

The First Amendment

The First Amendment

Cases, Problems, and Materials

SIXTH EDITION

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To Laurence, Ben and Kate, with love,
RLW

For Elizabeth, Caitlin, Margaret, and Peter, with love,
CH

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Preface

Historically, most constitutional law casebooks have been written like mini-treatises. In addition to including the landmark constitutional law cases, most books contain detailed notes that discuss every highway and byway of the law. Most of these books have a tendency to overload rather than facilitate the learning process. Students are reluctant to read 1,000 to 1,200 pages of First Amendment law, much less to pore over the details. Because most First Amendment law casebooks include so many decisions (in mini-treatise fashion), casebook authors are forced to severely edit the cases they do include.

In creating this new book, our primary goal was to create an accessible and teachable book that would help students understand First Amendment theory, lead students to greater insights, generate classroom interactivity, and facilitate effective and inspired learning. One way we accomplish these objectives is through the inclusion of problems. This model has demonstrated utility for bridging differences in learning styles. It adds value to the educational process by reinforcing and deepening understanding of cases and engendering a more practice-ready student by providing opportunities for applied learning. Problems also achieve an efficiency with respect to coverage in an area that otherwise presents significant editorial challenges.

Consistent with the book's outcome-based learning objectives, and the authors' appreciation of differences in learning styles, we do not use a single type of problem. Many problems are factual in nature and are designed to encourage students to think about constitutional doctrine in context. In some instances, these fact-based problems are premised upon actual cases, including United States Supreme Court cases. Other problems are theoretical in nature and are designed to expand the student's range of thinking and perspective. We thus use problems to illustrate and clarify doctrinal principles and conflicts, place students in real-life situations, ask them how they would respond, or have them apply existing doctrine to new circumstances.

Our ultimate objective is to advance student ability to solve problems using critical thinking and thereby accelerate development of core lawyering skill. Even though the existence of a "problem" may suggest that there is "an answer," problems can (and should) be used to promote critical thinking. Whether in the form of Realism, Critical Theory, or some other premise, students should be encouraged to develop an organizing theory for First Amendment law, rather than to regard law as simply a "deductive process." Even if the Court has rendered a decision in a particular case, we might present that case as a "problem" to ensure students critically analyze the issues presented. If a student responds, "I read the decided case and the Court held . . .," we encourage

the professor to respond with questions designed to stimulate thought. “Ok, fair enough. Now, do you think that the Court got it right? Did it give sufficient weight to this consideration? How could the Court possibly have reached that conclusion?” Such analysis helps students become better lawyers, judges, and law professors.

Tradeoffs are necessary in any constitutional law casebook, and this book is no different. Although we include the landmark cases, we do not attempt to catalog every decision (even every United States Supreme Court ruling) in each of the relevant areas. Over the past half-century, constitutional case law has multiplied to the extent that it is impossible to discuss every decision fully and do justice to each one. Although this book is designed to give students a thorough grounding in constitutional law, students can always consult secondary sources if they desire more amplification. We have chosen cases for a variety of reasons: because they are modern cases that reflect the current state of the law; because they are “landmarks” that students need to read and understand; or because (even though they might be older cases) they provide critical context or enrich understanding and perspective.

Because we include fewer cases overall, we are generally able to include more of the cases that we do include. In other words, we allow students to read the Court’s own words and decide for themselves what the decisions mean. In order to not encumber the page with dots, omissions have not always been indicated with ellipses. In addition, some footnotes have been removed from the cases; those included have the original footnote numbers retained in brackets at the beginning of the footnote. Other cases may come in through questions, problems, or hypotheticals.

We give thanks to the many people who assisted us in the creation and revision of this book, including our research assistants and secretaries. Professor Weaver gives particular thanks to his former assistant, Mr. Rob DeWees. We are particularly grateful to students who (over the years) helped us find and correct errors. Finally, we are thankful to our spouses, significant others, and children who supported us through the various stages of this project.

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