbreadth Doctrine 301
Note: The Vagueness Doctrine 302

**Chapter 5 · Content-Based Regulation** 305
A. The Principle 305
*Police Department of Chicago v. Mosley* 305
Note: "Above All Else . . .": The *Mosley* Principle 308
Note: Speech Near Polling Places 310
B. Defining Content Discrimination 312
*Reed v. Town of Gilbert* 312
Note: A Narrower View of Content Neutrality? 322
Problem: Flags on Holidays 323
Problem: A Panhandling Ordinance 323
C. Applying Strict Scrutiny 324
*Williams-Yulee v. Florida Bar* 324

Note: How Strict Is "Strict"? 337
Problem: Nondisclosure of National Security Letters 339

**Chapter 6 · Regulating the "Time, Place, and Manner" of Protected Speech** 341
A. Early Development of the Doctrine 341
*Lovell v. City of Griffin* 341
*Schneider v. New Jersey* 342
Note: From *Lovell* to *Schneider* 344
*Martin v. City of Struthers* 344
Note: Regulating the Manner of Expressive Activity 348
B. Applications of the Doctrine 350
*Frisby v. Schultz* 350
*Ward v. Rock Against Racism* 356
*City of Ladue v. Gilleo* 360
Note: Foreclosing Particular Modes of Expression 365
Note: Narrow Tailoring and "Underinclusiveness" 366
Problem: Regulating Newsracks 367
*McCullen v. Coakley* 368
Note: Restrictions on Anti-Abortion Speech 384
Problem: Buffer or Bubble? 386
Problem: Picketing of Religious Activities 386

**Chapter 7 · Expressive Conduct and Secondary Effects** 389
A. Expressive Conduct 389
*United States v. O'Brien* 389
Note: "Symbolic Speech" and the *Tinker* Case 395
Note: "Incidental" Burdens on Expression 395
*Texas v. Johnson* 397
Note: Flag Burning as Protected Speech 406
Problem: A New Flag Protection Act 406
B. "Secondary Effects" as a Basis for Regulation 407
*City of Renton v. Playtime Theatres, Inc.* 407
Note: Origins of the "Secondary Effects" Doctrine 412
*Boos v. Barry* 413
*City of Los Angeles v. Alameda Books, Inc.* 417
Note: Continuing Controversy over "Secondary Effects" 427
Problem: Limiting the Hours of Adult Businesses 428
C. Expression and Conduct: Untangling the Doctrines 429
*City of Erie v. Pap's A.M.* 430
Note: Expressive Conduct, Secondary Effects, and Incidental Burdens 440
Problem: Nudity "for Entertainment Purposes" 442
Problem: An "Affirmative Action Bake Sale" 443

**Chapter 8 · Speech on Government Property and the Public Forum Doctrine** 445
A. Foundations of the Doctrine 445
*Hague v. Committee for Industrial Organization* 445
*Schneider v. New Jersey* 447
*Cantwell v. Connecticut* 447
Note: The Significance of *Cantwell* 449
*Cox v. New Hampshire* 449
Note: The Law Established by the Foundational Cases 452
B. Mass Demonstrations and the Problem of the "Hostile Audience" 453
*Terminiello v. Chicago* 453
Note: Hostile Audiences and Provocative Speakers 457
*Forsyth County v. Nationalist Movement* 460
Note: Fees and Permits for Demonstrations on Public Property 465
Problem: Klan Rally and Counter-Rally 466
C. Access to Nontraditional Forums and Facilities 467
Note: Competing Approaches to Speech on Public Property 467
*Lehman v. City of Shaker Heights* 470
Note: *Lehman* and the *Perry* Synthesis 474
*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* 476
*International Society for Krishna Consciousness, Inc. v. Lee* 485
*Lee v. International Society for Krishna Consciousness Inc.* 498
Note: Competing Views of the Public Forum 499
Note: *Rosenberger* and Viewpoint Discrimination 500
Note: "Limited" and "Designated" Forums 502
Problem: Display of Controversial Art 503
Problem: Flags and Banners on Highway Overpasses 504
D. Speech on Private Property 505
Note: The *Marsh* Decision 505
Note: The Shopping Center Cases 506

**Chapter 9 · Compelled Expression** 509
A. Compelled Speech 509
*West Virginia State Board of Education v. Barnette* 509
Note: *Barnette* and Its Implications 517
Problem: A State University Pledge 517
*Wooley v. Maynard* 518
Note: The *Barnette* Principle 521
Problem: Navajo Spiritualism on License Plates? 523
Note: "Trivializing" *Barnette*? 523
Problem: The Wedding Photographer and the Gay Couple 524
Note: Speech, Coercion, and Meaning 525
B. Compelled Subsidy 526

*Abood v. Detroit Board of Education* 526
Note: Unease with *Abood* 530
Note: Applying *Abood* Beyond the Union Context 531
Problem: Satirical Anti-Tobacco Advertising 535

**Chapter 10 · Freedom of Association** 537
*NAACP v. Alabama* 537
Note: *NAACP* and Beyond 540
*Roberts v. United States Jaycees* 540
Note: Competing Approaches to Freedom of Association 547
Problem: The New Age Coalition and the Fundamentalist 548
Note: *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* 549
*Boy Scouts of America v. Dale* 550
Note: *Dale* and the Precedents 563
Note: Status and Message 564
Problem: Exclusion from a Gay Softball League 564

**Chapter 11 · Campaign Finance** 567
A. Foundational Principles 567
*Buckley v. Valeo* 567
Note: *Buckley* and Its Progeny 585
B. Corporate and Union Political Speech 586
Note: Corporate and Union Speech, Electoral Integrity, and the First Amendment 586
*Citizens United v. Federal Election Commission* 590
Problem: Corporate Contributions to an Independent Spender 605
Problem: A State Response to *Citizens United*? 606
C. Disclosure Requirements 606
Note: Disclosure Requirements and the First Amendment 606
D. Circumvention of Contribution Limits and *Buckley*'s Limits 610
Note: The Anti-Circumvention Idea 610
Note: *McCutcheon* and the Limits of the Anti-Circumvention Rationale 611

**Chapter 12 · Beyond Regulation: The Government as Employer and Educator** 615
A. First Amendment Rights of Government Employees 615
*Connick v. Myers* 615
Note: *Pickering* and Its Progeny 623
Problem: An Activist Clerk 624
*Garcetti v. Ceballos* 625
Note: The Implications of *Garcetti* 637

Problem: The Outspoken University Administrator 638
Note: Testimony as Part of an Employee's "Ordinary" Work Responsibilities 638
Problem: The Police Chief Versus the Mayor 639
Note: Patronage Dismissals 640
B. The First Amendment in the Public Schools 641
*Tinker v. Des Moines Independent School District* 641
Note: The Implications of *Tinker* 646
Note: From *Tinker* to the "Bong Hits" Case 646
*Morse v. Frederick* 650
Note: The Implications of *Morse v. Frederick* 659
Problem: Career Guidance and Student Protest 660
Problem: A Controversial T-Shirt 661
Problem: Trolling on a Blog 662

**Chapter 13 · Beyond Regulation: Whose Message Is It?** 665
A. Paying the Piper — and Calling the Tune? 665
*Rust v. Sullivan* 665
Note: *Rust* and *Rosenberger* 672
Note: Government Funding of Legal Services 673
*Agency for International Development v. Alliance for Open Society International, Inc.* 676
Note: "Inside" the Program — or "Outside"? 685
B. When Is the Government the Speaker? 686
Note: The Government Speech Doctrine 686
*Walker v. Texas Division, Sons of Confederate Veterans, Inc.* 690
Note: Expanding the Government Speech Doctrine 701
*Matal v. Tam* 702
Problem: "Enhanced Underwriting" by the Ku Klux Klan 702
Problem: Exclusion from a State's Adopt-a-Highway Program 704

**Chapter 14 · Freedom of the Press** 705
Note: What Is "The Press," Anyway? 705
A. Singling Out the Press 706
*Grosjean v. American Press Co.* 706
Note: *Grosjean* and the Free-Press Clause 711
*Minneapolis Star v. Minnesota Commissioner of Revenue* 711
Note: *Grosjean* and *Minneapolis Star* 718
Note: Discrimination among Media Categories 718
Problem: Restrictions on College Newspapers 721
Problem: Save the Newspapers! 721
B. Claims of Exemption from Generally Applicable Laws 722
*Branzburg v. Hayes* 722
Note: Justice Powell's "Enigmatic" Concurrence 732

Note: Journalists' Privilege in the Lower Courts 734
Note: Legislative and Executive Responses to the Shield Issue 735
Note: *Branzburg* and Access to Prisons 736

**Chapter 15 · Testing the Boundaries of Doctrine** 739
A. "Hate Speech" 739
Note: *Beauharnais* and "Group Libel" 739
*R.A.V. v. City of St. Paul* 740
Note: The Implications of *R.A.V.* 755
Note: A Penalty Enhancement Statute 756
Note: Cross Burning Redux 758
Note: Cross Burning and the First Amendment 760
B. Government Programs and Offensive Speech 761
*Matal v. Tam* 761
Note: The Implications of *Matal* 772
C. The Internet as the New Public Square? 772
*Packingham v. North Carolina* 772
Note: The Internet as the New Public Forum? 780
Problem: Net Neutrality 781
Problem: Posts on a Commissioner's Facebook Page 781

**Part Two**
**Freedom of Religion**

**Chapter 16 · The History and Purposes of the Religion Clauses** 785
A. The Debate over the Original Understanding 785
*Everson v. Board of Education* 786
*Wallace v. Jaffree* 789
*Lee v. Weisman* 793
B. History and Tradition 797
*McCreary County v. ACLU* 798
*Van Orden v. Perry* 802
Problem: Ceremonial Deism 804
Note: The Incorporation Doctrine 805
C. Values 806
William P. Marshall, *Truth and the Religion Clauses* 807

**Chapter 17 · The Establishment Clause** 813
A. Financial Aid to Religion 813
[1] Basic Principles 813
*Everson v. Board of Education* 813
Note: Two Competing Principles—"No Aid" and "Equal Aid" 817
[2] The *Lemon* Test as Modified 818
*Lemon v. Kurtzman* 818

Note: The *Lemon* Test 823
*Agostini v. Felton* 823
*Mitchell v. Helms* 830
[3] School Vouchers 842
*Zelman v. Simmons-Harris* 842
Problem: Faith-Based Social Service Providers 857
B. School Prayer 857
*Engel v. Vitale* 857
*School District of Abington Township v. Schempp* 861
*Wallace v. Jaffree* 867
*Lee v. Weisman* 871
Problem: Drafting a Moment-of-Silence Policy 877
C. School Curriculum 877
*Edwards v. Aguillard* 877
Problem: Intelligent Design 884
D. Displays in Public Places 885
*County of Allegheny v. Greater Pittsburgh ACLU* 885
*McCreary County v. ACLU* 898
*Van Orden v. Perry* 908
Note: Justice Breyer's Constitutional Distinctions 919
Problem: Atheists Cross about Highway Memorials 921
E. Legislative Prayer 921
*Town of Greece v. Galloway* 922

**Chapter 18 · The Free Exercise Clause** 939
A. Early Cases 939
*Reynolds v. United States* 939
*United States v. Ballard* 942
B. Modern Cases 946
*Sherbert v. Verner* 946
*Wisconsin v. Yoder* 951
*Employment Division v. Smith* 959
Note: Statutory Protections of the Exercise of Religion 968
C. Discrimination against Religion 977
*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 978
Problem: Police Grooming Regulation 988

**Chapter 19 · Interrelationships among the Clauses** 989
A. Definition of Religion 989
*Torcaso v. Watkins* 990
*United States v. Seeger* 991
Note: Freedom of Conscience and the Constitution 996
Note: Dogma, Heresy, and Schism 999
*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* 1000

Problem: Peremptory Challenges 1008
B. Tensions between the Religion Clauses 1008
*Locke v. Davey* 1009
Note: The Blaine Amendments 1014
*Trinity Lutheran Church of Columbia, Inc. v. Comer* 1015
Problem: The Good Friday School Holiday 1030
C. Religious Speech 1030
Note: The Free Speech-Public Forum Overlay 1031
*Rosenberger v. Rector and Visitors of the University of Virginia* 1032
*Good News Club v. Milford Central School* 1041
Problem: "Whom Do I Arrest?" 1050
Note: A Postscript on the Religion Clauses 1052

**Appendix A · The Constitution of the United States** 1053
**Appendix B · The Justices of the United States Supreme Court, 1946–2016 Terms** 1063
**Index** 1067

# Table of Cases

281 Care Committee v. Arneson, 262
44 Liquormart, Inc. v. Rhode Island, 226, 532
12 200-ft. Reels of Film, United States v., 182
Abood v. Detroit Board of Education, 526, 542, 587
Abrams v. United States, 12, 81, 771
Adamson v. California, 805
Adarand Constructors, Inc. v. Peña, 326
Adderley v. Florida, 467, 479, 569, 736
Adler v. Board of Education, 617
Agency for International Development v. Alliance for Open Society International, Inc., 676, 766
Agostini v. Felton, 823, 830, 835, 844, 848, 1023
Aguilar v. Felton, 823
Albertini, United States v., 357
Alberts v. California, 124, 129
Alexander v. United States, 265
Allegheny, County of v. Greater Pittsburgh ACLU, 885, 902, 924
Alvarez, United States v., 249, 331
Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 506
American Library Assn., Inc., United States v., 766
Arcara v. Cloud Books, Inc., 395, 396
Arkansas Writers' Project v. Ragland, 718
Arnett v. Kennedy, 620
Ashcroft v. American Civil Liberties Union, 151, 174, 233, 239
Ashcroft v. Free Speech Coalition, 185, 235, 236, 301, 302, 775, 776
Associated Press v. NLRB, 724
Associated Press v. United States, 713, 724
Austin v. Michigan Chamber of Commerce, 588, 590, 600
Automobile Workers, United States v., 594
Ballard, United States v., 942, 948, 962, 999
Baltzer v. United States, 7
Bantam Books, Inc. v. Sullivan, 265, 282
Barnes v. Glen Theatre, Inc., 430, 436, 437, 440, 743
Barr v. Matteo, 82
Barron v. Baltimore, 805
Bartnicki v. Vopper, 104, 123
Bates v. Little Rock, 578, 723, 726
Bates v. State Bar of Arizona, 204, 302
Batson v. Kentucky, 1008
Bd. of Educ. of Westside Cmty. Schools (Dist. 66) v. Mergens, 1031
Beauharnais v. Illinois, 75, 81, 125, 178, 234, 739, 741
Bethel School Dist. No. 403 v. Fraser, 592, 646
Bigelow v. Virginia, 198
Blackwell v. Issaquena County Board of Education, 641, 644
Blair v. United States, 731
Board of Airport Commissioners v. Jews for Jesus, 302
Board of Directors of Rotary International v. Rotary Club of Duarte, 548, 555
Board of Education v. Allen, 822
Board of Regents of Univ. of Wis. System v. Southworth, 674

Board of Trustees of State University of N.Y. v. Fox, 212, 217, 226
Boerne, City of v. Flores, 968, 969, 973
Bolger v. Youngs Drug Products Corp., 210
Boos v. Barry, 309, 372, 401, 413, 428, 438, 463, 747, 749
Bose Corp. v. Consumers Union of United States, Inc., 34, 112, 741
Boy Scouts of America v. Dale, 550
Boyd v. United States, 345
Brady v. Maryland, 635
Brandenburg v. Ohio, 50, 54, 190, 195, 234, 239, 250, 400, 656, 657, 748, 760, 775
Branti v. Finkel, 616, 620, 640
Branzburg v. Hayes, 705, 713, 722
Braunfeld v. Brown, 948, 950
Breard v. Alexandria, 198, 713
Brewster v. Boston Herald-Traveler Corp., 725
Bridge, In re, 734
Broadrick v. Oklahoma, 187, 294, 297, 741
Brown v. Board of Education, 641
Brown v. City of Pittsburgh, 386
Brown v. Entertainment Merchants Association, 238, 252, 327, 332, 337
Brown v. Louisiana, 398, 441
Brown v. Oklahoma, 162
Buckley v. Valeo, 440, 528, 543, 567, 585, 592, 603, 606, 607
Bullock v. Carter, 584
Burnside v. Byars, 641, 643, 646
Burson v. Freeman, 311, 312, 326, 373
Burwell v. Hobby Lobby Stores, Inc., 970, 976
Butler v. Michigan, 170, 172
Cafeteria Workers v. McElroy, 617
California Medical Ass'n v. FEC, 610
Callahan, People v., 71
Cameron v. Johnson, 304, 470
Cantwell v. Connecticut, 68, 69, 70, 157, 345, 447, 454, 538, 806, 943, 961, 1026
Capitol Square Review & Advisory Bd. v. Pinette, 1031
Carey v. Brown, 352, 743
Central Hudson Gas & Electric Corp. v. Public Service Commission, 205, 532, 533, 767
Chaplinsky v. New Hampshire, 67, 69, 95, 115, 116, 125, 157, 160, 167, 181, 197, 232, 234, 239, 250, 308, 400, 454, 741, 748
Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools, 502
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 978
Cincinnati, City of v. Discovery Network, Inc., 210, 212, 218, 315, 319, 362
CIO, United States v., 593
Citizens United v. Federal Election Commission, 586, 590
City Council of Los Angeles v. Taxpayers for Vincent, 353, 361, 490, 544
**City of (see name of city)**
Clark v. Community for Creative Non-Violence, 356, 441
Clay, State v., 73
Coates v. Cincinnati, 304
Cohen v. California, 155, 160, 161, 168, 170, 239, 306, 352, 473, 582, 653, 751
**Commonwealth v. (see name of defendant)**
Communist Party v. Subversive Activities Control Bd., 579
Connally v. General Construction Co., 303
Connick v. Myers, 107, 111, 615, 623, 625, 640
Consolidated Edison Co. v. Public Service Comm'n, 415
Contempt of Court of Wright, Matter of, 734
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 476, 487, 1047

Cousins v. Wigoda, 571
Cox Broadcasting Co. v. Cohn, 617
Cox v. Louisiana, 304, 307, 469, 569
Cox v. New Hampshire, 268, 272, 449, 463, 465
CSC v. Letter Carriers, 571, 572
Curtis Publishing Co. v. Butts, 91, 96, 97, 723
Curtis, Ex parte, 620
Cutter v. Wilkinson, 973, 976, 1025
Dallas v. Stanglin, 562
Dameron v. Washington Magazine, Inc., 106
Davis v. Massachusetts, 445, 446, 447, 469
Davis, Commonwealth v., 445, 447
De Jonge v. Oregon, 34, 52, 80, 268, 284, 306, 538, 806
Debs, In re, 290
Debs v. United States, 9
DeGregory v. Attorney General of New Hampshire, 723
Democratic Party of United States v. Wisconsin ex rel. LaFollette, 553
Dennis v. United States, 36, 51, 52
Doe v. Reed, 608
Dombrowski v. Pfister, 295
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 86, 106, 111
Duncan v. Louisiana, 806
Edwards v. Aguillard, 800, 877, 901
Edwards v. South Carolina, 458, 467, 468
Eichman, United States v., 407
Elfbrandt v. Russell, 723
Elk Grove Unified School Dist. v. Newdow, 931
Elonis v. United States, 62
Elrod v. Burns, 527, 620, 640
Employment Division v. Smith, 946, 959, 968, 980, 983, 985, 987, 973, 1003, 1017
Engel v. Vitale, 857, 864, 872, 873, 909
Epperson v. Arkansas, 879
Erie, City of v. Pap's A.M., 430
Erznoznik v. City of Jacksonville, 163, 170, 240, 352, 410, 569
Euclid v. Ambler Realty Co., 169
Everson v. Board of Education, 786, 789, 793, 806, 813, 822, 849, 900, 949, 989, 1017, 1022, 1026, 1052
FCC v. League of Women Voters of Cal., 668, 679, 684
FCC v. Pacifica Foundation, 165, 177, 352
Federal Election Comm'n v. Wisconsin Right to Life, Inc., 590
Federal Election Commission v. Massachusetts Citizens for Life, 587, 603
Federal Election Commission v. National Right to Work Committee, 587, 596, 600
Feiner v. New York, 157, 457
Ferber v. New York, 232, 742
First National Bank of Boston v. Bellotti, 586, 592, 604
Fiske v. Kansas, 33, 51
Florida Bar v. Went For It, Inc., 204
Florida Free Beaches, Inc. v. Miami, 440
Florida Star, The v. B.J.F., 122, 593
Follett v. McCormick, 961
Forsyth County v. Nationalist Movement, 272, 453, 460
Fowler v. Rhode Island, 981
Fox Television Stations v. FCC, 174
Frazee v. Ill. Dep't of Employment Sec., 999
Freedman v. Maryland, 269, 285, 723
Frisby v. Schultz, 114, 115, 350, 359, 475, 743
Frohwerk v. United States, 8
FW/PBS, Inc. v. Dallas, 269
Garcetti v. Ceballos, 625
Garland v. Torre, 725
Garner v. Board of Public Works, 617
Garrison v. Louisiana, 97
Gertz v. Robert Welch, Inc., 93, 167, 201, 250, 260, 593

Giboney v. Empire Storage & Ice Co., 131, 160, 178, 182, 183, 195, 234, 250, 310, 524, 645
Gibson v. Florida Legislative Investigation Committee, 726, 731
Ginsberg v. New York, 169, 170, 177, 240, 243, 644, 753
Gitlow v. New York, 22, 29, 267, 448, 538, 806
Givhan v. Western Line Consolidated School District, 618, 628, 631, 632, 637
Glickman v. Wileman Brothers & Elliott, 532, 686
Goldman v. United States, 5
Gompers v. Bucks Stove & Range Co., 4, 5
Gonzales v. O Centro Espirita Beneficente Uniáo do Vegetal, 969
Good News Club v. Milford Central School, 502, 1041
Gooding v. Wilson, 70, 160, 161, 298, 299
Grace, United States v., 114, 487
Grand Jury Proceedings, In re, 734
Grand Jury Subpoena of Williams, In re, 735
Grand Jury Subpoena, Judith Miller, In re, 732, 735
Grayned v. City of Rockford, 303, 469, 497
Greece, Town of v. Galloway, 922
Greer v. Spock, 477, 478, 479, 501
Griswold v. Connecticut, 542, 646
Grosjean v. American Press Co., 268, 593, 706, 712, 723, 724, 729
Hague v. Committee for Industrial Organization, 343, 414, 445, 449, 451, 452, 453, 458, 467, 474, 487
Hamilton v. Regents, 510, 516
Hamling v. United States, 151
Harte-Hanks Communications, Inc. v. Connaughton, 88
Hazelwood School District v. Kuhlmeier, 647, 650
Hebert v. Louisiana, 707
Heckler v. Mathews, 544
Heineman, United States v., 62
Herndon v. Lowry, 35, 52
Hess v. Indiana, 53, 190
Hill v. Colorado, 369, 379, 384
Hobbie v. Unemployment Appeals Comm'n of Florida, 960
Holder v. Humanitarian Law Project, 326, 337, 372, 681, 685
Holt v. Hobbs, 974
Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 1000, 1017
Houchins v. KQED, Inc., 712, 737
Houston, City of v. Hill, 71, 297, 302
Hudgens v. NLRB, 493, 507
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 532, 549
Hustler Magazine v. Falwell, 108, 111, 116, 119, 251, 402, 751
Hutchinson v. Proxmire, 103
**In re (see name of party)**
International Society for Krishna Consciousness, Inc. v. Lee, 485, 486, 489, 490, 491, 496, 497, 498, 502, 1031
Interstate Circuit, Inc. v. Dallas, 133
J.E.B. v. Alabama, 1008
Jackson, Ex parte, 268
Jacobellis v. Ohio, 133, 144
Jacobson v. Massachusetts, 516
Jenkins v. Georgia, 149
Johanns v. Livestock Marketing Association, 534, 686, 692, 763
Jones v. Wolf, 999
Joseph Burstyn, Inc. v. Wilson, 168, 239
Karalexis v. Byrne, 137
Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 1002
Keyishian v. Board of Regents, 616, 617
Knox v. Service Employees International, 530

Kois v. Wisconsin, 140
Kokinda, United States v., 486
Kovacs v. Cooper, 171, 349, 352, 569
Kusper v. Pontikes, 568, 571
Ladue, City of v. Gilleo, 321, 328, 338, 360, 366, 374
Lakewood, City of v. Plain Dealer Publishing Co., 273, 367, 462
Lamb's Chapel v. Center Moriches Union Free School Dist., 1033, 1043
Lamont v. Postmaster General, 729
Lane v. Franks, 638, 640
Lawrence, Ex parte, 725
Leathers v. Medlock, 719
Lee v. International Society for Krishna Consciousness Inc., 486, 489, 491, 497, 498
Lee v. Weisman, 793, 806, 871, 911, 926, 928, 932, 934, 935
Lee, United States v., 714, 960
Legal Services Corp. v. Velazquez, 674, 679
Lehman v. City of Shaker Heights, 470, 478, 479
Lemon v. Kurtzman, 818, 826, 831, 848, 867, 878, 881, 887, 899, 900, 909, 917, 933
Letellier, In re, 734
Lewis v. City of New Orleans, 298, 299, 300
Linmark Associates, Inc. v. Willingboro, 361, 593
Littleton, City of v. Z.J. Gifts D-4, L.L.C., 270
Lloyd Corp., Ltd. v. Tanner, 507
Lochner v. New York, 26, 209, 232
Locke v. Davey, 1009, 1015, 1016, 1017, 1019, 1021, 1025, 1028
Lohrenz v. Donnelly, 105
Lorillard Tobacco Co. v. Reilly, 215
Los Angeles, City of v. Alameda Books, Inc., 417
Lovell v. City of Griffin, 68, 266, 268, 301, 341, 342, 344, 345, 347, 446, 449, 451, 452, 727, 729
Lubin v. Panish, 584
Lynch v. Donnelly, 887, 892, 893, 909, 927
Mabee v. White Plains Pub. Co., 713, 720, 724
Machinists v. Street, 527
Macintosh, United States v., 993
Madigan, Illinois ex rel. v. Telemarketing Associates, Inc., 251
Madsen v. Women's Health Ctr., 379
Mapp v. Ohio, 134
Marbury v. Madison, 235
Marks v. United States, 292, 429, 732
Marsh v. Alabama, 505, 508, 729
Marsh v. Chambers, 526, 800, 910, 911, 921, 922, 923, 930, 931, 933
Martin v. City of Struthers, 344, 348, 349, 352, 358, 359, 723, 729
Masses Publishing Co. v. Patten, 16, 21
Matal v. Tam, 702, 761
**Matter of** (**see name of party**)
McAuliffe v. Mayor of New Bedford, 617
McConnell v. Federal Election Commission, 589, 590
McCreary County v. ACLU, 798, 898, 911, 917, 925
McCullen v. Coakley, 320, 368, 775, 778
McCutcheon v. Federal Election Commission, 611
McDaniel v. Paty, 981
McGowan v. Maryland, 950
McGrath v. Kristensen, 437
McIntyre v. Ohio Elections Comm'n, 376
McKoy v. North Carolina, 733
Medure v. New York Times Co., 105
Meek v. Pittenger, 831, 832, 835
Memoirs v. Massachusetts, 139
Metromedia Inc. v. San Diego, 361, 744
Meyer v. Nebraska, 29, 542, 546, 642, 646
Miami Herald Publishing Co. v. Tornillo, 168, 174, 575, 593
Milkovich v. Lorain Journal Co., 108

Miller v. California, 138, 143, 145, 146, 167, 170, 176, 185, 239, 250, 582, 742, 752
Miller v. United States, 732
Mills v. Alabama, 575, 622
Minersville School District v. Gobitis, 509, 514, 519
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 396, 711
Mitchell v. Helms, 830, 1015, 1023, 1024
Monitor Patriot Co. v. Roy, 90
Morse v. Frederick, 650, 659
Mt. Healthy City Board of Ed. v. Doyle, 618
Mueller v. Allen, 844
Murdock v. Pennsylvania, 464, 961
Mutual Film Corp. v. Industrial Comm'n of Ohio, 241
NAACP v. Alabama, 527, 537, 542, 558, 568, 571, 578, 579, 589, 716, 723, 726, 731, 806
NAACP v. Button, 80, 715, 723, 726, 731, 947
NAACP v. Claiborne Hardware Company, 55, 195, 542, 618
National Endowment for Arts v. Finley, 766
National Treasury Employees Union, United States v., 624
Near v. Minnesota, 86, 251, 267, 268, 274, 280, 282, 285, 290, 292, 301, 449, 710, 723, 729
Nebraska Press Ass'n v. Stuart, 309
New York v. Ferber, 175, 185, 235, 250, 294, 309, 775, 776
New York State Club Ass'n, Inc. v. City of New York, 551
New York Times Co. v. Sullivan, 16, 21, 58, 61, 76, 90, 96, 111, 116, 120, 124, 132, 178, 198, 210, 250, 260, 306, 308, 568, 569, 575, 593, 646, 705, 723, 724, 729
New York Times Co. v. United States (The "Pentagon Papers" Case), 251, 281, 593, 724, 729, 736
Niemotko v. Maryland, 306
Nixon v. Shrink Missouri Government PAC, 585
O'Brien, United States v., 156, 220, 309, 315, 357, 372, 389, 398, 406, 408, 429, 430, 438, 441, 519, 561, 568, 712, 743
Oklahoma Press Publishing Co. v. Walling, 713, 714, 718, 720, 724
Old Glory Condom Corp., In re, 764
Oliver, United States v., 526
Ollman v. Evans, 109
Olmstead v. United States, 135
Organization for a Better Austin v. Keefe, 279, 281, 282, 353
Osborne v. Ohio, 182, 235
OSU Student Alliance v. Ray, 503
Packer Corp. v. Utah, 471
Packingham v. North Carolina, 499, 772
Palko v. Connecticut, 267, 538
Palmore v. Sidoti, 544
Paris Adult Theatre I v. Slaton, 142
Patterson v. Colorado, 4, 6, 267
Pell v. Procunier, 736
**People v.** (**see name of defendant**)
Permoli v. New Orleans, 805
Perry Education Association v. Perry Local Educators' Association, 474, 478, 490, 669, 1043
Perry v. Sindermann, 618
Philadelphia Newspapers, Inc. v. Hepps, 108, 593
Pickering v. Board of Education, 529, 615, 616, 618, 623
Pierce v. Society of Sisters, 29, 542, 546, 813, 953, 961
Pipefitters v. United States, 594
Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 178, 713
Planned Parenthood v. Casey, 806

Playboy Entertainment Group, Inc., United States v., 234, 372
Pleasant Grove City v. Summum, 318, 686, 688, 691, 763
Plunkett v. Hamilton, 725
Police Department of Chicago v. Mosley, 305, 314, 319, 341, 372, 417, 473, 714, 717, 741, 742, 749
Pope v. Illinois, 150
Porter v. Ascension Parish School Bd., 652, 659
Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 226, 745
Powell v. Alabama, 709, 711
Price v. Time, Inc., 735
Prince v. Massachusetts, 240, 957
Progressive, Inc., The, United States v., 293
Prudential Ins. Co. v. Cheek, 24
PruneYard Shopping Center v. Robins, 508, 522
Public Utilities Comm'n v. Pollak, 471, 472
R.A.V. v. City of St. Paul, 222, 234, 242, 314, 320, 328, 739, 740, 772, 1033
Railway Employes' Dept. v. Hanson, 527
Railway Express Agency v. New York, 714
Raines, United States v., 295
Rankin v. McPherson, 112
Read, State v., 73
Red Lion Broadcasting Co. v. FCC, 168, 170, 174
Redrup v. New York, 134, 141
Reed v. Reed, 306, 307
Reed v. Town of Gilbert, 309, 312, 323, 338, 339, 366, 428, 769, 772
Regan v. Taxation with Representation of Wash., 667, 670, 673, 678, 679, 684, 720
Regan v. Time, Inc., 357
Regina v. Hicklin, 127
Reidel, United States v., 137, 145, 146
Reno v. American Civil Liberties Union, 174, 189, 774
Renton, City of v. Playtime Theatres, Inc., 321, 373, 407, 415, 416, 418, 433, 744, 746
Republican Party of Minn. v. White, 317, 326
Reynolds v. United States, 788, 789, 814, 939, 955, 960, 962
Rinaldo, State v., 734
Roberts v. United States Jaycees, 540, 551, 961, 1003
Robinson, State v., 74
Roe v. Wade, 198
Rosenberger v. Rector and Visitors of Univ. of Va., 316, 318, 321, 374, 500, 629, 673, 767, 1010, 1023, 1032, 1043
Rosenblatt v. Baer, 89, 95
Rosenbloom v. Metromedia, Inc., 94, 101
Rosenfeld v. New Jersey, 160, 163
Roth v. United States, 124, 130, 134, 142, 146, 147, 167, 199, 234, 239, 285, 308, 568, 618, 741
Rowan v. United States Post Office Dept., 352
Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), 523, 678
Runyon v. McCrary, 544
Rust v. Sullivan, 665, 674, 678, 679, 683, 686, 766
Rutan v. Republican Party of Illinois, 640
Sable Communications of Cal., Inc. v. FCC, 593, 741
Saia v. New York, 308, 350, 440
San Diego, City of v. Roe, 112, 623
Saxbe v. Washington Post, 736
Scales v. United States, 47
Schacht v. United States, 399, 403
Schaumburg, Village of v. Citizens for a Better Environment, 477
Schenck v. United States, 3, 8, 64, 167, 245, 276, 285, 516

Schneider v. New Jersey, 326, 342, 344, 349, 352, 359, 440, 447, 449, 452, 491, 539, 716, 723
School District of Abington Township v. Schempp, 806, 848, 861, 873, 909, 910, 924
School District of Grand Rapids v. Ball, 825
Schwimmer, United States v., 63, 768
Scopes v. State, 879
Seeger, United States v., 991, 996
Shapiro v. Lyle, 516
Shelton v. Tucker, 520, 571, 731
Sheppard v. Maxwell, 725
Sherbert v. Verner, 617, 946, 954, 956, 957, 960, 961, 988, 1019
Siel, State v., 734
Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 234, 308, 314, 593, 743
Smith v. Cahoon, 268
Smith v. Collin, 466, 756
Smith v. Daily Mail Publishing Co., 123, 328
Snyder v. Phelps, 110
Sorrell v. IMS Health Inc., 228, 314, 771
Southeastern Promotions, Ltd. v. Conrad, 265, 478, 484, 593
Speiser v. Randall, 82
Spence v. Washington, 398, 441
St. Amant v. Thompson, 87
Stanley v. Georgia, 134, 139, 145, 148, 172, 184, 189, 775
Stansbury v. Marks, 516
**State v. (see name of defendant)**
Stevens, United States v., 70, 182, 232, 239, 243, 245, 248, 250, 336, 769
Stone v. Graham, 900, 902, 910, 915, 917
Street v. New York, 402, 405
Stromberg v. California, 399, 441
Sweezy v. New Hampshire, 539, 571, 731
Terminiello v. Chicago, 80, 157, 400, 453, 458, 643, 646, 751
Texas v. Johnson, 309, 396, 397, 406, 430, 438, 440, 441, 741, 748, 754, 760, 806
Thomas v. Chicago Park District, 269, 271
Thomas v. Collins, 723, 948
Thomas v. Review Bd. of Ind. Employment Sec. Div., 960, 999
Thornhill v. Alabama, 295, 301
Time, Inc. v. Firestone, 102, 593
Time, Inc. v. Hill, 593, 617
Tinker v. Des Moines Independent School District, 158, 395, 398, 441, 641
Torcaso v. Watkins, 528, 990
Tory v. Cochran, 281
**Town of (see name of town)**
Treasurer of the Committee to Gerald D. Lostracco v. Fox, 262
Trinity Lutheran Church of Columbia, Inc. v. Comer, 1015, 1066
Turner Broadcasting System v. FCC, 593, 678
Twining v. New Jersey, 707
United Foods, United States v., 530, 533, 686
United Public Workers v. Mitchell, 617
**United States v. (see name of defendant)**
Valentine v. Chrestensen, 79, 197, 198, 345
Van Orden v. Perry, 801, 802, 908, 924, 933, 938
Vernonia School Dist. 47J v. Acton, 653
**Village of (see name of village)**
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 197, 209, 221, 234, 250, 409, 532
Virginia v. Black, 61, 704, 740, 756, 758, 760
Virginia v. Hicks, 302
Virginia, Ex parte, 79
Vogelgesang, People v., 516

Walker v. Texas Division, Sons of Confederate Veterans, Inc., 689, 690, 763, 772
Wallace v. Jaffree, 789, 793, 808, 867, 900, 1029
Walz v. Tax Commission, 819, 1009, 1025
Ward v. Rock Against Racism, 229, 309, 312, 314, 356, 372, 432, 743, 774, 777
Watts v. United States, 60, 250, 744
Welsh v. United States, 996
Wepplo, People v., 126
West Virginia State Board of Education v. Barnette, 399, 509, 519, 528, 561, 678, 685, 939, 943, 961
Whitney v. California, 27, 51, 52, 53, 136, 159
Widmar v. Vincent, 478, 483, 484
Wieman v. Updegraff, 617
Williams v. Rhodes, 574
Williams, United States v., 191, 194, 195, 261, 304
Williams-Yulee v. Florida Bar, 324
Williamson v. Lee Optical Co., 200, 410, 413
Winters v. New York, 133, 238, 248
Wisconsin v. Mitchell, 756
Wisconsin v. Yoder, 946, 951, 961
Witters v. Commission for Blind, 1010
Witters v. Washington Dept. of Servs. for Blind, 827, 845, 1013
Wolman v. Walter, 831, 832, 835
Wood v. Georgia, 85
Wooley v. Maynard, 517, 518, 550, 671, 678, 689, 695, 961
Yates v. United States, 46, 52, 156
Young v. American Mini Theatres, Inc., 178, 408, 427, 438, 593
Youngstown Sheet & Tube Co. v. Sawyer, 290
Zelenka v. State, 734
Zelman v. Simmons-Harris, 806, 842, 1010, 1023, 1025
Zemel v. Rusk, 724, 729, 736
Zerilli v. Smith, 735
Zobrest v. Catalina Foothills School Dist., 826, 845
Zorach v. Clauson, 799, 861, 863, 1052
Zurcher v. Stanford Daily, 733

# Preface to the Fourth Edition

The First Edition of our Casebook was published in 2006. As we explained in the Preface to that work (reprinted immediately following), the book's content and organization were shaped by our belief that, from a lawyer's perspective, the First Amendment is above all else *law* — albeit a special kind of law. One thing that is special is that First Amendment law is found primarily in the decisions of the Supreme Court of the United States. Close analysis of those precedents is thus the principal tool that lawyers must rely on when seeking to persuade a judge or when negotiating with an adversary on behalf of a client. One purpose of our book was to help students learn how to best deploy that tool. To that end, we provided versions of the opinions that were relatively complete; we also organized the cases in accordance with the Court's own categories and the temporal development of the doctrines within those categories.

The Second and Third Editions of the book were published in 2010 and 2014, respectively. While the Third Edition added a new section (in Chapter 3) highlighting the sequence of decisions in which the Court steadfastly refused to expand the universe of unprotected speech, the Second and Third Editions otherwise hewed closely to the organization of the First Edition.

This Fourth Edition adheres to the organizational *principle* that has guided us through the prior editions, but because the Court's decisions have moved in some new directions, the organization itself features some significant changes. Most notably, while the first four chapters (Chapters 1–4) retain their pre-existing pride of place, the next four chapters (Chapters 5–8) now cover, respectively, the rule against content discrimination; time, place, and manner regulations; expressive conduct and the secondary effects doctrine; and the public forum doctrine. We moved up this material primarily to reflect the increased emphasis the Court has placed on the content-neutrality rule, especially in the new leading case of *Reed v. Town of Gilbert* (2015). That change, in turn, prompted us to move up our discussions of the doctrines that follow from that rule. Simply put, the content-neutrality rule has achieved a sufficiently central status in First Amendment doctrine that it merits students' early and careful attention, after they have encountered the historically foundational cases addressing unprotected speech categories (Chapters 1 and 2), partially or potentially unprotected categories (Chapter 3), and prior restraints, vagueness, and overbreadth (Chapter 4). Our belief is that early exposure to concepts such as content neutrality and strict scrutiny will make the later materials more accessible to students.

A second organizational change is to give campaign finance regulation its own chapter (Chapter 11), in recognition of the growing (and largely self-contained) body

of First Amendment doctrine governing that subject. This new chapter immediately follows the chapter on freedom of association, consistent with the grounding of the doctrine in "the right to associate with the political party of one's choice" in *Buckley v. Valeo* (1976). By contrast, we retired the earlier editions' chapter on new technologies and distributed its most important content among Chapter 3 (*FCC v. Pacifica Foundation* (1978)) and Chapter 15 (*Packingham v. North Carolina* (2017)). We made this change partly to keep the book at a manageable length, but primarily because some of the cases in that now-deleted chapter (most notably the spectrum scarcity cases growing out of *Red Lion Broadcasting v. FCC* (1969)) have likely become sufficiently marginalized and irrelevant to students' experiences as to become less important and pedagogically satisfying.

Chapter 15 concludes Part I of the book, and focuses on three areas that each implicate multiple, cross-cutting aspects of free speech law. The section on "hate speech" remains from the corresponding chapter from the earlier editions, and it is followed by *Matal v. Tam* (2017), the decision that struck down the disparagement provision of federal trademark law, and *Packingham v. North Carolina* (2017), which invalidated the state's law against convicted sex offenders accessing social media. The debate over "hate speech" undoubtedly remains current today in the popular culture. *Matal* engages that debate, while also broaching the fascinating and pedagogically important question of how to analyze, for First Amendment purposes, programs such as the federal trademark regime. Finally, *Packingham* features potentially broad language about the importance of social media in the marketplace of ideas as well as musings about the First Amendment-protected status of the Internet as a public forum — along with a pointed caution about those musings from the concurring Justices.

Overall, the organization and the structure of Part Two on Freedom of Religion have required little change over three editions, but the Fourth Edition incorporates modest modifications to reflect the Supreme Court's recent handiwork. In Chapter 16 ("The History and Purposes of the Religion Clauses") we added a new section to introduce students to the values underlying the Religion Clauses. Chapter 17 ("The Establishment Clause") includes a new section on Legislative Prayer that features *Town of Greece v. Galloway* (2014). In Chapter 18 ("The Free Exercise Clause") an extensive new note summarizes various statutory provisions that are important other protections of religious liberty. Chapter 19 ("Interrelationships Among the Clauses") has been revamped to emphasize the line of precedents that includes *Locke v. Davey* (2004) and the very recent decision in *Trinity Lutheran Church of Columbia v. Comer* (2017).

In addition to these organizational and structural changes, the Fourth Edition, like those before it, features smaller-scale alterations to reflect recent developments and also to ensure that material is presented as compactly as possible. In particular, following a practice that we initiated for the Third Edition, some principal cases have been condensed down to essential extracts in extended Notes. We have done this because we want to keep the foundational older opinions that define the landscape of First Amendment law but also to include the significant recent decisions that alter the contours or expand the boundaries — all the while allowing the Justices to speak

for themselves. It is simply not possible to do all that and treat every important case as a principal case. But even when we have condensed some cases to Notes, we have endeavored, as much as possible, to present the material through extended quotations from the Justices' own language. We believe these Note versions are sufficiently complete to support meaningful class discussion.

We also continue to include Problems as a key pedagogical tool. These Problems have been carefully designed to require students to analyze the cases and use them as lawyers do to make or respond to arguments. For this edition, we reviewed all of the Problems in the Third Edition. Most of them have worked well in the classroom, and we have kept them, sometimes with minor updating or tweaking. But we have dropped Problems that did not work well or that seemed outdated and have added some new ones.

With this edition Professors Hellman, Araiza, and Baker welcome as a co-author Professor Ashutosh A. Bhagwat of the University of California at Davis School of Law. The three incumbent authors are delighted that he has joined the book and they extend their great appreciation for his many contributions to the Fourth Edition.

ARTHUR D. HELLMAN
hellman@pitt.edu

WILLIAM D. ARAIZA
bill.araiza@brooklaw.edu

THOMAS E. BAKER
thomas.baker@fiu.edu

ASHUTOSH A. BHAGWAT
aabhagwat@ucdavis.edu

# Preface to the First Edition

The title of our new First Amendment casebook is "First Amendment Law." The emphasis on "law" is not simply a matter of nomenclature. The First Amendment can be viewed as history, as policy, and as theory, but from a lawyer's perspective, it is above all *law*—albeit a special kind of law. One thing that is special is that the governing texts have receded into the background. *The law is the cases, and the cases are the law.* Close analysis of precedent is therefore the principal tool of argumentation and adjudication. The purpose of this book is to help students to learn the law in a way that will enable them to use it in the service of clients. This process entails skills as well as knowledge.

Constitutional topics like the First Amendment are not often thought of as vehicles for skills training, but they can be, and we hope that in our book they will be. Moreover, the skills we seek to impart will be valuable to students not just in the realm of the First Amendment, but in any area where lawyers must rely on close analysis of precedent when seeking to persuade a judge or an adversary on behalf of a client. Four principal features of the book will help students to master these skills.

First, the cases have been edited with a relatively light hand. If students read cases in severely abridged versions that include only the essential passages, they will be greatly handicapped when they are required to use cases in their sprawling unabridged original form. Supreme Court opinions are so long today that some abridgement is necessary, but our versions are generally more complete than those of other casebooks.

Second, the structure of the book has been designed to reinforce the students' understanding of what the cases establish and what they leave open. Commentators—and sometimes casebook authors—attempt to impose their own structure on the law of the First Amendment. But for a lawyer seeking to persuade a judge or an adversary, the structure that matters is the structure that the Supreme Court has created. Using that structure as the starting point (while raising questions about it in the note material) enables students to see how the cases build upon one another—or move in new directions.

Third, the book concentrates on the main lines of development and their implications for future disputes rather than traveling down every byway of doctrinal refinement. Each year, the Supreme Court adds as many as 10 new decisions to the already-voluminous body of precedent interpreting the First Amendment. No one can possibly master all of that law through a single law school course. Nor is there any need to do so; if the student is familiar with the principal lines of doctrine, the refinements can easily be fitted into the mental picture that those lines delineate.

Finally, in editing the cases we have acted upon the premise that the Justices' own treatment of precedent can provide a uniquely valuable perspective for gaining an understanding of First Amendment doctrines — their content, their evolution, and their interrelationships. This is so, in part, because not all precedents are equal. While the total number of Supreme Court decisions is large, the body of precedents that the Justices invoke outside their immediate context for more than platitudes or abstractions is relatively small. Most of those cases are included in this Casebook. And in editing the Justices' opinions, we have retained all references to those cases (other than string cites and the like). This enables students to see how the Justices use precedent to build their arguments; it also reinforces students' understanding of the doctrines and ideas covered in previous chapters. As students encounter the landmark precedents again and again, each time approaching them from a different direction, they will come to appreciate the First Amendment landscape as a whole as well as the contours of its individual features.

*Supporting materials.* As the preceding account suggests, our overriding principle in designing the casebook has been to give primacy to the Justices' own words and the Court's own doctrinal structure. But we have also provided guidance in working with the opinions. Ultimately students will have to learn to work with lengthy cases entirely on their own, but a casebook can help. The notes and questions in this book direct students' attention to critical language in Court opinions, to apparent inconsistencies between decisions addressing similar issues, and to point-counterpoint face-offs between majorities and dissents.

The notes and questions make use of a variety of sources. For example, we have drawn on the rich material now available in the archives from the private papers of the Justices — preliminary drafts of opinions, memorandum exchanges between Justices, and even notes of the Justices' private conferences. These shed light on what was established by existing precedents and how a new decision changes (or does not change) the law.

We also exploit another of the characteristics that makes First Amendment law special: the law is made by a small number of individuals — the Justices of the Supreme Court — and bears the imprint of their individual philosophies as well as their collective judgments. Tracing the views of individual Justices can contribute to an understanding of the larger issues that the members of the Court address in different contexts over a period of years. This provides a vehicle for seeing the connections between doctrines that is internal rather than external.

To assist in that endeavor, Appendix B lists the Justices serving on the Court in every Term starting with 1946. Knowing the volume of the United States Reports in which an opinion is published, you can find who was on the Court at that time. And by seeing who dissented or concurred, you can see which Justices joined in the majority.

Finally, the book includes some problems. These problems have been designed from the overall perspective of the book; their primary purpose is to encourage a close reading of precedent and an understanding of what that precedent stands for. Most of the problems are based on actual cases.

As is evident, we have cast our net widely in writing and compiling the non-case material in this casebook. In part, this is because different approaches work better for different topics. But we also believe that the variety itself makes the course more interesting for the teacher as well as the student. However, the goal remains the same: to enhance the student's understanding of — and ability to use — the law of the First Amendment.

*Legal eloquence.* There are special rewards in studying the First Amendment. No other area of law has so often inspired the Justices of the Supreme Court to write opinions marked by eloquence and passion. And because words are the lawyer's stock in trade, study of these opinions is a profitable enterprise even for the student who will never litigate a First Amendment case.

Most of the great opinions have been written in defense of First Amendment rights; here you will find memorable language from Holmes, Brandeis, Hughes, Jackson, Harlan, and Brennan — to name only some of the Justices of the past. But there is eloquence on the other side as well, perhaps best illustrated by the writings of Frankfurter and (again) Jackson.

*Editing of cases.* Although we have gone further than most casebooks in retaining the content of the Justices' opinions, we have not hesitated to adjust matters of format in the interest of readability. (Thus, the cases should not be used for research purposes.) In this, we have followed familiar conventions. Specifically: Omissions are indicated by brackets or ellipses; alterations are indicated by brackets. Most footnotes have been omitted; however, footnotes in opinions and other quoted material retain their original numbers. Citations to cases other than those in the Casebook have generally been deleted. Brackets and internal quotation marks have been omitted from quoted material within cases. Lengthy paragraphs have sometimes been broken up to promote readability.

# Acknowledgments

Professor Hellman expresses his thanks for the dedicated efforts of Faculty Secretary Patricia Blake and research assistance by Linda Tashbook of the Library staff. He expresses his appreciation for research support from the University of Pittsburgh School of Law.

Professor Araiza thanks his research assistants: Marvin Espana, Giancarlo Martinez, Rebecca Meyer, and Michael Tal, as well as his faculty assistants: Simone Clemente and Maria Raneri. He also expresses his deep appreciation to Dean Nick Allard of Brooklyn Law School for encouraging his work even while he served as Vice Dean.

Professor Baker appreciates the dedicated efforts of his research assistants: Andrew Figueroa — who performed yeoman service with the copyright permissions — along with Andrew Balthazor, Patrick Brady, Tal Knight, Tucker Pryor, and George Zeckler. He also thanks Veronica Torres for her unfailing staff support. Finally, he does not take for granted the research support of the Florida International University College of Law and the encouragement of former Dean R. Alexander Acosta.

Professor Bhagwat thanks the UC Davis School of Law as well as Deans Kevin Johnson and Madhavi Sunder for generous and unflagging support.

Special thanks go from all of the authors for the dedicated efforts of the staff of the Document Technology Center at the University of Pittsburgh School of Law: LuAnn Driscoll, Barbara Salopek, Karen Knochel, Darleen Mocello, and Vicki DiDomenico.

## Permissions

Dickson ed., 2001). Copyright © 2001 Oxford University Press. Reprinted by Permission of Oxford University Press, USA.

- For Electronic Edition — The Supreme Court in Conference — The Private Discussions Behind Nearly 300 Supreme Court Decisions (1940–1985) 433 (Del Dickson ed., 2001). Copyright © 2001 Oxford University Press. Reprinted by Permission of Oxford University Press, USA. www.oup.com.

William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 244-56 & 260-68 (1994). Copyright DEPAUL LAW REVIEW. Reprinted with permission.