First Amendment Law

First Amendment Law

Freedom of Expression and Freedom of Religion

FIFTH EDITION

Arthur D. Hellman
PROFESSOR OF LAW EMERITUS
UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

William D. Araiza
STANLEY A. AUGUST PROFESSOR OF LAW
BROOKLYN LAW SCHOOL

Thomas E. Baker
PROFESSOR OF LAW
FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW

Ashutosh A. Bhagwat
DISTINGUISHED PROFESSOR OF LAW AND
BOOCHEVER AND BIRD ENDOWED CHAIR
UNIVERSITY OF CALIFORNIA, DAVIS SCHOOL OF LAW

CAROLINA ACADEMIC PRESS
Durham, North Carolina

LCCN: 2021953133
ISBN: 978-1-5310-2426-0
eISBN: 978-1-5310-2427-7

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
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 Fifth Edition xxix

Preface to the First Edition xxxiii

Acknowledgments xxxvii

The First Amendment to the Constitution of the United States xxxix

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* 12
B. The *Abrams* Case and the Holmes Dissent 12
Abrams v. United States 12
Note: The *Abrams* Dissent and Seditious Libel 16
C. Learned Hand and the *Masses* Case 17
Masses Publishing Co. v. Patten 17
Note: The Opinion in *Masses* 21
Problem: Protesting a U.S. Military Action 22
D. *Gitlow*, *Whitney*, and the Cases of the Thirties 23
Gitlow v. New York 23
Note: *Gitlow* and *Lochner* 27
Whitney v. California 28
Note: Why Protect Freedom of Speech? 33
Note: Organizational Advocacy and Individual Responsibility 34
E. The Smith Act Prosecutions 37
Dennis v. United States 37
Note: *Dennis* and Revolutionary Speech 47

Note: *Yates*, *Scales*, and *Noto* 47
Problem: "Warriors for Earth" 51
F. *Brandenburg v. Ohio* and Its Implications 52
Brandenburg v. Ohio 52
Note: *Brandenburg* and Its Antecedents 55
Hess v. Indiana 55
Note: The Summary Reversal in *Hess* 57
NAACP v. Claiborne Hardware Company 57
Problem: Injury at a Protest 60
Problem: Encouraging Participation in a "Jihad" 62
Problem: Advice to a Street Gang 63
G. The "True Threat" 64
Note: *Watts*, *Black*, and the "True Threat" 64
Problem: Anti-Abortion Website 66
H. A Last Word from Justice Holmes 67
United States v. Schwimmer 67
Note: "Freedom for the Thought that We Hate" 68

Chapter 2 · Unprotected Speech: The *Chaplinsky* Exclusions 71
A. "Fighting Words" 71
Chaplinsky v. New Hampshire 71
Note: *Chaplinsky* and Its Implications 73
Note: "Fighting Words" Today 75
Problems: The "Callahan Epithet" and Other Expletives 76
B. "The Libelous" — or Otherwise Tortious 80
1. The Constitutionalization of Defamation 80
New York Times Co. v. Sullivan 80
Note: The Holding of *New York Times* 90
Note: Proving "Malice" 92
Note: "Public Officials" and "Official Conduct" 94
Note: Beyond "Public Officials" 96
2. "Public Figures" and Private Plaintiffs 98
Gertz v. Robert Welch, Inc. 98
Note: Who Is a "Public Figure"? 108
Note: "Public Figures" in the Lower Courts 111
Note: Suits by Private Plaintiffs 112
Note: "Fact" and "Opinion" 114
3. "Outrage" and Emotional Distress 116
Snyder v. Phelps 116
Note: Intentional Infliction of Emotional Distress and the First Amendment 125
Problem: An Obsessive Blogger 128
4. Invasion of Privacy 128
Problem: A Wrestler and a Sex Tape 130

C. "The Lewd and Obscene" 130
1. Initial Development of the Law 130
Roth v. United States 131
Alberts v. California 131
Note: *Roth* and Its Antecedents 138
Note: "Ideas" and "Entertainment" 139
Note: "I Know It When I See It"? 140
Stanley v. Georgia 141
Note: The Implications of *Stanley* 144
2. Current Doctrine 145
Miller v. California 145
Paris Adult Theatre I v. Slaton 149
Note: The 1973 "Restatement" 156
Note: "Community Standards" and the Internet 158

Chapter 3 · New Candidates for Categorical Exclusion or Limited Protection 161
A. Offensive Language and Images 161
Cohen v. California 161
Note: The Implications of *Cohen* 166
Rosenfeld v. New Jersey 166
Note: "The Willful Use of Scurrilous Language" 168
Note: Protecting the Unwilling Audience 169
Problem: Foul Language in a Neighborhood Park 170
Problem: The Cursing Canoeist 170
FCC v. Pacifica Foundation 171
Note: The Medium and the Message 180
Problem: The Overexcited Actress 181
B. Child Pornography 181
New York v. Ferber 182
Note: A New Category of Unprotected Speech 188
Note: Private Possession of Child Pornography 189
Problem: "Child Pornography" in a Journal 191
Ashcroft v. Free Speech Coalition 192
Note: "Virtual Child Pornography" 201
Note: *U.S. v. Williams* and "Purported" Child Pornography 201
C. Commercial Speech 204
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 204
Note: First Amendment Protection for Commercial Speech 211
Central Hudson Gas & Electric Corp. v. Public Service Commission 213
Note: Commercial Speech as "Low Value" Speech 218
Note: Identifying Commercial Speech 219

Problem: "Commercial" Speech and Public Debate 220
Lorillard Tobacco Co. v. Reilly 221
Note: The Normalization of Commercial Speech 232
Problem: Attacking Childhood Obesity 234
Note: *Sorrell* and the Continued Ferment over Commercial Speech 234
Note: A Return to *Lochner*? 238
D. The End of Categorical Balancing 238
United States v. Stevens 239
Note: The Implications of *Stevens* 244
Brown v. Entertainment Merchants Association 245
Note: Violence, Interactivity, and the Protection of Children 255
United States v. Alvarez 256
Note: Knowingly False Statements of Fact 269
Problem: The Stolen Valor Act of 2013 270

Chapter 4 · Trans-Substantive Doctrines 271
A. Prior Restraints 271
Note: An Introduction to Prior Restraints 271
1. Licensing 272
Lovell v. City of Griffin 272
Note: Licensing Schemes and the *Freedman* Requirements 274
2. Injunctions and Other Remedies 280
Near v. Minnesota 280
Note: The Decision in *Near* 285
Problem: A Recalcitrant Defamer 286
New York Times Co. v. United States (The "Pentagon Papers" Case) 288
Note: Injunctions against Speech 298
Note: "The H-Bomb Secret" 299
Problems: Disclosure of NSA Monitoring 300
B. Overbreadth and Vagueness 301
New York v. Ferber 301
City of Houston v. Hill 304
Ashcroft v. Free Speech Coalition 308
Note: The Overbreadth Doctrine 308
Note: The Vagueness Doctrine 309

Chapter 5 · Content-Based Regulation 313
A. The Principle 313
Police Department of Chicago v. Mosley 313
Note: "Above All Else . . .": The *Mosley* Principle 316
Note: Speech Near Polling Places 319
B. Defining Content Discrimination 320

Reed v. Town of Gilbert 321
Note: A Narrower View of Content Neutrality? 331
Problem: Flags on Holidays 333
Problem: A Panhandling Ordinance 334
C. Applying Strict Scrutiny 334
Williams-Yulee v. Florida Bar 334
Note: How Strict Is "Strict"? 348
Problem: Nondisclosure of National Security Letters 350

Chapter 6 · Regulating the "Time, Place, and Manner" of Protected Speech 351
A. Early Development of the Doctrine 352
Lovell v. City of Griffin 352
Schneider v. New Jersey 352
Note: From *Lovell* to *Schneider* 354
Martin v. City of Struthers 354
Note: Regulating the Manner of Expressive Activity 359
B. Applications of the Doctrine 361
Frisby v. Schultz 361
Ward v. Rock Against Racism 366
City of Ladue v. Gilleo 371
Note: Foreclosing Particular Modes of Expression 376
Note: Narrow Tailoring and "Underinclusiveness" 377
Problem: Regulating Newsracks 378
McCullen v. Coakley 379
Note: Restrictions on Anti-Abortion Speech 395
Problem: Buffer or Bubble? 397
Problem: Picketing of Religious Activities 397

Chapter 7 · Expressive Conduct and Secondary Effects 401
A. Expressive Conduct 401
United States v. O'Brien 401
Note: "Symbolic Speech" and the *Tinker* Case 407
Note: "Incidental" Burdens on Expression 407
Texas v. Johnson 409
Note: Flag Burning as Protected Speech 418
Problem: A New Flag Protection Act 419
B. "Secondary Effects" as a Basis for Regulation 419
City of Renton v. Playtime Theatres, Inc. 419
Note: Origins of the "Secondary Effects" Doctrine 425
Boos v. Barry 426
Note: The Future of "Secondary Effects" 430
Problem: Limiting the Hours of Adult Businesses 433
C. Expression and Conduct: Untangling the Doctrines 434

City of Erie v. Pap's A.M. 434
Note: Expressive Conduct, Secondary Effects, and Incidental Burdens 445
Problem: Nudity "for Entertainment Purposes" 447
Problem: An "Affirmative Action Bake Sale" 447

Chapter 8 · Speech on Government Property and the Public Forum Doctrine 449
A. Foundations of the Doctrine 449
Hague v. Committee for Industrial Organization 449
Schneider v. New Jersey 451
Cantwell v. Connecticut 451
Note: The Significance of *Cantwell* 453
Cox v. New Hampshire 454
Note: The Law Established by the Foundational Cases 456
B. Mass Demonstrations and the Problem of the "Hostile Audience" 457
Terminiello v. Chicago 458
Note: Hostile Audiences and Provocative Speakers 461
Forsyth County v. Nationalist Movement 465
Note: Fees and Permits for Demonstrations on Public Property 470
Problem: Klan Rally and Counter-Rally 471
C. Access to Nontraditional Forums and Facilities 472
Note: Competing Approaches to Speech on Public Property 472
Lehman v. City of Shaker Heights 475
Note: *Lehman* and the *Perry* Synthesis 479
Cornelius v. NAACP Legal Defense and Educational Fund, Inc. 481
International Society for Krishna Consciousness, Inc. v. Lee 491
Lee v. International Society for Krishna Consciousness Inc. 504
Note: Competing Views of the Public Forum 505
Note: *Rosenberger* and Viewpoint Discrimination 506
Note: "Limited" and "Designated" Forums 508
Note: The "Reasonableness" Requirement 509
Problem: Display of Controversial Art 511
Problem: Flags and Banners on Highway Overpasses 512
D. Speech on Private Property 513
Note: The *Marsh* Decision 513
Note: The Shopping Center Cases 514

Chapter 9 · Compelled Expression 519
A. Compelled Speech 519
West Virginia State Board of Education v. Barnette 519
Note: *Barnette* and Its Implications 527
Problem: A State University Pledge 527
Wooley v. Maynard 528
Note: The *Barnette* Principle 532
Problem: Navajo Spiritualism on License Plates? 533

Note: "Trivializing" *Barnette*? 534
Note: NIFLA and the Proper Scrutiny Level for Speech Compulsions 535
Problem: The Wedding Photographer and the Gay Couple 538
Note: Speech, Coercion, and Meaning 538
B. Compelled Subsidy 539
Note: Compelled Subsidies and the Winding Road to *Janus* 539
Janus v. American Federation of State, County, and Municipal Employees, Council 31 545
Note: *Janus* and Its Implications 553

Chapter 10 · Freedom of Association 555
A. Compelled Disclosure of Association 555
NAACP v. Alabama 555
Note: From *NAACP* to *AFP* 558
Americans for Prosperity Foundation v. Bonta 561
Note: "Exacting" Scrutiny, Chill, and *Americans for Prosperity* **575**
B. Compelled Association 577
Roberts v. United States Jaycees 577
Note: Competing Approaches to Freedom of Association 584
Problem: The New Age Coalition and the Fundamentalist 585
Note: *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* 586
Boy Scouts of America v. Dale 587
Note: *Dale* and the Precedents 600
Note: Status and Message 601
Problem: Exclusion from a Gay Softball League 601
Preamble 601

Chapter 11 · Campaign Finance 603
A. Foundational Principles 603
Buckley v. Valeo 603
Note: *Buckley* and Its Progeny 621
B. Corporate and Union Political Speech 622
Note: Corporate and Union Speech, Electoral Integrity, and the First Amendment 622
Citizens United v. Federal Election Commission 626
Note: Questions About *Citizens United* 642
Problem: Corporate Contributions to an Independent Spender 643
Problem: A State Response to *Citizens United*? 643
C. Disclosure Requirements 644
Note: Disclosure Requirements and the First Amendment 644
D. Circumvention of Contribution Limits and *Buckley*'s Limits 648
Note: The Anti-Circumvention Idea 648
Note: *McCutcheon* and the Limits of the Anti-Circumvention Rationale 650

Chapter 12 · Beyond Regulation: The Government as Employer and Educator **653**
A. First Amendment Rights of Government Employees 653
Connick v. Myers 653
Note: *Pickering* and Its Progeny 661
Problem: An Activist Clerk 662
Garcetti v. Ceballos 663
Note: The Implications of *Garcetti* 676
Problem: The Outspoken University Administrator 676
Note: Testimony as Part of an Employee's "Ordinary" Work Responsibilities 676
Problem: The Police Chief versus the Mayor 678
Note: Patronage Dismissals 678
B. The First Amendment in the Public Schools 679
Tinker v. Des Moines Independent School District 679
Note: The Implications of *Tinker* 684
Note: From *Tinker* to *Mahanoy* 685
Problem: Career Guidance and Student Protest 690
Problem: A Controversial T-Shirt 691
Mahanoy Area School Dist. v. B. L. 692
Note: *Mahanoy*'s Unanswered Questions 707
Problem: Building Bridges—or Burning Them 710
Problem: Trolling on a Blog 711

Chapter 13 · Beyond Regulation: Whose Message Is It? **713**
A. Paying the Piper—and Calling the Tune? 713
Rust v. Sullivan 713
Note: *Rust* and *Rosenberger* 721
Note: Government Funding of Legal Services 722
Agency for International Development v. Alliance for Open Society International, Inc. 724
Note: "Inside" the Program—or "Outside"? 733
B. When Is the Government the Speaker? 734
Note: The Government Speech Doctrine 734
Problem: Satirical Anti-Tobacco Advertising 738
Walker v. Texas Division, Sons of Confederate Veterans, Inc. 739
Note: Expanding the Government Speech Doctrine 751
Matal v. Tam 751
Problem: "Enhanced Underwriting" by the Ku Klux Klan 751
Problem: Exclusion from a State's Adopt-a-Highway Program 753

Chapter 14 · Freedom of the Press **755**
Note: What Is "The Press," Anyway? 755
A. Singling Out the Press 756
Grosjean v. American Press Co. 756

Note: *Grosjean* and the Free-Press Clause 761
Minneapolis Star v. Minnesota Commissioner of Revenue 761
Note: *Grosjean* and *Minneapolis Star* 768
Note: Discrimination among Media Categories 768
Problem: Restrictions on College Newspapers 771
Problem: Save the Newspapers! 772
B. Claims of Exemption from Generally Applicable Laws 773
Branzburg v. Hayes 773
Note: Justice Powell's "Enigmatic" Concurrence 782
Note: Journalists' Privilege in the Lower Courts 784
Note: Legislative and Executive Responses to the Shield Issue 785
Note: *Branzburg* and Access to Prisons 787

Chapter 15 · Testing the Boundaries of Doctrine 791
A. "Hate Speech" 791
Note: *Beauharnais* and "Group Libel" 791
Note: *R.A.V. v. City of St. Paul* 792
Note: A Penalty Enhancement Statute 796
Note: Cross Burning Redux 797
Note: Cross Burning and the First Amendment 799
B. Government Programs and Offensive Speech 800
Matal v. Tam 800
Note: The Implications of *Matal* 811
Note: *Iancu v. Brunetti* 812
C. The Internet as the New Public Square? 815
Note: The Supreme Court and Cyberspace 815
Packingham v. North Carolina 816
Note: The Internet as the New Public Forum? 823
Note: Regulating Social Media 824
Biden v. Knight First Amendment Institute at Columbia University 826
Note: Social Media Platforms as Common Carriers? 831
Problem: Limiting Deplatforming and Curating 832
Problem: Posts on a Commissioner's Facebook Page 833

PART TWO
FREEDOM OF RELIGION

Chapter 16 · The History and Purposes of the Religion Clauses 837
A. The Debate Over the Original Understanding 837
Everson v. Board of Education 838
Wallace v. Jaffree 841
Lee v. Weisman 845
B. History and Tradition 849

McCreary County v. ACLU 850
Van Orden v. Perry 855
Note: Justice Breyer's Constitutional Distinctions 857
Problem: Ceremonial Deism 858
Note: The Incorporation Doctrine 859
C. Values 860
William P. Marshall, *Truth and the Religion Clauses* 861

Chapter 17 · The Establishment Clause 867
A. Financial Aid to Religion 867
1. Basic Principles 867
Everson v. Board of Education 867
Note: Two Competing Principles — "No Aid" and "Equal Aid" 871
2. The *Lemon* Test as Modified 872
Lemon v. Kurtzman 872
Note: The *Lemon* Test 877
Agostini v. Felton 878
Mitchell v. Helms 885
3. School Vouchers 897
Zelman v. Simmons-Harris 897
Problem: Faith-Based Social Service Providers 912
B. School Prayer 912
Engel v. Vitale 912
School District of Abington Township v. Schempp 917
Wallace v. Jaffree 922
Lee v. Weisman 926
Problem: Drafting a Moment-of-Silence Policy 932
C. School Curriculum 933
Edwards v. Aguillard 933
Problem: Intelligent Design 940
D. Legislative Prayer 941
Town of Greece v. Galloway 941
Note: "Congress shall make no law respecting an establishment of religion. . . ." 958
Problem: "Please rise and bow your heads!" 958
E. Displays in Public Places 960
American Legion v. American Humanist Ass'n 960
Problem: Atheists Cross about Highway Memorials 980

Chapter 18 · The Free Exercise Clause 981
A. Early Cases 981
Reynolds v. United States 982
United States v. Ballard 984
B. Modern Cases 988
Sherbert v. Verner 989

Wisconsin v. Yoder 994
Employment Division v. Smith 1002
Note: Choosing Up Sides to Cast the Shadow of Strict Scrutiny on COVID-19 Regulations of Religious Gatherings 1011
Note: Statutory Protections of the Exercise of Religion 1014
C. Discrimination against Religion 1024
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah 1025
Note: State Administrative Agencies Must Remain Neutral, Fair, and Impartial Toward Religious Claims 1036
Problem: The Traditions of Abraham in the Twenty-First Century 1041
D. Future Uncertainty 1042
Note: *Fulton v. City of Philadelphia* —Debating without Deciding—What to Do with *Smith*? 1043

Chapter 19 · Interrelationships Among the Clauses 1055
A. Definition of Religion 1055
Torcaso v. Watkins 1056
United States v. Seeger 1058
Note: Freedom of Conscience and the Constitution 1062
Note: Dogma, Heresy, and Schism 1065
Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC 1066
Note: A Deeper Dive into the Ministerial Exception and the Religion Clauses 1075
Problem: Peremptory Challenges 1077
B. Tensions between the Religion Clauses 1077
Espinoza v. Montana Department of Revenue 1079
Note: The Blaine Amendments 1100
Problem: The Good Friday School Holiday 1101
C. Religious Speech 1101
Note: The Free Speech-Public Forum Overlay 1102
Rosenberger v. Rector and Visitors of the University of Virginia 1103
Good News Club v. Milford Central School 1112
Problem: "Whom Do I Arrest?" 1121
Note: A Postscript on the Religion Clauses 1123

Appendix · The Justices of the United States Supreme Court, 1946–2020 Terms 1125

Index 1131

Table of Cases

Principle case page numbers are in **bold**.

12 200-ft. Reels of Film, United States v., 189
281 Care Committee v. Arneson, 269
44 Liquormart, Inc. v. Rhode Island, 542
725 Eatery Corp. v. City of New York, 432

Abood v. Detroit Board of Education, 540, 543, 545, 579, 623
Abrams v. United States, **12**
Adamson v. California, 859
Adarand Constructors, Inc. v. Peña, 337
Adderley v. Florida, 472, 605, 787
Adler v. Board of Education, 655
Agency for International Development v. Alliance for Open Society International, Inc., **724**
Agostini v. Felton, **878**
Aguilar v. Felton, 878
Albertini, United States v., 367
Alberts v. California**, 131**
Alexander v. United States, 271
Allegheny, County of v. American Civil Liberties Union, Greater Pittsburgh Chapter, 972, 976, 977
Alvarez, United States v., **256**
American Bev. Ass'n v. City and County of San Francisco, 537
American Legion v. American Humanist Ass'n, **960**, 961
American Library Assn., Inc., United States v., 805
Americans for Prosperity Foundation v. Bonta, **561**, 562
Arcara v. Cloud Books, Inc., 408
Arcara, People ex rel. v. Cloud Books, Inc., 409
Arkansas Writers' Project v. Ragland, 769
Arnett v. Kennedy, 658
Arts v. Finley, 805
Ashcroft v. ACLU, 158, 180
Ashcroft v. Free Speech Coalition, **192, 308**
Associated Press v. NLRB, 774
Associated Press v. United States, 763, 775
Austin v. Michigan Chamber of Commerce, 624, 626
Automobile Workers, United States v., 630

Ballard, United States v., **984**
Bantam Books, Inc. v. Sullivan, 271, 830
Barker v. Conroy, 958
Barnes v. Glen Theatre, Inc., 434, 445
Barr v. American Association of Political Consultants, Inc., 333
Barr v. Matteo, 87
Barron v. Baltimore, 859
Bartnicki v. Vopper, 110, 129
Bartow, United States v., 74
Bates v. City of Little Rock, 558, 563, 570, 614, 773, 777
Bates v. State Bar of Arizona, 212, 309

Batson v. Kentucky, 1077
Bd. of Educ. of Westside Cmty. Schools (Dist. 66) v. Mergens, 1102
Beauharnais v. Illinois, 80, 132, 791
Berisha v. Lawson, 92, 110
Bethel School Dist. No. 403 v. Fraser, 629, 685, 694
Biden v. Knight First Amendment Institute at Columbia University, **826**
Bigelow v. Virginia, 205
Blair v. United States, 781
Board of Airport Commissioners v. Jews for Jesus, 309
Board of Directors of Rotary International v. Rotary Club of Duarte, 585, 592
Board of Education v. Allen, 876
Board of Regents of Univ. of Wis. System v. Southworth, 722
Boerne, City of v. Flores, 1014
Bolger v. Youngs Drug Products Corp., 219
Boos v. Barry, **426**
Bose Corp. v. Consumers Union, 35, 118
Boy Scouts of America v. Dale, **587**
Boyd v. United States, 356
Brandenburg v. Ohio, **52**
Branti v. Finkel, 654, 658, 678
Branzburg v. Hayes, 755, **773**
Braunfeld v. Brown, 991, 992
Breard v. Alexandria, 205, 763
Brewster v. Boston Herald-Traveler Corp., 775
Bridge, In re, 784
Broadrick v. Oklahoma, 194, 301, 304
Brown v. Board of Education, 679
Brown v. City of Pittsburgh, 397
Brown v. Entertainment Merchants Association, **245**
Brown v. Louisiana, 411, 446
Brown v. Oklahoma, 168
Buckley v. Valeo, 445, 559, **603**
Bullock v. Carter, 620
Burnside v. Byars, 680, 685
Burson v. Freeman, 319
Burwell v. Hobby Lobby Stores, Inc., 1017

California Medical Ass'n v. FEC, 649
Callahan, People v., 76
Cameron v. Johnson, 311, 474
Cantwell v. Connecticut, 73, 74, **451**, 556**, 860**
Capitol Square Review and Advisory Bd. v. Pinette, 979, 1101
Carey v. Brown, 362
Central Hudson Gas & Electric Corp. v. Public Service Commission, **213**
Chaplinsky v. New Hampshire, **71**, 100
Chicago Teachers Union v. Hudson, 541
Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools, 508
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, **1025**
Cincinnati, City of v. Discovery Network, Inc., 218
CIO, United States v., 630
Citizens United v. Federal Election Commission, 622, **626**
City of (see name of city)
Clark v. Community for Creative Non-Violence, 367, 446
Clay, State v., 77
Coates v. Cincinnati, 311
Cohen v. California, **161**, 166
Collin v. Smith, 471
Commonwealth v. (see name of defendant)
Communist Party v. Subversive Activities Control Bd., 615
Connally v. General Construction Co., 310
Connick v. Myers, 113, **653**
Conroy v. Lacey Twp. School Dist., 702

Consolidated Edison Co. v. Public Service Comm'n, 427
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., **481**
County of (see name of county)
Cox Broadcasting Co. v. Cohn, 655
Cox v. Louisiana, 311, 474, 605
Cox v. New Hampshire, 275, **454**
CSC v. Letter Carriers, 607
Curtis Publishing Co. v. Butts, 96, 773
Curtis, Ex parte, 658
Cutter v. Wilkinson, 1020

Dameron v. Washington Magazine, Inc., 112
Davis v. Massachusetts, 450, 451
Davis, Commonwealth v., 449, 451
De Jonge v. Oregon, 35, 85, 274, 290, 556, 860
Debs v. United States, **9**
Debs, In re, 296
Democratic Party of United States v. Wisconsin ex rel. LaFollette, 590
Dennis v. United States, **37**
Doe v. Pulaski County Special School Dist., 702
Doe v. Reed, 559, 562, 646
Dombrowski v. Pfister, 302
Doninger v. Niehoff, 702
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 91, 112
Duncan v. Louisiana, 860
Dunkley v. Board of Ed. of Greater Egg Harbor Regional High School Dist., 703

Edwards v. Aguillard, **933**
Edwards v. South Carolina, 463
Eichman, United States v., 419
Elk Grove Unified School Dist. v. Newdow, 951
Elonis v. United States, 66
Elrod v. Burns, 658, 678
Employment Div. v. Smith (U.S. 1988) , 1002
Employment Division v. Smith (U.S. 1990) **, 1002**
Engel v. Vitale, **912**
Erie, City of v. Pap's A.M., **434**
Erznoznik v. City of Jacksonville, 169, 176, 423, 605
Espinoza v. Montana Department of Revenue, 860, **1079**
Euclid v. Ambler Realty Co., 175
Evans v. Bayer, 702
Everson v. Board of Education, **838**, 860, **867**, 1055
Ex parte (see name of party)
Ex rel. (see name of relator)

FCC v. League of Women Voters of Cal., 716, 727, 732
FCC v. Pacifica Foundation, **171**
Federal Election Comm'n v. Wisconsin Right to Life, Inc., 626, 690
Federal Election Commission v. Massachusetts Citizens for Life, 624, 639
Federal Election Commission v. National Right to Work Committee, 623, 633, 636
Feiner v. New York, 461
First Nat. Bank of Boston v. Bellotti, 622, 629
Fiske v. Kansas, 34
Florida Bar v. Went for It, Inc., 212
Florida Free Beaches, Inc. v. Miami, 445
Florida Star v. B.J.F., 129, 629
Follett v. McCormick, 1003
Forsyth County v. Nationalist Movement, **465**
Fowler v. Rhode Island, 1028
Frazee v. Ill. Dep't of Employment Sec., 1065
Freedman v. Maryland, 275, 774
Freedom Watch, Inc. v. Google, 827, 831

Friedrichs v. California Teachers Association, 545, 547
Frisby v. Schultz, **361**
Frohwerk v. United States, **8**
Fulton v. City of Philadelphia, 1043
FW/PBS, Inc. v. Dallas, 276

Garcetti v. Ceballos, **663**
Garland v. Torre, 775
Garner v. Board of Public Works, 655
Garrison v. Louisiana, 379 U.S. , 102
Gertz v. Robert Welch, Inc., **98**
Giboney v. Empire Storage & Ice Co., 138, 139, 166, 184, 188, 319, 534, 683
Gibson v. Florida Legislative Investigation Committee, 777, 782
Ginsberg v. New York, 175, 176, 183, 247, 683
Gitlow v. New York, **23**, 30, 860
Givhan v. Western Line Consolidated School District, 656, 666, 670
Glickman v. Wileman Brothers & Elliott, 542, 554, 735
Goldman v. United States, 5
Gompers v. Bucks Stove & Range Co., 4, 5
Gonzales v. O Centro Espirita Beneficente Uniáo do Vegetal, 1015
Good News Club v. Milford Central School, **1112**
Gooding v. Wilson, 75, 166, 305
Grace, United States v., 120, 493
Grand Jury Proceedings, In re, 784
Grayned v. City of Rockford, 310, 473
Greece, Town of v. Galloway, **941**
Greer v. Spock, 507
Griswold v. Connecticut, 579, 684
Grosjean v. American Press Co., 274, **756**

Hague v. Committee for Industrial Organization, **449**
Hamilton v. Regents, 520, 526
Hamling v. United States, 158
Harris v. Quinn, 545, 546
Harte-Hanks Communications, Inc. v. Connaughton, 93
Hazelwood School District v. Kuhlmeier, 686, 694
Hebert v. Louisiana, **757**
Heckler v. Mathews, 581
Heineman, United States v., 66
Herndon v. Lowry, 36
Hess v. Indiana, **55**
Holder v. Humanitarian Law Project, 336, 348, 383, 730. 734
Holt v. Hobbs, 1020
Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, **1066**
Houchins v. KQED, Inc., 763
Houston, City of v. Hill, 75, **304**
Hudgens v. NLRB, 515
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 586, 589
Hustler Magazine v. Falwell, 114, 117, 125
Hutchinson v. Proxmire, 109

Iancu v. Brunetti, 812
Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 259
In re (see name of party)
International Society for Krishna Consciousness, Inc. v. Lee, **491**, 1102
Interstate Circuit, Inc. v. Dallas, 140

J.E.B. v. Alabama, 1077
Jackson, Ex parte, 274
Jacobellis v. Ohio, 140, 151
Janus v. American Federation of State, County, and Municipal Employees, Council 31, **545**
Jarchow v. State Bar of Wisconsin, 554
Jenkins v. Georgia, 156
Johanns v. Livestock Marketing Association, 545, 735, 741, 803

Jones v. Wolf, 1066
Joseph Burstyn, Inc. v. Wilson, 174, 245, 248
Judith Miller, In re Grand Jury Subpoena, 783, 786

Karalexis v. Byrne, 144
Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 1069, 1075
Keller v. State Bar of California, 541, 543, 554
Keyishian v. Board of Regents, 654, 655
King v. Governor of the State of New Jersey, 212
Knox v. Service Employees, 545, 546
Kois v. Wisconsin, 146
Kokinda, United States v., 492
Kovacs v. Cooper, 359, 605, 815
Kowalski v. Berkeley County Schools, 703
Kusper v. Pontikes, 604, 607

Ladue, City of v. Gilleo, **371**
Lakewood, City of v. Plain Dealer Publishing Co., 279
Lamb's Chapel v. Center Moriches Union Free School Dist., 1104, 1114
Lander v. Seaver, 705, 710
Lane v. Franks, 676
Lawrence, Ex parte, 775
Leathers v. Medlock, 770
Lee v. International Society for Krishna Consciousness Inc., **504**
Lee v. Weisman, **845**, 860, **926**
Lee, United States v., 764, 1003
Legal Services Corp. v. Velazquez, 722, 727
Lehman v. City of Shaker Heights, **475**
Lehnert v. Ferris Faculty Ass'n, 541, 552
Lemon v. Kurtzman, **872**
Letellier, In re, 784
Lewis v. City of New Orleans, 304
Linmark Associates, Inc. v. Willingboro, 372, 629
Littleton, City of v. Z.J. Gifts D-4, L.L.C., 276
Lloyd Corp., Ltd. v. Tanner, 515
Lochner v. New York, 27, 217
Locke v. Davey, 1078
Lohrenz v. Donnelly, 111
Lorillard Tobacco Co. v. Reilly, **221**
Los Angeles, City of v. Alameda Books, Inc., 430
Lovell v. City of Griffin, 72, **272, 352**
Lubin v. Panish, 620
Lujan v. Defenders of Wildlife, 972

Machinists v. Street, 540, 543
Madsen v. Women's Health Center, Inc., 390
Mahanoy Area School Dist. v. B. L., **692**
Manhattan Community Access Corporation v. Halleck, 516, 827
Mapp v. Ohio, 141
Marbury v. Madison, 241
Marks v. United States, 298, 434, 783
Marsh v. Alabama, 513
Marsh v. Chambers, 539, 941, 943, 958
Martin v. City of Struthers, **354**
Masses Publishing Co. v. Patten, **17**, 22
Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 1036
Matal v. Tam, **751**, **800**, 816
Matter of (see name of party)
Mattison, State ex rel. v. Baudhuin, 269
McAuliffe v. Mayor of New Bedford, 655
McConnell v. Federal Election Commission, 625
McCreary County v. ACLU, **850**
McCullen v. Coakley, **379**
McCutcheon v. Federal Election Commission, 563, 650

McDaniel v. Paty, 1028
McDonald v. Chicago, 705
McGowan v. Maryland, 992
McGrath v. Kristensen, 442
McIntyre v. Ohio Elections Comm'n, 387
McKoy v. North Carolina, 783
McNeil v. Sherwood School Dist. 88J, 702
Medure v. New York Times Co., 111
Meek v. Pittenger, 885
Members of City Council of Los Angeles v. Taxpayers for Vincent, 372, 496, 581
Memoirs v. Massachusetts, 146
Metromedia Inc. v. San Diego, 372, 815
Meyer v. Nebraska, 30, 579, 583, 680
Miami Herald Publishing Co. v. Tornillo, 180, 611, 629, 825
Milkovich v. Lorain Journal Co., 114
Miller v. California, **145**
Mills v. Alabama, 611, 660
Minersville School District v. Gobitis, 519, 529
Minneapolis Star v. Minnesota Commissioner of Revenue, 408, **761**
Minnesota Voters Alliance v. Mansky, 509, 827
Mitchell v. Helms, **885**
Monitor Patriot Co. v. Roy, 95
Morse v. Frederick, 688, 694, 708
Mt. Healthy City Board of Ed. v. Doyle, 656
Mueller v. Allen, 899
Murdock v. Pennsylvania, 468, 1003
Mutual Film Corp. v. Industrial Comm'n of Ohio, 248

NAACP v. Alabama, **555**, 860
NAACP v. Button, 85, 765, 782, 990
NAACP v. Claiborne Hardware Company, **57**
National Institute of Family and Life Advocates v. Becerra, 212, 332, 535, 552
National Treasury Employees Union, United States v., 662
Near v. Minnesota, 91, 274, **280**
New York State Club Ass'n, Inc. v. City of New York, 588
New York Times Co. v. Sullivan, 17, 21, 60, 65, **80**
New York Times Co. v. United States (The "Pentagon Papers" Case), **288**, 775
New York v. Ferber, **182, 301**
Niemotko v. Maryland, 314
Nixon v. Shrink Missouri Government PAC, 621
Noto v. United States, 50

O'Brien, United States v., 162, **401**
Ohralik v. Ohio State Bar Ass'n, 212
Oklahoma Press Publishing Co. v. Walling, 763, 768, 770, 774, 775
Old Glory Condom Corp., In re, 804
Oliver, United States v., 539
Ollman v. Evans, 115
Olmstead v. United States, 142
Organization for a Better Austin v. Keefe, 286, 287, 288, 363
Osborne v. Ohio, 189
Our Lady of Guadalupe School v. Morrissey-Berru, 1075

Packer Corp. v. Utah, 476
Packingham v. North Carolina**, 816**
Palko v. Connecticut, 273, 556
Palmore v. Sidoti, 581
Paris Adult Theatre I v. Slaton, **149**
Patterson v. Colorado, 4, 6, 273
Pell v. Procunier, 787
People v. (see name of defendant)
Permoli v. New Orleans, 859
Perry Education Association v. Perry Local Educators' Association, 479, 717
Perry v. Sindermann, 656
Philadelphia Newspapers, Inc. v. Hepps, 113, 629

Pickering v. Board of Education, 653, 654, 661
Pierce v. Society of Sisters, 30, 579, 583, 867, 996, 1004
Pipefitters v. United States, 630
Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 184, 205, 763
Playboy Entertainment Group, Inc., United States v., 240, 348, 383
Pleasant Grove City v. Summum, 734, 803
Plunkett v. Hamilton, 775
Police Department of Chicago v. Mosley, **313**
Pope v. Illinois, 157
Porter v. Ascension Parish School Bd., 702
Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 232
Powell v. Alabama, 759, 761
Price v. Time, Inc., 786
Prince v. Massachusetts, 247
PruneYard Shopping Center v. Robins, 517, 532, 829
Public Utilities Comm'n v. Pollak, 476, 477
Purtell v. Mason, 74

R.A.V. v. City of St. Paul, 316, 792
Railway Employees v. Hanson, 540
Railway Express Agency v. New York, 764
Raines, United States v., 301
Rankin v. McPherson, 118
Read, State v., 78
Red Lion Broadcasting Co. v. FCC, 180
Redrup v. New York, 140, 141, 148
Reed v. Reed, 314
Reed v. Town of Gilbert, **321**
Regan v. Taxation with Representation of Wash., 715, 726, 732, 770, 1095, 1097, 1098, 1100
Regan v. Time, Inc., 367
Reidel, United States v., 144
Reno v. ACLU, 180, 815, 817
Renton, City of v. Playtime Theatres, Inc., **419**
Republican Party of Minn. v. White, 326, 336
Reynolds v. United States, **982**
Rinaldo, State v., 785
Roberts v. United States Jaycees, 546, **577**
Robinson, State v., 79
Rodriguez de Quijas v. Shearson/Am. Express, Inc., 432
Rosenberger v. Rector and Visitors of the University of Virginia, 506, 667, 806, **1103**
Rosenblatt v. Baer, 94, 101
Rosenbloom v. Metromedia, Inc., 100
Rosenfeld v. New Jersey, **166**
Roth v. United States, **131**
Rowan v. United States Post Office Dept., 363
Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), 534, 726
Runyon v. McCrary, 581
Rust v. Sullivan, **713**
Rutan v. Republican Party of Illinois, 678

S. J. W. v. Lee's Summit R-7 School Dist., 702
Sable Communications of Cal., Inc. v. FCC, 629
Saia v. New York, 316, 360, 445
San Diego, City of v. Roe, 662
Saxbe v. Washington Post, 787
Scales v. United States, 49
Schacht v. United States, 411
Schenck v. United States, **3**, 68
Schneider v. New Jersey, **352**, 445, **451**
School Dist. of Grand Rapids v. Ball, 880
School District of Abington Township v. Schempp, 860, **917**

Schwimmer, United States v., **67**
Scopes v. State, 935
Seeger, United States v., **1058**
Shapiro v. Lyle, 526
Shelton v. Tucker, 530, 558, 563, 607, 782
Sheppard v. Maxwell, 775
Sherbert v. Verner, 655, **989**
Siel, State v., 784
Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 317, 348, 629
Smith v. Cahoon, 274
Smith v. Daily Mail Pub. Co., 129, 338
Snyder v. Phelps, **116**
Sorrell v. IMS Health Inc., 234, 549, 550, 551, 810
Southeastern Promotions, Ltd. v. Conrad, 271, 484, 629
Speiser v. Randall, 87
St. Amant v. Thompson, 93
St. James School v. Biel, 1075
Stanley v. Georgia, **141**, 146
Stansbury v. Marks, 526
State v. (see name of defendant)
Stevens, United States v., 74, **239**
Street v. New York, 414, 417
Stromberg v. California, 411, 446
Sweezy v. New Hampshire, 557, 607, 782

Tandon v. Newsom, 1011
Tanzin v. Tanvir, 1016
Terminiello v. Chicago, 412, **458**
Texas v. Johnson, **409**, 860
The Progressive, Inc., United States v., 299
Thomas v. Chicago Park District, 275, 277
Thomas v. Collins, 990
Thomas v. Review Bd. of Indiana Employment Security Div., 1002, 1065
Thornhill v. Alabama, 302, 308
Time, Inc. v. Firestone, 108, 629
Time, Inc. v. Hill, 629, 655
Tinker v. Des Moines Independent School District, **679**
Torcaso v. Watkins, **1056**
Tory v. Cochran, 287
Town of (see name of town)
Treasurer of the Committee to Elect Lostracco v. Fox, 269
Trinity Lutheran Church of Columbia, Inc. v. Comer, 1078
Trunk v. San Diego, 979
Turner Broadcasting System v. FCC, 629, 825
Twining v. New Jersey, 757

Union v. Logan Valley Plaza, Inc., 514
United Foods, United States v., 543, 547, 735
United Public Workers v. Mitchell, 655
United States v. (see name of defendant)

Valentine v. Chrestensen, 84, 204
Van Orden v. Perry, **855**
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., **204**
Virginia v. Black, 65, 753, 797
Virginia v. Hicks, 309
Virginia, Ex parte, 84
Vogelgesang, People v., 526

Walker v. Texas Division, Sons of Confederate Veterans, Inc., **739**
Wallace v. Jaffree, **841**, **922**
Walz v. Tax Comm'n of City of New York, 860, 873, 1078
Ward v. Rock Against Racism, **366**
Watts v. United States, 64
Welsh v. United States, 1062
Wepplo, People v., 133
West Virginia State Board of Education v. Barnette, **519**, 981
Whitney v. California, **28**
Widmar v. Vincent, 484
Wieman v. Updegraff, 655

Williams v. Rhodes, 609
Williams, In re Grand Jury Subpoena of, 786
Williams, United States v., 202, 311
Williamson v. Lee Optical Co., 207, 423
Williams-Yulee v. Florida Bar, **334**
Winters v. New York, 139
Wisconsin v. Mitchell, 796
Wisconsin v. Yoder, **994**
Wisniewski v. Board of Ed., 702
Witters v. Washington Dept. Servs. for Blind, 881, 899
Wolman v. Walter, 885
Wood v. Georgia, 90
Wooley v. Maynard, **528**
Wright, Matter of Contempt of, 785
Wynar v. Douglas County School Dist., 702

Yates v. United States, 47
Young v. American Mini Theatres, Inc., 420, 629
Youngstown Sheet & Tube Co. v. Sawyer, 296

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 212, 536
Zelenka v. State, 785
Zelman v. Simmons-Harris, 860, **897**
Zemel v. Rusk, 775, 780, 787
Zerilli v. Smith, 785
Zobrest v. Catalina Foothills School Dist., 881
Zorach v. Clauson, 851, 916
Zurcher v. Stanford Daily, 783

Preface to the Fifth 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, Third, and Fourth Editions of the book were published in 2010, 2014, and 2018, respectively. While the Third Edition added a new section 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. The Fourth Edition was different. In addition to other changes, that edition altered the sequence of some chapters, placing earlier in the book the material considering both the rule against content discrimination and doctrines, such as the time, place, and manner doctrine, that follow from the content-neutrality rule. We moved this material up primarily to reflect the increased emphasis the Court has placed on that rule, especially in the now-leading case of *Reed v. Town of Gilbert* (2015).

Developments since 2014 have confirmed the soundness of these choices. The Court's embrace of a historical approach to identifying unprotected categories of speech, which the Third Edition highlighted in a new section in Chapter 3, has remained a stable part of the Court's First Amendment doctrine. So has its emphasis on the content-neutrality rule. Indeed, a case that receives note treatment in three different chapters of this edition, *National Institute for Family and Life Advocates v. Becerra* (2018) (*NIFLA*), suggests that the content-neutrality rule may eventually expand into the Court's compelled speech jurisprudence, much as it began to influence the Court's commercial speech jurisprudence a decade ago in *Sorrell v. IMS Health* (2011).

Despite the stability of those core concepts, the Fifth Edition's freedom of expression materials contain substantial new content. First, cases such as *NIFLA*

point toward the expansion of the content-neutrality rule's domain. Second, areas implicating rules beyond the unprotected speech/content-neutrality core have witnessed significant development in recent years. The same year as *NIFLA*, the Court issued an important decision addressing compelled speech subsidies, overruling, in *Janus v. American Federation of State, County, and Municipal Employees* (2018), a 40-year-old precedent that had allowed government to require non-union members in a government workplace to defray a union's expenses in representing that workplace's employees. In 2021, in *Americans for Prosperity Foundation v. Bonta*, the Court applied 60-year-old precedents from the Civil Rights Era to strike down a state law requiring charities to disclose to the government their leading funders. In that same year, in *Mahanoy Area School District v. B.L.*, the Court ruled in favor of a student who claimed that her First Amendment rights were violated when she was disciplined for her expression, made off-campus on a social media platform, about a school matter. The Court's concern for vindicating First Amendment interests in these disparate contexts suggests that the Roberts Court's earlier establishment of strong rules protecting First Amendment interests in core doctrinal areas has not extinguished its interest in exploring — and arguably expanding — the boundaries of the First Amendment's guarantees of free expression.

The Freedom of Religion chapters have also continued to evolve. In creating this new edition, every effort was made to preserve the canonical cases while capturing the thinking of the current Justices. Chapter 16 presents the history and values of the Religion Clauses considered together; no significant changes have been made to that chapter. Chapter 17 breaks down Establishment Clause doctrine into the familiar categories that organized earlier editions: financial aid, school prayer, school curriculum, legislative prayer, and religious displays in public places. The meta-theory of the chapter is to trace the arc of the *Lemon* test to examine how it is applied and sometimes not applied in those settings.

Chapter 18, which covers the Free Exercise Clause and other statutory and regulatory protections of religious exercise, highlights the paradigm-shifting approach to religious freedom taken in *Employment Division v. Smith* (1990) and the developments since. *Smith* has been under pressure in recent cases highlighted in this edition. Most recently, in *Fulton v. City of Philadelphia* (2021), the Court went right up to the edge of overruling *Smith* before pulling up short. Chapter 18 ends with a new section rehearsing that near-overruling and speculating on whether five Justices will coalesce in a future overruling. Chapter 19 puts the two Religion Clauses back together to examine the tensions between them and how the Free Speech Clause overlays them.

In addition to these organizational and structural changes, the Fifth 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. 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 the Problems in the

Fourth 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.

As always, the authors welcome feedback and suggestions from readers.

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 Araiza thanks his research assistants: Parker Brown, Ru Hochen, Derek Knight, Thu Nguyen, Thomas Pearce, Maya Sparks, and Michael Wozniak.

Professor Baker appreciates the dedicated efforts of his research assistants: Cooper Eisinger — who performed yeoman service with the copyright permissions — along with Robert Kemper and Benjamin Zavelsky. He also thanks Connie Giffuni for her staff support. Finally, he does not take for granted the research support of the Florida International University College of Law with the encouragement of Dean Antony Page.

Professor Bhagwat thanks his research assistant Christine Hanon.

The authors express appreciation for the support provided by LuAnn Driscoll, Karen Knochel, and Vicki DiDomenico of Pitt Law Administrative Services at the University of Pittsburgh School of Law.

Permissions

The First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.