

PREFACE

It may come as a surprise to many students entering law school that an entire course could be devoted to a single amendment of the United States Constitution. On the other hand, it may also come as a surprise to other students that most of the jurisprudence discussed in this case book is less than 100 years old. The Supreme Court devoted very little attention to the First Amendment prior to World War I. Since that time, however, the First Amendment has become one of the most frequently litigated components of the Constitution. From the modern perspective, the First Amendment has become such a central part of our social, political, and religious interaction in the United States that it is difficult to envision society without it. In an increasingly diverse culture, which is witnessing an explosion of new media through which conflicting opinions can be disseminated, the First Amendment is likely to remain a focal point of constitutional litigation.

This casebook surveys the entire range of contemporary First Amendment jurisprudence, including cases relating to each of the six major concerns of the amendment—freedom of speech, press, assembly, association, petition, and religion. This casebook is organized around substantial excerpts of the Supreme Court’s most significant First Amendment decisions. We have attempted to edit the cases less aggressively than the authors of many other casebooks on this subject, in order to let the Justices’ own words lead students through the doctrine. In addition to the main cases, notes after many of the cases provide short excerpts or summaries of other relevant Supreme Court decisions and important academic commentary, along with references to some lower court decisions regarding matters on which the Supreme Court has not yet spoken. Most of the chapters also include problem sets to focus students’ attention on the particular applications and internal conflicts of the doctrine. We also have made a conscious effort to address the interplay of historical and political events and First Amendment doctrine. In our view, consideration of the historical and political context of free speech and religious freedom cases helps to illuminate the concerns that can motivate judges to accept or reject constitutional claims. Finally, in several important areas, we present decisions from foreign constitutional courts because we believe that these materials provide a helpful contrast with the U.S. approach to common legal problems. Looking at a problem from a comparative perspective often can yield useful insights into the (often unstated) policies and objectives of contemporary First Amendment jurisprudence.

The casebook is organized with the intention of first providing students with a general background of overriding First Amendment concepts, before turning to more specific areas in which the Supreme Court has developed and applied specialized rules. Modern First Amendment law can be very frustrating for the uninitiated because the lines between the various specialized rules and standards are often unclear. Indeed, the Supreme Court’s consistent drift from

general, open-ended principles to frame and decide First Amendment cases toward a vast sea of three and four part tests that apply only in very specific, limited circumstances provides one of the larger themes of this casebook. As you explore these materials, you should consider whether highly context specific, complex, multipronged balancing tests better secure fundamental liberties than would more general, open-ended tests.

In some respects, attempting to understand First Amendment law is like learning to play three-dimensional chess. In many situations raising First Amendment issues, more than one set of rules will seem to apply. Any given case may raise generalized First Amendment concerns (such as the rule that the government may almost never engage in content or viewpoint regulation), coupled with specific rules developed for particular factual scenarios (such as the rules regarding obscenity, fighting words, threats, or government-subsidized speech), which are further complicated by special procedural rules (such as the expedited litigation requirements of *Freedman v. Maryland*), special remedial rules (such as the Court's strong discouragement of injunctive prior restraints), and even special statutory-construction mandates (such as the Court's unusual willingness to consider facial overbreadth challenges to statutes impinging on free speech). The First Amendment even has special real estate rules for government property, which dictate when and how that property must be opened to speakers wishing to express themselves to other members of the public. Learning to navigate the often conflicting cross-currents of First Amendment law is one of the student's main tasks in a First Amendment course, and this casebook is designed to make that task easier.

The basic organization of the book divides the discussion of the First Amendment between the Speech Clauses, which are covered in Part I (the first twelve chapters), and the Religion Clauses, which are covered in Part II (the final four chapters). Within the speech chapters, the discussion moves from an overview of the general theory and structure of the First Amendment to the specific doctrines that apply to particular areas of speech. The first three chapters provide an overview of the history and theory of the First Amendment, along with a discussion of the basic rules regarding content and viewpoint regulation by the government. These chapters also provide a basic understanding of the government's role in regulating political expression, which is the topic that the Supreme Court addressed in its earliest First Amendment cases, and which remains at the heart of free speech jurisprudence. Chapters 4 and 5 provide a general discussion of content and viewpoint regulation, along with a consideration of the ways in which the government can regulate speech without regard to the content of that speech. These chapters also discuss the rules governing speech in public forums. Chapter 6 is a bridge chapter, discussing the general rules regarding compelled and anonymous speech, and also addressing the specific First Amendment doctrines relating to electoral speech. Chapters 7 through 12 move from the general to the particular, discussing a variety of different First Amendment doctrines that relate to specific types of speech, including commercial speech, media regulation, group libel, fighting words, erotica, defamation, government employees, and government-subsidized speech.

Part II discusses the Religion Clauses. The first three chapters of Part II discuss the Establishment Clause. As in the speech chapters, the initial discussion introduces students to the history and theory of the Establishment Clause, and briefly discusses the many different standards that have been used

to apply the Clause. Chapter 14 then turns to cases involving symbolic endorsement of religion by the government, both inside the public schools and in other governmental contexts. Chapter 15 discusses cases involving government financing of religion, including indirect financing through voucher programs for parents sending children to religious schools, and direct financing via government grants to religious enterprises. Chapter 16 addresses the Free Exercise Clause, and includes discussions of religious accommodations mandated by the Constitution, statutory accommodation mandates, and the rules regarding judicial interference in intra-church disputes.

As this brief summary indicates, the complexities of the interrelationships between the many First Amendment standards and doctrines are daunting. Fortunately, the entertainment value of cases raising First Amendment issues is quite high. The reader will find in the materials that follow a gallery of rogues and heroes, dissenters and visionaries, and more than a few simple oddballs. The cast of characters includes Communists and Ku Klux Klansmen, cross burners and draft-card burners, atheists and evangelicals, Eugene V. Debs and Richard Nixon, and Larry Flynt and Catherine McKinnon. In one sense it is their First Amendment that this book discusses, but in a more important sense this colorful cast has helped the Court define the scope of expressive and religious freedom enjoyed by the entire society. The authors of this casebook believe that we have rendered the story of the First Amendment in a way that makes it both coherent and digestible. Whether we succeeded in that task is for the reader to decide, but at the very least we feel certain that no one will find this material boring.

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January 2008