
TABLE OF CONTENTS

PREFACE	v
TABLE OF CASES	xxvii
TABLE OF AUTHORITIES	xxxiii
CHAPTER 1. Freedom of Speech—Why Government Re- stricts Speech—Unprotected and Less Protected Expression	1
Section	
1. Free Speech: An Overview	1
Introduction	1
A. First Amendment History	2
Prior restraints	2
Seditious libel	3
Later history	4
B. First Amendment Theory	4
Truth	4
Self-government	6
Autonomy	7
Negative theories	7
Eclectic theories	8
C. First Amendment Jurisprudence	8
Justifying special protection for speech	9
Absolutes versus balancing	10
Categorization versus balancing	11
2. Incitement	13
A. The World War I Cases: “Clear and Present Danger”	13
Introduction	13
<i>Schenck v. United States</i>	15
<i>Frohwerk v. United States</i>	16
<i>Debs v. United States</i>	17
<i>Abrams v. United States</i>	19
Subversive Advocacy From Schenck to Abrams	23
Comparing the Schenck-Frohwerk-Debs approach	23
The evolution of Holmes’ Abrams dissent	23
The impact of the Abrams dissent	24
An alternative approach: Learned Hand and the Masses case	24
<i>Masses Publishing Co. v. Patten</i>	25
Comparing the Holmes and Hand Approaches	28
The strengths and weaknesses of Hand’s “incitement” ap- proach	28
The differences between Hand and Holmes: Some historical data	28

Section	
2. Incitement—Continued	
B. The “Red Scare” Cases	29
<i>Gitlow v. New York</i>	29
<i>Whitney v. California</i>	33
The Gitlow-Whitney Problem	38
Legislative presumptions of harm from speech	38
An alternative approach: the Masses test	38
Comparing the Holmes and Brandeis approaches	38
Retreat from Gitlow-Whitney: Fiske, DeJonge and Herndon	39
<i>Fiske v. Kansas</i>	39
<i>DeJonge v. Oregon</i>	39
<i>Herndon v. Lowry</i>	39
C. The Smith Act Prosecutions	40
<i>Dennis v. United States</i>	40
“Clear and Present Danger” After Dennis	45
The Dennis formulation	45
Clear and present danger and Learned Hand	46
Free speech theory and the advocacy of totalitarian govern- ment	46
Retreat from Dennis: Yates, Scales and Noto	47
<i>Yates v. United States</i>	47
<i>Scales v. United States</i>	47
<i>Noto v. United States</i>	48
The impact of Yates, Scales and Noto	48
Other federal anti-Communist legislation of the 1950s	49
<i>Communist Party v. SACB</i>	49
<i>Aptheker v. Secretary of State</i>	49
<i>United States v. Robel</i>	49
<i>Lamont v. Postmaster General</i>	49
Vietnam era cases	50
<i>Bond v. Floyd</i>	50
<i>Watts v. United States</i>	50
D. The Modern Incitement Test	50
<i>Brandenburg v. Ohio</i>	50
The Impact of Brandenburg	53
The best of Hand and Holmes?	53
Later applications of Brandenburg	53
<i>Hess v. Indiana</i>	53
<i>NAACP v. Claiborne Hardware Co.</i>	53
The scope of Brandenburg	54
Deference to legislative determinations of the dangerousness of speech	55
<i>Landmark Communications, Inc. v. Virginia</i>	55
3. Fighting Words and Hostile Audiences	55
Introduction	55
A. Fighting Words	55
<i>Cantwell v. Connecticut</i>	56
<i>Chaplinsky v. New Hampshire</i>	57

Section

3. Fighting Words and Hostile Audiences—Continued

The Court's methodology in excluding "fighting words" from First Amendment protection	57
The contemporary vitality of the "fighting words" exception --	58
<i>Gooding v. Wilson</i>	58
<i>Rosenfeld v. New Jersey</i>	58
<i>Lewis v. New Orleans</i>	58
<i>Brown v. Oklahoma</i>	58
The limitation of the "fighting words" exception to words that "tend to incite an immediate breach of the peace"	59
<i>Texas v. Johnson</i>	59
<i>Cohen v. California</i>	60
The Court's methodology in Cohen	64

B. Hostile Audiences

Terminiello and "provocative" speech which "invites dispute" --	65
<i>Terminiello v. Chicago</i>	65
The Feiner problem: Focus on protected words or on audience context?	65
<i>Feiner v. New York</i>	65
Distinguishing Feiner in later cases	67
Street Demonstrations	67
<i>Edwards v. South Carolina</i>	67
<i>Cox v. Louisiana</i>	68
<i>Gregory v. Chicago</i>	68
Permit requirements as an alternative approach	69
<i>Kunz v. New York</i>	69
Permit fees	69
<i>Forsyth County, Georgia v. Nationalist Movement</i>	69
The right to heckle	70

4. Injury to Reputation and Sensibility

Introduction

A. Beauharnais and Group Libel

<i>Beauharnais v. Illinois</i>	71
Debate over Beauharnais	72
The vitality of Beauharnais	73

B. Libel

<i>New York Times Co. v. Sullivan</i>	73
The Meaning of New York Times	76
The immediate impact of the decision	76
The First Amendment interest in false statements of fact	76
The Court's methodology in New York Times	77
Criticism of New York Times	77
Procedural developments after New York Times	78
Extension of New York Times to other settings	79
Public Figures	79
<i>Curtis Publishing Co. v. Butts</i>	79
<i>Associated Press v. Walker</i>	79
Private Figures	80
<i>Rosenbloom v. Metromedia, Inc.</i>	81

Section

4. Injury to Reputation and Sensibility—Continued	
<i>Gertz v. Robert Welch, Inc.</i> -----	81
Speech on Matters of Private Concern -----	83
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders</i> -----	83
Defamation law: a summary -----	84
C. Non-Defamation Torts -----	84
Intentional infliction of emotional distress -----	84
<i>Hustler Magazine v. Falwell</i> -----	84
Invasion of Privacy -----	86
“False light” invasion of privacy -----	86
<i>Time, Inc. v. Hill</i> -----	86
Disclosure of rape victims’ names -----	87
<i>Cox Broadcasting Corp. v. Cohn</i> -----	87
<i>Florida Star v. B.J.F.</i> -----	88
Appropriation torts -----	88
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> -----	88
D. Hate Speech -----	89
Arguments for regulation of hate speech -----	89
Arguments against regulation of hate speech -----	90
Restraining Nazi demonstrations: the Skokie controversy -----	91
<i>National Socialist Party v. Skokie</i> -----	91
<i>Smith v. Collin</i> -----	93
Regulating racist and other bigoted speech on campus -----	93
<i>R.A.V. v. City of St. Paul</i> -----	94
The Implications of R.A.V. -----	102
Distinguishing the regulation of hate speech from the regula- tion of hate crimes -----	102
<i>Wisconsin v. Mitchell</i> -----	103
The limits of the distinction between R.A.V. and Mitchell -----	104
Hostile environment sexual or racial harassment -----	104
5. Sexually Explicit Expression -----	104
Introduction -----	104
A. Obscenity -----	106
<i>Roth v. United States</i> -----	106
<i>Alberts v. California</i> -----	108
Obscenity Between Roth and Miller -----	108
Overview -----	108
<i>Kingsley Int’l Pictures Corp. v. Regents</i> -----	109
<i>Stanley v. Georgia</i> -----	109
<i>United States v. Reidel</i> -----	110
The 1970 Obscenity Commission Report -----	111
The Burger Court’s new judicial definition of obscenity -----	111
<i>Miller v. California</i> -----	112
<i>Paris Adult Theatre I v. Slaton</i> -----	114
Obscenity Law After Miller and Paris -----	119
Justifications for obscenity regulation -----	119
Debasement of individual character -----	119
Offense to unwilling onlookers -----	119
Inducement of criminal conduct -----	120

Section

5. Sexually Explicit Expression—Continued

Eroding moral standards -----	120
Harming the social fabric -----	120
The value of obscenity as “speech”? -----	120
Non-political -----	120
Non-cognitive -----	121
Not susceptible to counterspeech -----	121
Critiques of obscenity law after Miller -----	121
Post-Miller decisions -----	121
<i>Jenkins v. Georgia</i> -----	122
Community standards -----	122
<i>Hamling v. United States</i> -----	122
<i>Smith v. United States</i> -----	122
Serious value -----	123
The Attorney General’s Commission on Pornography, 1986 --	123
B. Child Pornography -----	124
<i>New York v. Ferber</i> -----	124
The Court’s methodology in <i>Ferber</i> -----	127
Possession of child pornography -----	128
<i>Osborne v. Ohio</i> -----	128
C. Pornography as Subordination of Women -----	128
Feminist anti-pornography theory -----	128
Feminist arguments against pornography regulation -----	129
Gay pornography -----	129
The invalidation of the MacKinnon-Dworkin ordinance -----	129
<i>American Booksellers Ass’n v. Hudnut</i> -----	130
D. Sexually Explicit But Non-Obscene Expression -----	134
Introduction -----	134
Nudity Bans -----	135
Nudity on drive-in movie screens -----	135
<i>Erznoznik v. Jacksonville</i> -----	135
Live nude dancing -----	137
<i>Schad v. Mount Ephraim</i> -----	137
“Erogenous Zoning” -----	138
Low value speech? -----	138
<i>Young v. American Mini Theatres</i> -----	138
“Secondary effects” -----	141
<i>Renton v. Playtime Theatres, Inc.</i> -----	141
Indecency Bans in the Communications Media -----	143
<i>FCC v. Pacifica Foundation</i> -----	143
The Limits of <i>Pacifica</i> -----	148
Captive audiences: <i>Pacifica</i> ’s privacy invasion rationale -----	148
<i>Rowan v. U.S. Post Office Department</i> -----	148
<i>Consolidated Edison v. Public Service Comm’n</i> -----	149
<i>Bolger v. Youngs Drug Products Corp.</i> -----	149
Total indecency bans -----	150
<i>Sable Communications, Inc. v. FCC</i> -----	150
Authorizing cable operators to regulate indecent program- ming -----	151

Section

5. Sexually Explicit Expression—Continued

*Denver Area Educational Telecommunications Consortium**v. FCC*----- 151*Reno v. American Civil Liberties Union* ----- 153

6. Commercial Speech ----- 163

Introduction ----- 163

Valentine v. Chrestensen ----- 163*Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n* --- 164*Bigelow v. Virginia* ----- 164*Virginia Pharmacy Board v. Virginia Citizens Consumer Council* --- 165

Commercial Speech and First Amendment Theory ----- 170

Advertising as "speech" ----- 170

Advertising and the rationales for freedom of speech ----- 170

Self-government ----- 170

Truth ----- 171

Autonomy ----- 171

Negative First Amendment theory ----- 171

"Commonsense differences" between commercial and other
speech ----- 172

Hardiness ----- 172

Verifiability ----- 172

Defining commercial speech ----- 172

Bolger v. Youngs Drug Products Corp. ----- 173*Board of Trustees, State Univ. of New York v. Fox* ----- 173

Commercial Speech After Virginia Pharmacy ----- 173

Real estate "For Sale" signs as protected speech ----- 173

Linmark Associates, Inc. v. Willingboro ----- 173

Contraceptive advertising ----- 174

Carey v. Population Services Int'l ----- 174

Regulating the legal profession and other professions ----- 174

Bates v. State Bar of Arizona ----- 174*Ohralik v. Ohio State Bar Association* ----- 174*Zauderer v. Office of Disciplinary Counsel* ----- 175*Shapero v. Kentucky Bar Ass'n* ----- 175*Peel v. Attorney Registration and Disciplinary Comm'n of Ill.* ---- 176*Edenfield v. Fane* ----- 176*Ibanez v. Florida* ----- 176*Florida Bar v. Went For It, Inc.* ----- 176

What Standard of Scrutiny for Commercial Speech? ----- 177

Central Hudson Gas v. Public Service Comm'n ----- 178

Commercial Speech Regulation After Central Hudson ----- 180

Commercial speech and "least restrictive alternative" analysis-- 180

Board of Trustees, State Univ. of New York v. Fox ----- 180Billboards and newsracks: may commercial speech be treated
differently?----- 181*Metromedia, Inc. v. San Diego* ----- 181*City of Cincinnati v. Discovery Network, Inc.* ----- 182The rise and fall of the "vice" exception: restrictions on adver-
tising harmful products and services ----- 183

Section

6. Commercial Speech—Continued

<i>Posadas De Puerto Rico Assocs. v. Tourism Company of Puerto Rico</i>	183
<i>United States v. Edge Broadcasting Co.</i>	184
<i>Rubin v. Coors Brewing Co.</i>	185
<i>44 Liquormart, Inc. v. Rhode Island</i>	186
Commercial Speech Regulation After <i>Liquormart</i>	190
What standard of scrutiny?	190
<i>Glickman v. Wileman Bros.</i>	190
Paternalism and commercial speech	191

CHAPTER 2. Freedom of Speech—How Government Restricts Speech—Modes of Abridgment and Standards of Review	192
---	-----

Section

1. The Distinction Between Content-Based and Content-Neutral Regulations

Introduction	192
A. Content-Based Restrictions	193
Viewpoint restrictions	193
Subject matter restrictions	193
<i>Police Dept. v. Mosley</i>	194
<i>Carey v. Brown</i>	194
<i>Simon & Schuster, Inc. v. Members of New York State Crime Victims Board</i>	195
<i>Burson v. Freeman</i>	196
Speaker restrictions	197
Communicative impact on the audience	197
<i>Boos v. Barry</i>	197
Content-neutral laws	198
Reasons for differential treatment of content-based and content-neutral laws	199
Purpose	199
Effect	199
Political safeguards	199
Total medium bans	200
B. Content-Neutral Laws and Symbolic Conduct	201
Introduction	201
<i>United States v. O'Brien</i>	202
The Significance of <i>O'Brien</i>	205
Expression and action	205
Legislative motivation	206
The <i>O'Brien</i> test and the content-based/content-neutral distinction	206
"Incidental" restrictions on expression	207
<i>Arcara v. Cloud Books, Inc.</i>	207
Flag Desecration	208
<i>Street v. New York</i>	209

Section

1. The Distinction Between Content-Based and Content-Neutral Regulations—Continued	
<i>Smith v. Goguen</i>	209
<i>Spence v. Washington</i>	210
<i>Texas v. Johnson</i>	210
The Aftermath of <i>Texas v. Johnson</i>	217
Congressional response to <i>Johnson</i>	217
<i>United States v. Eichman</i>	217
Statute versus amendment	219
Nude Dancing	219
<i>Barnes v. Glen Theatre, Inc.</i>	220
2. Government's Power to Limit Speech in Its Capacity as Proprietor, Educator, Employer and Patron	223
A. Speech in Public Forums and Other Government Property	223
Introduction	224
Early Public Forum Cases	224
The First Amendment "right" to a public forum	224
<i>Massachusetts v. Davis</i>	224
Guaranteed access versus equal access: is the issue distribution or discrimination?	225
Early cases: standardless licensing and the problem of discrimination	226
<i>Saia v. New York</i>	226
<i>Staub v. Baxley</i>	226
<i>Hynes v. Mayor of Oradell</i>	226
<i>Lakewood v. Plain Dealer Publishing Co.</i>	227
<i>Cox v. New Hampshire</i>	227
Early cases: total medium bans and the problem of distribution	228
<i>Schneider v. State</i>	228
<i>Martin v. Struthers</i>	229
<i>Kovacs v. Cooper</i>	230
<i>City of Ladue v. Gilleo</i>	232
The Modern "Time, Place and Manner" Test	233
Introduction	233
Public Order and Safety	234
<i>Cox v. Louisiana</i>	234
<i>Heffron v. International Society for Krishna Consciousness</i>	234
Aesthetics	237
<i>Metromedia, Inc. v. San Diego</i>	237
<i>Members of City Council v. Taxpayers for Vincent</i>	238
<i>Clark v. Community for Creative Non-Violence</i>	243
Tranquility, Privacy and Repose	249
Noise regulations	249
<i>Ward v. Rock Against Racism</i>	249
Protecting "captive audiences"	250
Targeted residential picketing	250
<i>Frisby v. Schultz</i>	250

Section

2. Government's Power to Limit Speech in Its Capacity as**Proprietor, Educator, Employer and Patron—Continued**

Abortion clinic protests -----	252
<i>Madsen v. Women's Health Center, Inc.</i> -----	252
<i>Schenck v. Pro-Choice Network of Western New York</i> -----	255
Is a Time, Place or Manner Regulation Ever Invalid? -----	256
<i>United States v. Grace</i> -----	256
Speaker Access to Public Places Other Than Streets and Parks--	257
Introduction -----	257
Libraries, Jails and Schools -----	258
<i>Brown v. Louisiana</i> -----	258
<i>Adderley v. Florida</i> -----	259
<i>Grayned v. Rockford</i> -----	261
Buses, Theaters, and Military Bases-----	262
<i>Lehman v. Shaker Heights</i> -----	262
<i>Southeastern Promotions, Ltd. v. Conrad</i> -----	263
<i>Greer v. Spock</i> -----	264
<i>United States v. Albertini</i> -----	266
The Modern Trichotomy of Traditional, Designated and Non-	
public Forums -----	266
Mailboxes -----	266
<i>U.S. Postal Service v. Council of Greenburgh Civic Assns.</i> ----	266
Teachers' mailboxes -----	267
<i>Perry Education Assn. v. Perry Local Educators' Assn.</i> -----	267
Charitable campaigns in federal offices-----	269
<i>Cornelius v. NAACP Legal Defense and Ed. Fund</i> -----	269
Post Office sidewalks -----	271
<i>United States v. Kokinda</i> -----	271
Airport terminals -----	273
<i>International Society for Krishna Consciousness, Inc. v. Lee</i> --	273
The Court's trichotomy of public places-----	277
The special problem of solicitation -----	277
Candidate debate on public television-----	278
<i>Arkansas Educational Television Comm'n v. Forbes</i> -----	278
Religious Speech on Public Property -----	280
<i>Widmar v. Vincent</i> -----	280
<i>Lamb's Chapel v. Center Moriches Union Free School Dist.</i> ----	280
<i>Capitol Square Review Board v. Pinette</i> -----	282
First Amendment Access Rights to Private Property? -----	283
Introduction -----	283
<i>Amalgamated Food Employees v. Logan Valley Plaza</i> -----	283
<i>Lloyd Corp. v. Tanner</i> -----	284
<i>Hudgens v. NLRB</i> -----	284
B. Speech in Public Schools -----	284
Introduction -----	284
<i>Tinker v. Des Moines Independent Community School District</i> 285	
<i>Board of Education v. Pico</i> -----	286
<i>Bethel School Dist. No. 403 v. Fraser</i> -----	290
<i>Hazelwood School District v. Kuhlmeier</i> -----	291

Section	
2. Government's Power to Limit Speech in Its Capacity as Proprietor, Educator, Employer and Patron—Continued	
C. Speech and Association by Public Employees and Contractors	293
Introduction	293
<i>McAuliffe v. Mayor of New Bedford</i>	294
Public Employee Speech	294
<i>Pickering v. Board of Education</i>	294
<i>Connick v. Myers</i>	295
<i>Rankin v. McPherson</i>	299
<i>Waters v. Churchill</i>	300
<i>United States v. National Treasury Employees Union</i>	300
Public Employee Party Affiliation	302
Prohibitions of political activities by public employees: The Hatch Act cases	303
<i>United Public Workers v. Mitchell</i>	303
<i>United States Civil Service Comm'n v. National Ass'n of Letter Carriers</i>	303
Patronage dismissals of public employees	303
<i>Elrod v. Burns</i>	303
<i>Branti v. Finkel</i>	304
<i>Rutan v. Republican Party of Illinois</i>	305
Speech and Party Affiliation of Independent Contractors	307
<i>Board of Commissioners, Wabaunsee Co. v. Umbehr</i>	307
<i>O'Hare Truck Service, Inc. v. City of Northlake</i>	307
D. Speech Subsidized by Public Funds	309
<i>Speiser v. Randall</i>	309
<i>Regan v. Taxation with Representation of Washington</i>	310
<i>FCC v. League of Women Voters</i>	311
<i>Rust v. Sullivan</i>	313
<i>Rosenberger v. Rector and Visitors of the University of Virginia</i>	314
<i>National Endowment for the Arts v. Finley</i>	316
3. Impermissible Forms of Speech-Restrictive Law: Overbreadth, Vagueness and Prior Restraint	320
A. Overbreadth	321
Introduction	321
<i>Gooding v. Wilson</i>	321
The distinctive features of overbreadth	321
The attractiveness of overbreadth analysis	322
Criticisms of overbreadth analysis	323
Limits on overbreadth analysis: the requirement of "substantial" overbreadth	323
<i>Broadrick v. Oklahoma</i>	324
<i>New York v. Ferber</i>	326
Limits on overbreadth analysis: requiring that a statute be incapable of a narrowing construction	327
<i>Brockett v. Spokane Arcades, Inc.</i>	327
<i>Schaumburg v. Citizens for Better Environment</i>	327
<i>Secretary of State v. Joseph H. Munson Co.</i>	329

Section

3. Impermissible Forms of Speech-Restrictive Law: Overbreadth, Vagueness and Prior Restraint—Continued

Overbreadth and due process	329
<i>Massachusetts v. Oakes</i>	329
<i>Osborne v. Ohio</i>	330
The Court's continued reliance on overbreadth invalidation --	330
<i>Houston v. Hill</i>	330
<i>Board of Airport Commissioners v. Jews for Jesus</i>	331
"Less restrictive means" analysis and its relation to overbreadth	332

B. Vagueness

<i>Coates v. Cincinnati</i>	333
<i>National Endowment for the Arts v. Finley</i>	334

C. Prior Restraint

Introduction	334
--------------------	-----

Licensing

The concern with administrative discretion	335
<i>Lovell v. Griffin</i>	335
<i>Lakewood v. Plain Dealer Publishing Co.</i>	336
Procedural safeguards	337
<i>Freedman v. Maryland</i>	337
<i>FW/PBS, Inc. v. Dallas</i>	338
Standing to challenge licensing schemes	339
<i>Poulos v. New Hampshire</i>	339

Does the prior restraint-subsequent punishment distinction make sense?	339
--	-----

<i>Kingsley Books, Inc. v. Brown</i>	340
--	-----

Injunctions

<i>Near v. Minnesota</i>	341
<i>Walker v. Birmingham</i>	343
<i>Carroll v. President & Comm'rs of Princess Anne</i>	344
Prior Restraint and National Security	344
<i>New York Times Co. v. United States [The Pentagon Papers Case]</i>	344

<i>United States v. Progressive, Inc.</i>	351
---	-----

<i>Snepp v. United States</i>	352
-------------------------------------	-----

Prior Restraint and Fair Trial	353
--------------------------------------	-----

<i>Nebraska Press Ass'n v. Stuart</i>	353
---	-----

CHAPTER 3. Rights Ancillary to Freedom of Speech

Introduction	356
--------------------	-----

Section

1. Compelled Speech: The Right Not to Speak**A. Compelled Individual Speech**

Citizens as mouthpieces	357
<i>Minersville School Dist. v. Gobitis</i>	357
<i>West Virginia State Bd. of Educ. v. Barnette</i>	357
Citizens as mobile billboards	358
<i>Wooley v. Maynard</i>	358

Section

1. Compelled Speech: The Right Not to Speak—Continued

Compelled disclosure of speaker identity----- 358

Talley v. California ----- 358*McIntyre v. Ohio Elections Commission* ----- 359**B. Compelled Access for the Speech of Others** ----- 361

Compelled rights of reply ----- 361

Red Lion Broadcasting Co. v. FCC ----- 361*Miami Herald Pub. Co. v. Tornillo* ----- 361

Compelled access by speakers to private property----- 361

PruneYard Shopping Center v. Robins ----- 361*Pacific Gas & Elec. Co. v. Public Util. Comm'n* ----- 362*Turner Broadcasting System, Inc. v. FCC (Turner I)* ----- 364*Turner Broadcasting System, Inc. v. FCC (Turner II)* ----- 366

Compelled access to a parade ----- 366

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston ----- 366

The Court's methodology in compelled speech cases ----- 369

Constitutional compelled speech ----- 369

2. Freedom of Association ----- 369

Introduction ----- 369

A. Compelled Disclosure of Membership ----- 370*NAACP v. Alabama* ----- 371*Shelton v. Tucker* ----- 372*Gibson v. Florida Legislative Investigation Comm.* ----- 374

Compelled Disclosure of Political Campaign Contributions ----- 376

Buckley v. Valeo ----- 376*Brown v. Socialist Workers '74 Campaign Committee* ----- 378**B. Restrictions on Organizational Activity** ----- 378

Litigation ----- 378

NAACP v. Button ----- 378*Brotherhood of Railroad Trainmen v. Virginia* ----- 381*United Mine Workers v. Illinois State Bar Ass'n* ----- 381*United Transportation Union v. State Bar of Michigan* ----- 381

Boycotts ----- 382

NAACP v. Claiborne Hardware Co. ----- 382*International Longshoremen's Ass'n v. Allied International, Inc.* ----- 384**C. Denial of Government Benefits Because of Association** ----- 385

The Cold War period ----- 385

Konigsberg v. State Bar of California ----- 386

The Warren Court ----- 387

Cramp v. Board of Public Instruction ----- 387*Baggett v. Bullitt* ----- 387*Elfbrandt v. Russell* ----- 388*Keyishian v. Board of Regents* ----- 389

Loyalty Requirements and the Modern Court ----- 390

Loyalty oaths ----- 390

Cole v. Richardson ----- 390

Bar admission cases ----- 391

Section

2. Freedom of Association—Continued*Baird v. State Bar of Arizona* ----- 391

Application of Stolar ----- 391

Law Students Civil Rights Research Council v. Wadmond ----- 392**D. The Right Not to Associate** ----- 392

Compulsory fees ----- 392

Aboud v. Detroit Board of Educ. ----- 392*Glickman v. Wileman Bros.* ----- 394

Compulsory membership ----- 396

Roberts v. United States Jaycees ----- 396*Board of Directors of Rotary International v. Rotary Club* ----- 397*New York State Club Ass'n v. City of New York* ----- 397**3. Money and Political Campaigns** ----- 398*Buckley v. Valeo* ----- 398

The Problems and Progeny of Buckley ----- 407

The Court's methodology in Buckley ----- 407

Equalization of speaking power ----- 407

Public funding of political campaigns ----- 408

Other government interests in campaign finance limits ----- 408

Post-Buckley decisions: political action committees ----- 408

California Medical Ass'n v. FEC ----- 408*FEC v. National Conservative PAC* ----- 409

Post-Buckley decisions: political parties ----- 409

Colorado Republican Federal Campaign Committee v. FEC ----- 409

Post-Buckley decisions: corporations and political campaigns ----- 411

First National Bank of Boston v. Bellotti ----- 411*FEC v. National Right to Work Committee* ----- 413*FEC v. Massachusetts Citizens for Life* ----- 413*Austin v. Michigan Chamber of Commerce* ----- 414

Post-Buckley decisions: referenda ----- 416

Citizens Against Rent Control v. Berkeley ----- 416*Meyer v. Grant* ----- 416

The limits of Buckley's anticorruption rationale: candidates' promises in election campaigns ----- 417

Brown v. Hartlage ----- 417**4. Freedom of the Press** ----- 417

Introduction ----- 417

The press as a "fourth branch" of government ----- 418

The press as just another speaker ----- 418

First National Bank of Boston v. Bellotti ----- 418**A. Press Access to Newsworthy Governmental Information** 419

Introduction ----- 419

Press Access to Jails ----- 420

Pell v. Procunier ----- 420*Saxbe v. Washington Post Co.* ----- 420*Houchins v. KQED, Inc.* ----- 421

Press Access to Judicial Proceedings ----- 422

Pretrial hearings ----- 422

Gannett Co. v. DePasquale ----- 422

Section

4. Freedom of the Press—Continued

Criminal trials -----	423
<i>Richmond Newspapers, Inc. v. Virginia</i> -----	423
The scope of Richmond Newspapers -----	426
<i>Globe Newspaper Co. v. Superior Court</i> -----	426
<i>Press-Enterprise Co. v. Superior Court</i> -----	428
Press interference with judicial proceedings -----	429
<i>Landmark Communications, Inc. v. Virginia</i> -----	429
<i>Bridges v. California</i> -----	429
<i>Pennekamp v. Florida</i> -----	430
<i>Craig v. Harney</i> -----	430
<i>Wood v. Georgia</i> -----	430
B. Governmental Demands for Information From the Press -----	431
Introduction -----	431
<i>Branzburg v. Hayes</i> -----	431
Journalistic Privilege After Branzburg -----	436
The judicial and legislative response to Branzburg -----	436
Searches of newsrooms pursuant to ex parte warrants -----	436
<i>Zurcher v. Stanford Daily</i> -----	436
C. Laws Discriminating Against the Press -----	437
<i>Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue</i> -----	437
The Implications and Limits of Minneapolis Star -----	441
Is the press special? -----	441
Slippery slopes -----	442
Antimedia, intramedium and intermedia discrimination -----	442
<i>Arkansas Writers' Project, Inc. v. Ragland</i> -----	442
<i>Leathers v. Medlock</i> -----	443
<i>Turner Broadcasting v. FCC</i> -----	444
Laws of general applicability -----	444
<i>Cohen v. Cowles Media Co.</i> -----	444
D. Differential Regulation of the Broadcast Media -----	446
Introduction -----	446
Scarcity, Access and the Broadcasting Media -----	447
Right-of-reply obligations on the broadcasting media -----	447
<i>Red Lion Broadcasting Co. v. FCC</i> -----	447
The limits of Red Lion: technological versus economic scarcity -----	449
Repeal of the fairness doctrine -----	450
A constitutional right of access to the broadcasting media for editorial advertisements? -----	450
<i>Columbia Broadcasting, Inc. v. Democratic National Comm.</i> --	450
A statutory right of access to the broadcasting media for candidates seeking federal elective office -----	451
<i>CBS, Inc. v. FCC</i> -----	451
The standard of review in broadcasting cases -----	452
<i>FCC v. League of Women Voters</i> -----	452
Speaker access to public television -----	452
<i>Arkansas Educational Television Comm'n v. Forbes</i> -----	452

Section

4. Freedom of the Press—Continued

New Media: Cable Television and the Internet-----	453
Cable television and the First Amendment-----	453
<i>Turner Broadcasting v. FCC</i> -----	453
<i>Denver Area Educational Telecommunications Consortium v. FCC</i> -----	455
The Internet and the First Amendment-----	456
<i>Reno v. ACLU</i> -----	458

CHAPTER 4. The Religion Clauses: Free Exercise and Establishment-----

459

Introduction-----	459
-------------------	-----

Section

1. An Overview of the Religion Clauses----- 460

History of the religion clauses-----	460
--------------------------------------	-----

The dominant view: voluntarism and separatism-----	460
--	-----

<i>Everson v. Board of Education</i> -----	460
--	-----

A minority view: nonpreferentialism-----	461
--	-----

<i>Wallace v. Jaffree</i> -----	462
---------------------------------	-----

<i>Rosenberger v. Rector</i> -----	462
------------------------------------	-----

Reply to the minority view-----	462
---------------------------------	-----

<i>Lee v. Weisman</i> -----	463
-----------------------------	-----

The relevance of original history-----	464
--	-----

The incorporation of the religion clauses against the states-----	464
---	-----

Reconciling the religion clauses-----	465
---------------------------------------	-----

<i>Sherbert v. Verner</i> -----	465
---------------------------------	-----

The definition of “religion”-----	466
-----------------------------------	-----

<i>United States v. Seeger</i> -----	466
--------------------------------------	-----

<i>Welsh v. United States</i> -----	466
-------------------------------------	-----

<i>Gillette v. United States</i> -----	467
--	-----

The limits of judicial inquiry into religious content-----	468
--	-----

<i>United States v. Ballard</i> -----	468
---------------------------------------	-----

2. The Free Exercise of Religion----- 469

Introduction-----	469
-------------------	-----

A. Laws Discriminating Against Religion----- 469

<i>Torcaso v. Watkins</i> -----	469
---------------------------------	-----

<i>McDaniel v. Paty</i> -----	470
-------------------------------	-----

<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i> -----	470
---	-----

Lukumi and Religious Gerrymanders-----	474
--	-----

<i>Larson v. Valente</i> -----	474
--------------------------------	-----

B. Neutral Laws Adversely Affecting Religion: Are Religious Exemptions Constitutionally Compelled?----- 475

<i>Reynolds v. United States</i> -----	475
--	-----

<i>Cantwell v. Connecticut</i> -----	476
--------------------------------------	-----

<i>Prince v. Massachusetts</i> -----	476
--------------------------------------	-----

<i>Braunfeld v. Brown</i> -----	476
---------------------------------	-----

<i>Sherbert v. Verner</i> -----	477
---------------------------------	-----

Free Exercise Exemptions From Sherbert to Smith-----	479
--	-----

Section

2. The Free Exercise of Religion—Continued

Unemployment compensation cases after Sherbert	479
<i>Thomas v. Review Board</i>	479
<i>Hobbie v. Unemployment Appeals Comm'n</i>	480
<i>Frazee v. Illinois Employment Security Dept.</i>	480
Compulsory education laws	480
<i>Wisconsin v. Yoder</i>	480
Denials of free exercise claims between Sherbert and Smith --	482
<i>United States v. Lee</i>	482
<i>Bob Jones University v. United States</i>	482
<i>Goldman v. Weinberger</i>	483
<i>O'Lone v. Estate of Shabazz</i>	484
<i>Bowen v. Roy</i>	484
<i>Lyng v. Northwest Indian Cemetery Protective Ass'n</i>	485
The Court's methodology in the era between Sherbert and Smith	486
<i>Employment Division, Dept. of Human Resources v. Smith</i>	487
Smith and Religious Exemptions	494
The history of religious exemptions	494
<i>City of Boerne v. Flores</i>	495
The political theory of religious exemptions	496
Smith and constitutional jurisprudence	498
Religious exemptions and anarchy	498
The aftermath of Smith: The Religious Freedom Restoration Act of 1993	499
<i>City of Boerne v. Flores</i>	499
3. The Establishment Clause	500
Introduction	500
<i>Lemon v. Kurtzman</i>	500
A. Enshrining Official Beliefs	501
"Released Time" Programs in Public Schools	501
<i>McCullum v. Board of Education</i>	501
<i>Zorach v. Clauson</i>	501
The School Prayer Cases	503
Teacher-led prayers, Bible readings, and moments of silence --	503
<i>Engel v. Vitale</i>	503
<i>Abington School Dist. v. Schempp</i>	504
<i>Wallace v. Jaffree</i>	505
School prayer and "coercion"	506
<i>Lee v. Weisman</i>	506
Religion in the Public School Curriculum	513
The Ten Commandments	513
<i>Stone v. Graham</i>	513
Teaching evolution and creationism	513
<i>Epperson v. Arkansas</i>	513
<i>Edwards v. Aguillard</i>	514
Religious Symbolism Outside the School Context	518
Sunday closing law	518
<i>McGowan v. Maryland</i>	518

Section

3. The Establishment Clause—Continued

Legislative prayer -----	519
<i>Marsh v. Chambers</i> -----	519
Public religious displays -----	520
<i>Lynch v. Donnelly</i> -----	520
<i>Allegheny County v. American Civil Liberties Union</i> -----	526
<i>Capitol Square Review Board v. Pinette</i> -----	528

B. Financial Aid to Religious Institutions ----- 530

Introduction -----	530
Everson: "No Tax Large or Small" -----	531
<i>Everson v. Board of Education</i> -----	531
Aid to Parochial Education Since Everson -----	533
The "wall of separation" -----	533
Forms of aid: texts, tests, teachers, teaching aids and tuition--	533
<i>Mueller v. Allen</i> -----	535
Aid to higher education: Is a different standard appropriate?--	540
<i>Tilton v. Richardson</i> -----	540
<i>Roemer v. Maryland Public Works Bd.</i> -----	540
Increasing Tolerance for Religious Inclusion in Public Subsidy	
Schemes -----	541
<i>Walz v. Tax Comm'n</i> -----	541
<i>Widmar v. Vincent</i> -----	541
<i>Witters v. Washington Dept. of Services for Blind</i> -----	542
<i>Bowen v. Kendrick</i> -----	542
<i>Zobrest v. Catalina Foothills School Dist.</i> -----	543
<i>Rosenberger v. Rector and Visitors of the Univ. of Virginia</i> ----	544
<i>Agostini v. Felton</i> -----	546

C. Legislative Accommodations of Religion ----- 554

Introduction -----	554
Accommodation versus delegation -----	554
<i>Larkin v. Grendel's Den, Inc.</i> -----	554
Permissible statutory accommodations and their limits -----	554
<i>Estate of Thornton v. Caldor, Inc.</i> -----	554
<i>Corporation of Presiding Bishop v. Amos</i> -----	555
<i>Texas Monthly, Inc. v. Bullock</i> -----	556
<i>Board of Education v. Mergens</i> -----	557
Accommodation and religious gerrymandering -----	558
<i>Board of Educ. of Kiryas Joel v. Grumet</i> -----	558

INDEX -----	I-1
-------------	-----