FIRST AMENDMENT LAW:
FREEDOM OF EXPRESSION
AND
FREEDOM OF RELIGION

Third Edition
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FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION

Third Edition

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To Bonnie, Jerry, Roberta and Walter, ADH
To Stephen, WDA
To Jane Marie, TEB
Preface to the Third Edition

The first edition of our First Amendment 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 law — albeit a special kind of law. One thing that is special is that the law is found primarily in the decisions of the United States Supreme Court. Close analysis of those precedents is thus the principal tool that lawyers must use when seeking to persuade a judge or an adversary on behalf of a client. The overriding purpose of the book was to help students learn how to use that tool effectively.

The second edition of the Casebook was published in 2010. We replaced half a dozen or so principal cases with newer ones and made some other changes to take advantage of the lessons of experience, but overall we adhered to the approach and basic organization of the first edition.

Now, four years later, it is time for a third edition. Once again, the structure of the Casebook remains the same. The only organizational change is the addition of a new section in Chapter 3 to highlight the remarkable sequence of decisions in which the Supreme Court rejected successive exhortations to expand the universe of unprotected speech. Within chapters, however, we have made quite a few revisions, most of them prompted by new Court opinions. The most important of these are noted below.

Before turning to the new law made by the Supreme Court during the last four years, it is appropriate to say something about what the Court has not done. For more than a decade now, the Supreme Court has substantially reduced the number of cases it hears and decides. This “shrunked docket” has important implications for the litigation of First Amendment issues and therefore for the teaching of First Amendment law. In a nutshell: lower courts, lawyers, teachers, and students must do more with less. They cannot expect to find an array of precedents closely on point for a particular new issue, so they must carefully analyze decisions that shed light on the question at a higher level of generality or in indirect ways.

Some more specific consequences can also be identified. Conflicts between circuits can persist, sometimes indefinitely, leaving the law fragmented and uncertain. Often, lawyers and lower courts must confront new questions without the benefit of Supreme Court resolution of the previous round of controversies. As a result, they must address those newer issues by analogizing from Supreme Court precedents that are both topically and temporally removed. Decisions of the courts of appeals are binding within the circuit, but it is sometimes possible to argue that a recent Supreme Court decision, though not quite on point, impliedly calls for reconsideration.

We believe that these developments strongly vindicate the approach that we took in writing the first edition of this Casebook and that we now continue in the Third. We present the major cases with a minimum of abridgement. We emphasize the Justices’ treatment of their own precedents — both those they rely on and those that they distinguish.

At the same time (and notwithstanding the shrunken docket), the steady output of First Amendment decisions from the Supreme Court (three dozen or so in the eight years of the Roberts Court) has led us to modify our approach in a modest way. Ideally, we want
Preface to the Third Edition

to keep the foundational older opinions that define the landscape of First Amendment law
and 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. Thus, one of the
self-conscious techniques we have relied upon in this Third Edition is to condense some
principal cases down to essential extracts in extended Notes. 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.

It would be tedious to catalogue all of the changes from the Second to the Third
Edition, but some of them deserve note here. We have already mentioned the addition of
a new section to Chapter 3. Called “Other Content, Other Harms,” the new section
includes the decisions in United States v. Stevens (2010), Brown v. Entertainment
Merchants of America (2011), and United States v. Alvarez (2012). In Chapter 11,
concomitantly, the section on campaign finance has been substantially reorganized.
Substantial reorganization also marks Chapter 18. The motivation was to streamline the
treatment of the aggregated Religion Clauses and to make room for Hosanna-Tabor
Evangelical Lutheran Church and School v. EEOC (2012).

Other new principal cases are Snyder v. Phelps (2011) (Chapter 2), Holder v.
Humanitarian Law Project (2010) (Chapter 8), and Agency for International
Development v. Alliance for Open Society International Inc. (2013) (Chapter 13). To
make room for the new decisions, more than a dozen principal cases in the Second
Edition (most of them decided before 1990) have been dropped from the Third; most of
them are now treated in Notes.

This Third Edition has benefited from the feedback of our students and our colleagues
who have used the previous editions. Comments by Aaron Caplan were particularly
useful. We continue to welcome such feedback, knowing that it helps us to better serve
the needs of teachers and students of the First Amendment.
# Table of Contents

## PART ONE  FREEDOM OF EXPRESSION  .........................  1

### 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? .......................  31
   Note: From Whitney to the Communist Party Cases .........  32

E. THE SMITH ACT PROSECUTIONS  ................................  35
   Dennis v. United States  ....................................  35
   Note: Dennis and Revolutionary Speech  .....................  44
   Yates v. United States  ......................................  45
   Scales v. United States  .....................................  49
   Note: Scales and Noto  .......................................  51
   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  .............................................  56
   Note: The Summary Reversal in Hess  .........................  58
   NAACP v. Claiborne Hardware Company  ......................  58
   Problem: Encouraging Participation in a “Jihad” ............  61
   Problem: Advice to a Street Gang  ...........................  62
# Table of Contents

Note: *Watts* and “True Threats” .............................................. 62  
Problem: Anti-Abortion Web Site ............................................ 64  

G. A LAST WORD FROM JUSTICE HOLMES ................................. 65  
*United States v. Schwimmer* ................................................ 65  
Note: “Freedom for the Thought that We Hate” ......................... 67  

Chapter 2 CONTENT REGULATION: THE CHAPLINSKY EXCLUSIONS 69

A. “FIGHTING WORDS” ......................................................... 69  
*Chaplinsky v. New Hampshire* ............................................. 69  
Note: *Chaplinsky* and Its Implications .................................. 71  
*City of Houston v. Hill* .................................................... 72  
Note: “Fighting Words” Today ............................................... 76  
Problems: The “Callahan Epithet” and Other Expletives ............... 77  

B. “THE LIBELOUS” — OR OTHERWISE TORTIOUS ..................... 80  
*Beauharnais v. Illinois* .................................................... 80  
Note: *Beauharnais* and Group Libel ................................... 85  
*New York Times Co. v. Sullivan* ....................................... 86  
Note: The Holding of *New York Times* ................................. 95  
Note: Proving “Malice” ....................................................... 97  
Note: “Public Officials” and “Official Conduct” ....................... 99  
Note: Beyond “Public Officials” .......................................... 101  

[3] “Public Figures” and Private Plaintiffs ............................... 103  
*Gertz v. Robert Welch, Inc.* ............................................ 103  
Note: Who is a “Public Figure”? .......................................... 112  
Note: “Public Figures” in the Lower Courts ............................ 114  
Note: Suits by Private Plaintiffs ......................................... 116  
Note: “Fact” and “Opinion” ............................................... 118  

[4] “Outrage” and Emotional Distress ................................... 120  
*Snyder v. Phelps* ............................................................. 120  
Note: Intentional Infliction of Emotional Distress and the First Amendment ................................................................. 129  
Problem: An Obsessive Blogger ............................................ 131  

[5] Invasion of Privacy ......................................................... 132  
*Bartnicki v. Vopper* .......................................................... 133  
Note: Rights of Privacy and the First Amendment ..................... 144  

C. “THE LEWD AND OBSCENE” ............................................ 145  
[1] Initial Development of the Law ......................................... 145  
*Roth v. United States* ...................................................... 145
Table of Contents

Note: *Roth* and Its Antecedents ............................ 153
Note: “Ideas” and “Entertainment” ............................ 154
Note: “I Know It When I See It”? ............................ 154
*Stanley v. Georgia* ........................................ 155
Note: The Implications of *Stanley* .......................... 158

[2] Current Doctrine ........................................ 159

*Miller v. California* ....................................... 159
*Paris Adult Theatre I v. Slaton* ............................ 164
Note: The 1973 “Restatement” ................................ 170
*Jenkins v. Georgia* ......................................... 170
Note: The Elements of “Obscenity” ........................... 172
Note: “Community Standards” and the Internet .......... 175
Problems: What is “Obscene” Today? ....................... 177

Problems: What is “Obscene” Today? ........................ 177

Chapter 3  CONTENT REGULATION: NEW CANDIDATES FOR CATEGORICAL EXCLUSION OR LIMITED PROTECTION ........................................ 181

A. OFFENSIVE LANGUAGE AND IMAGES ........................ 181
   
   *Cohen v. California* ........................................ 181
   Note: The Implications of *Cohen* .......................... 186
   *Rosenfeld v. New Jersey* .................................... 187
   Note: “The Willful Use of Scurrilous Language” ............. 188
   Note: Protecting the Unwilling Audience .................... 189
   Problem: Foul Language in a Neighborhood Park ........... 190
   Problem: The Cursing Canoeist ................................ 191

B. CHILD PORNOGRAPHY ..................................... 191
   
   *New York v. Ferber* ........................................ 191
   Note: A New Category of Unprotected Speech ............... 198
   Note: Private Possession of Child Pornography .......... 198
   Problem: “Child Pornography” in a Journal ................ 201
   *Ashcroft v. Free Speech Coalition* ......................... 202
   Note: “Virtual Child Pornography” .......................... 211
   Note: *U.S. v. Williams* and “Purported” Child Pornography 211

C. COMMERCIAL SPEECH .................................... 214
   
   *Virginia State Board of Pharmacy v. Virginia Citizens
Consumer Council, Inc.* ..................................... 214
   Note: First Amendment Protection for Commercial Speech .... 221
   *Central Hudson Gas & Electric Corp. v. Public Service Commission* 222
   Note: Identifying Commercial Speech ....................... 227
   Problem: “Commercial” Speech and Public Debate ........... 228
   Note: *Discovery Network* and the “Reasonable Fit” .......... 229
Table of Contents

Problem: The National Do-Not-Call Registry ......................... 232
Note: Two Categories of Commercial Speech Regulation? ............ 233
44 Liquormart, Inc. v. Rhode Island ................................. 234
Note: Lorillard and Restrictions on Tobacco Advertising .......... 246
Problem: Attacking Childhood Obesity .............................. 249
Note: Sorrell and the Continued Ferment over Commercial Speech 249
Note: A Return to Lochner? ........................................... 253
D. OTHER CONTENT, OTHER HARMS ............................... 254
United States v. Stevens .............................................. 254
Note: The Implications of Stevens ................................... 259
Brown v. Entertainment Merchants Association ...................... 260
Note: Violence, Interactivity, and the Protection of Children .... 270
United States v. Alvarez .............................................. 270
Note: Knowingly False Statements of Fact ........................ 283
Problem: The Stolen Valor Act of 2013 ............................ 284

Chapter 4 TRANS-SUBSTANTIVE DOCTRINES ...................... 287

A. PRIOR RESTRAINTS ............................................. 287
Note: An Introduction to Prior Restraints .......................... 287
[1] Licensing ....................................................... 288
Lovell v. City of Griffin ........................................... 288
Note: Licensing Schemes and the Freedman Requirements ....... 290
[2] Injunctions and Other Remedies ................................. 296
Near v. Minnesota .................................................. 296
Note: The Decision in Near ....................................... 300
Problem: RICO Forfeiture .......................................... 302
Problem: A Recalcitrant Defamer .................................. 303
New York Times Co. v. United States: The “Pentagon Papers” 304
Case ................................................................. 304
Note: Injunctions Against Speech ................................ 315
Note: “The H-Bomb Secret” ...................................... 316
Problems: Disclosure of NSA Monitoring .......................... 317

B. OVERBREADTH AND VAGUENESS ............................... 318
New York v. Ferber ............................................... 318
City of Houston v. Hill .............................................. 320
Ashcroft v. Free Speech Coalition .................................. 320
Note: The Overbreadth Doctrine .................................. 320
Note: The Vagueness Doctrine .................................... 322
### Chapter 5  COMPELLED EXPRESSION  

**A. COMPELLED SPEECH**  

*West Virginia State Board of Education v. Barnette*  

Note: *Barnette* and Its Implications  

Problem: A State University Pledge  

*Wooley v. Maynard*  

Note: The *Barnette* Principle  

Problem: Navajo Spiritualism on License Plates?  

Problem: The Wedding Photographer and the Gay Couple  

Note: Speech, Coercion, and Meaning  

**B. COMPELLED SUBSIDY**  

*Abood v. Detroit Board of Education*  

Note: Is a Dissenter’s “Opt-Out” Right Constitutionally Sufficient?  

Note: Applying *Abood* Beyond the Union Context  

Problem: Satirical Anti-Tobacco Advertising  

### Chapter 6  FREEDOM OF ASSOCIATION  

*NAACP v. Alabama*  

Note: *NAACP* and Beyond  

*Roberts v. United States Jaycees*  

Note: Competing Approaches to Freedom of Association  

Problem: The New Age Coalition and the Fundamentalist  

Note: *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*  

Note: Dale and the Precedents  

Note: Status and Message  

Problem: Exclusion from a Gay Softball League  

### Chapter 7  REGULATING THE “TIME, PLACE, AND MANNER” OF PROTECTED SPEECH  

**A. EARLY DEVELOPMENT OF THE DOCTRINE**  

*Lovell v. City of Griffin*  

*Schneider v. New Jersey*  

Note: From *Lovell* to *Schneider*  

*Martin v. City of Struthers*  

Note: Regulating the Manner of Expressive Activity  

**B. APPLICATIONS OF THE DOCTRINE**  

*Frisby v. Schultz*  

*Ward v. Rock Against Racism*  

---  

Table of Contents  

Chapter 5  COMPELLED EXPRESSION  

A. COMPELLED SPEECH  

*West Virginia State Board of Education v. Barnette*  

Note: *Barnette* and Its Implications  

Problem: A State University Pledge  

*Wooley v. Maynard*  

Note: The *Barnette* Principle  

Problem: Navajo Spiritualism on License Plates?  

Problem: The Wedding Photographer and the Gay Couple  

Note: Speech, Coercion, and Meaning  

B. COMPELLED SUBSIDY  

*Abood v. Detroit Board of Education*  

Note: Is a Dissenter’s “Opt-Out” Right Constitutionally Sufficient?  

Note: Applying *Abood* Beyond the Union Context  

Problem: Satirical Anti-Tobacco Advertising  

Chapter 6  FREEDOM OF ASSOCIATION  

*NAACP v. Alabama*  

Note: *NAACP* and Beyond  

*Roberts v. United States Jaycees*  

Note: Competing Approaches to Freedom of Association  

Problem: The New Age Coalition and the Fundamentalist  

Note: *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*  

Note: Dale and the Precedents  

Note: Status and Message  

Problem: Exclusion from a Gay Softball League  

Chapter 7  REGULATING THE “TIME, PLACE, AND MANNER” OF PROTECTED SPEECH  

A. EARLY DEVELOPMENT OF THE DOCTRINE  

*Lovell v. City of Griffin*  

*Schneider v. New Jersey*  

Note: From *Lovell* to *Schneider*  

*Martin v. City of Struthers*  

Note: Regulating the Manner of Expressive Activity  

B. APPLICATIONS OF THE DOCTRINE  

*Frisby v. Schultz*  

*Ward v. Rock Against Racism*
Table of Contents

City of Ladue v. Gilleo ........................................ 404
Note: Foreclosing Particular Modes of Expression ............. 409
Note: Narrow Tailoring and “Underinclusiveness” .............. 410
Problem: Regulating Newsracks ................................ 411
Hill v. Colorado ............................................. 412
Note: Restrictions on Anti-Abortion Protests .................. 424
Problem: Picketing of Religious Activities ...................... 425

C. INJUNCTIONS AGAINST PROTESTERS ...................... 426
Madsen v. Women’s Health Center, Inc. ....................... 426
Note: Standards for Injunctions Against Speech .............. 436

Chapter 8 CONTENT NEUTRALITY: THE PRINCIPLE AND ITS PROGENY ........................................ 437

A. THE PRINCIPLE ............................................ 437
Police Department of Chicago v. Mosley ....................... 437
Note: “Above All Else . . .”: The Mosley Principle .......... 440
Note: Speech near Polling Places .............................. 443

B. O’BRIEN AND THE TWO-TRACK ANALYSIS .................. 444
United States v. O’Brien ....................................... 444
Note: “Symbolic Speech” and the Tinker Case ................. 450
Note: “Incidental” Burdens on Expression ....................... 450
Problem: A Pregnant Actress .................................. 452
Texas v. Johnson ............................................. 452
Note: Flag Burning as Protected Speech ....................... 461
Problem: A New Flag Protection Act .......................... 462
Holder v. Humanitarian Law Project ......................... 462
Note: “Material Support” and Freedom of Speech ............ 474

C. “SECONDARY EFFECTS” AS A BASIS FOR REGULATION .... 475
City of Renton v. Playtime Theatres, Inc. ....................... 475
Note: Origins of the “Secondary Effects” Doctrine .......... 480
Boos v. Barry .................................................. 481
City of Los Angeles v. Alameda Books, Inc. ................... 485
Note: Continuing Controversy over “Secondary Effects” .... 495
Problem: Limiting the Hours of Adult Businesses ............. 496

D. EXPRESSION AND CONDUCT: UNTANGLING THE DOCTRINES . 497
City of Erie v. Pap’s A.M. ...................................... 497
Note: Expressive Conduct, Secondary Effects, and Incidental Burdens ............................................. 507
Problem: Nudity “For Entertainment Purposes” ................ 509
Problem: An “Affirmative Action Bake Sale” .................. 510
Table of Contents

Chapter 9 SPEECH ON GOVERNMENT PROPERTY AND THE PUBLIC FORUM DOCTRINE .......................... 513

A. FOUNDATIONS OF THE DOCTRINE .......................... 513
   Hague v. Committee for Industrial Organization .................. 513
   Schneider v. New Jersey ......................................... 515
   Cantwell v. Connecticut ......................................... 515
   Note: The Significance of Cantwell ............................... 517
   Cox v. New Hampshire ............................................. 517
   Note: The Law Established by the Foundational Cases .............. 520

B. MASS DEMONSTRATIONS AND THE PROBLEM OF THE “HOSTILE AUDIENCE” ............................... 521
   Terminiello v. Chicago ............................................ 521
   Note: Hostile Audiences and Provocative Speakers ................. 525
   Forsyth County v. Nationalist Movement ........................... 528
   Note: Fees and Permits for Demonstrations on Public Property ...... 533
   Problem: Klan Rally and Counter-Rally ............................ 534

C. ACCESS TO NONTRADITIONAL FORUMS AND FACILITIES .................................................. 535
   Note: Competing Approaches to Speech on Public Property ......... 536
   Lehman v. City of Shaker Heights .................................. 538
   Note: Lehman and the Perry Synthesis ............................... 542
   Cornelius v. NAACP Legal Defense And Educational Fund, Inc. .... 544
   International Society for Krishna Consciousness, Inc. v. Lee .......... 554
   Lee v. International Society for Krishna Consciousness Inc. ........ 566
   Note: Competing Views of the Public Forum ........................ 567
   Note: Rosenberger and Viewpoint Discrimination .................... 568
   Note: “Limited” and “Designated” Forums .......................... 570
   Problem: Display of Controversial Art ............................ 571
   Problem: Flags and Banners on Highway Overpasses ................ 572

D. SPEECH ON PRIVATE PROPERTY ........................................... 573
   Note: The Marsh Decision ........................................... 573
   Note: The Shopping Center Cases ................................... 574
   Problem: Access to Migrant Workers .................................. 577

Chapter 10 ADAPTING DOCTRINE TO NEW TECHNOLOGIES ............................. 579

A. DIFFERENT MEDIA/DIFFERENT STANDARDS? .......................... 579
   Note: “A Law Unto Itself”: Medium-Specific Standards and the Case of
   Spectrum Scarcity ..................................................... 579
   Turner Broadcasting System v. FCC ................................ 584
   Note: Turner Broadcasting and the Must-Carry Rules ............... 591

B. INVASIVENESS AND THE PROTECTION OF CHILDREN ........................ 593
   Butler v. Michigan .................................................... 593

xiii
Table of Contents

Note: Ginsberg v. New York ........................................ 594
FCC v. Pacifica Foundation ........................................ 595
Note: Dial-A-Porn and Sable Communications ................. 604
Problem: The Over-Excited Actress ............................... 604
Note: Regulation of Violent Video Games: Does Interactivity
Matter? .................................................................... 605
Reno v. American Civil Liberties Union ........................... 607
Note: Regulation of Indecent Internet Content Since Reno ..... 615

Chapter 11 TESTING THE BOUNDARIES OF DOCTRINE ........ 621

A. “HATE SPEECH” .................................................. 621
   Note: Beauharnais and “Group Libel” ......................... 621
   R.A.V. v. City of St. Paul ......................................... 622
   Note: The Implications of R.A.V. ............................... 637
   Note: A Penalty Enhancement Statute ......................... 638
   Virginia v. Black .................................................. 640
   Note: Cross Burning and the First Amendment ............ 654

B. JUDICIAL CAMPAIGN SPEECH ................................. 655
   Republican Party of Minnesota v. White ..................... 655
   Note: Judicial Campaign Speech ............................... 665

C. CAMPAIGN FINANCE ........................................... 666
   Buckley v. Valeo .................................................. 666
   Note: Buckley and Its Progeny ................................ 683
   Note: Circumvention of Contribution Limits ................ 684
   Note: First National Bank of Boston v. Bellotti and Corporate Electoral
   Speech .................................................................. 686
   Note: Corporate Political Speech and Electoral Integrity from Bellotti to
   Citizens United .................................................... 690
   Citizens United v. Federal Election Commission ............ 695
   Note: (Further) Disagreement in Citizens United About Justifications for
   Campaign Expenditure Restrictions ............................ 711
   Problem: Corporate Contributions to an Independent Spender ....... 713
   Problem: A State Response to Citizens United? ............. 713
   Note: Disclosure Requirements and Political Expression .... 714

Chapter 12 BEYOND REGULATION: THE GOVERNMENT AS
EMPLOYER AND EDUCATOR ................................. 717

A. FIRST AMENDMENT RIGHTS OF GOVERNMENT EMPLOYEES .. 717
   Connick v. Myers .................................................. 717
   Note: Pickering and Its Progeny ................................. 725
   Problem: The Police Clerk (and Klan Recruiter) ............. 726
Table of Contents

Note: “I Hope They Get Him” ........................................... 727
_Garcetti v. Ceballos_ ......................................................... 730
Note: The Implications of _Garcetti_ ................................. 742
Problem: Investigating Corruption .................................... 742
Problem: The Outspoken University Administrator .................. 743
Note: Patronage Dismissals ............................................. 744

B. THE FIRST AMENDMENT IN THE PUBLIC SCHOOLS .......... 746
Note: The Implications of _Tinker_ ..................................... 752
Note: From _Tinker_ to the “Bong Hits” Case ............................ 752
_Morse v. Frederick_ ......................................................... 756
Note: The Implications of _Morse v. Frederick_ ...................... 764
Problem: Career Guidance and Student Protest ..................... 766
Problem: A Controversial T-Shirt ....................................... 767
Problem: Insults on the Internet ......................................... 768

Chapter 13 BEYOND REGULATION: WHOSE MESSAGE IS IT? ... 769

A. PAYING THE PIPER — AND CALLING THE TUNE? ............... 769
_Rust v. Sullivan_ ........................................................... 769
Note: _Rust, Rosenberger, and Finley_ ................................. 776
Note: Government Funding of Legal Services ....................... 779
_Agency for International Development v. Alliance for Open Society International, Inc._ ............................. 782
Note: “Inside” The Program — Or “Outside?” ............................ 791

B. WHEN IS THE GOVERNMENT THE SPEAKER? .................. 791
_Pleasant Grove City, Utah v. Summum_ .............................. 792
Note: “Government Speech” ............................................. 802
Problem: Firing the Poet Laureate ....................................... 802
Problem: “Enhanced Underwriting” by the Ku Klux Klan ............ 803
Problem: Exclusion From a State’s Adopt-A-Highway Program .... 804

Chapter 14 FREEDOM OF THE PRESS ................................. 807

A. SINGLING OUT THE PRESS .......................................... 807
_Grosjean v. American Press Co._ ...................................... 807
Note: _Grosjean and the Free-Press Clause_ ............................ 812
_Minneapolis Star v. Minnesota Commissioner of Revenue_ ...... 812
Note: _Grosjean and Minneapolis Star_ .................................. 819
Note: Discrimination Among Media Categories ....................... 819
Problem: Restrictions on College Newspapers ....................... 822
Problem: Save the Newspapers! ......................................... 822
### Table of Contents

**PART TWO**  FREEDOM OF RELIGION  ................. 859

**Chapter 15**  THE HISTORY AND PURPOSES OF THE RELIGION CLAUSES  ................. 861

A.  THE DEBATE OVER THE ORIGINAL UNDERSTANDING  .... 861
   - *Everson v. Board of Education*  ......................... 862
   - *Wallace v. Jaffree*  .................................. 864
   - *Lee v. Weisman*  .................................... 868

B.  HISTORY AND TRADITION  .............................. 873
   - *McCreary County v. ACLU*  .............................. 873
   - *Van Orden v. Perry*  .................................. 878
   - Problem: Ceremonial Deism  .............................. 879
   - Note: The Incorporation Doctrine  ...................... 880

**Chapter 16**  THE ESTABLISHMENT CLAUSE  ................. 883

A.  FINANCIAL AID TO RELIGION  .......................... 883
   [1]  Basic Principles  .................................... 883
   - *Everson v. Board of Education*  ......................... 883
   - Note: Two Competing Principles — “No Aid” and “Equal Aid” 887
   [2]  The Lemon Test as Modified  ........................... 888
   - *Lemon v. Kurtzman*  .................................. 888
   - Note: The Lemon Test: Three-Part Disharmony  ........ 893
   - *Agostini v. Felton*  .................................. 896
   - *Mitchell v. Helms*  .................................. 903
   - Note: What is the Test as Modified?  .................... 915
   [3]  School Vouchers  ...................................... 916
**Table of Contents**

- *Zelman v. Simmons-Harris* .................................................. 916
  - Note: A Supreme Court Scorecard .................................. 930
  - Problem: Faith-Based Social Service Providers .................. 931
- **B. SCHOOL PRAYER** .......................................................... 931
  - *Engel v. Vitale* ............................................................. 931
  - Note: Prayer in Schools .................................................. 935
  - *School District of Abington Township v. Schempp* ............... 936
  - *Wallace v. Jaffree* ....................................................... 941
  - *Lee v. Weisman* ............................................................ 945
  - Problem: Drafting a Moment-of-Silence Policy ...................... 952
- **C. SCHOOL CURRICULUM** .................................................. 952
  - *Epperson v. Arkansas* ..................................................... 952
  - *Edwards v. Aguillard* ................................................... 955
  - Problem: Intelligent Design ............................................. 961
- **D. DISPLAYS IN PUBLIC PLACES** ......................................... 962
  - *County of Allegheny v. Greater Pittsburgh ACLU* ................... 963
  - Note: Different Justices — Different Perspectives .................. 975
  - *McCreary County v. ACLU* ............................................... 976
  - *Van Orden v. Perry* ..................................................... 986
  - Note: Justice Breyer’s Constitutional Distinctions ................ 997
  - Note: A Supreme Sidebar on Displays in Public Places .......... 998
  - Problem: Atheists Cross About Highway Memorials ............... 1001

**Chapter 17**  
**THE FREE EXERCISE CLAUSE**  

- **A. EARLY CASES** ............................................................ 1003
  - *Reynolds v. United States* ............................................. 1003
  - *United States v. Ballard* .............................................. 1006
  - Note: Individual Belief .................................................. 1010
- **B. MODERN CASES** .......................................................... 1011
  - *Sherbert v. Verner* ....................................................... 1011
  - *Wisconsin v. Yoder* ..................................................... 1016
  - *Employment Division v. Smith* ......................................... 1024
  - Note: Free Exercise Analysis Redux? .................................... 1033
  - Note: Statutory Strict Scrutiny — RFRA & RLUIPA .................. 1034
- **C. DISCRIMINATION AGAINST RELIGION**  
  - *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* .... 1038
  - Note: The Smith-Lukumi Analysis ....................................... 1048
  - Problem: Police Grooming Regulation ................................ 1049
## Table of Contents

**Chapter 18  INTERRELATIONSHIPS AMONG THE CLAUSES . . . 1051**

A. DEFINITION OF RELIGION .......................... 1051
   *Torcaso v. Watkins* ............................ 1052
   *United States v. Seeger* ....................... 1054
   Note: Freedom of Conscience and the Constitution ........... 1058
   Note: Dogma, Heresy, and Schism .................... 1061
   *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*  ... 1062
   Note: A “Parade of Horribles”? .................... 1070
   Problem: Peremptory Challenges .................... 1071

B. TENSIONS BETWEEN THE RELIGION CLAUSES ............. 1071
   *Board of Education of Kiryas Joel Village*
   *School District v. Grumet* ..................... 1072
   Note: Satmar Hasidim Versus Old Order Amish ............. 1080
   *Locke v. Davey* ................................ 1081
   Note: The “Play in the Joints” ..................... 1086
   Note: The Blaine Amendments ....................... 1087
   Problem: The Good Friday School Holiday ............... 1088

C. RELIGIOUS SPEECH ................................ 1088
   Note: The Free Speech — Public Forum Overlay ............. 1089
   *Rosenberger v. Rector and Visitors of The University of Virginia* ... 1090
   *Good News Club v. Milford Central School* .............. 1100
   Problem: Praying in the Public Library .................. 1108
   Problem: Suing to Stop Them from Casting Stones .......... 1109
   Note: A Postscript on the Religion Clauses ............... 1111

**Appendix A  THE CONSTITUTION OF THE UNITED STATES . . .. . 1113**

**Appendix B  THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1946–2012 TERMS ......................... 1121**

**TABLE OF CASES ........................................ TC-1**

**INDEX .................................................. I-1**
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