

THE AMERICAN FIRST
AMENDMENT IN THE
TWENTY-FIRST CENTURY

CASES AND MATERIALS

FOURTH EDITION

WILLIAM W. VAN ALSTYNE

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THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY

Cases and Materials
(Fourth Edition)

By

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*This book is dedicated
to
James Madison, Thomas Jefferson,
and John Stuart Mill*

PREFACE TO THE FOURTH EDITION

Eight years have passed since completion of the third edition of this work in August of 2001. Significant developments since, 2001, both legislative and judicial, were captured in annual or biennial Supplements, most recently as of the end of the Supreme Court's term in July of 2007. That last Supplement was by itself just about two hundred pages long.

The awkwardness of having to "travel" back-and-forth, navigating between the chapters of cases and materials in the third edition, and the modifications, additions, cases and comments reflected in the separate Supplement, is now brought to an end. In brief, this new edition integrates all of that material and more recent developments through July of 2010. It also reflects some revisions of the third edition as well.

The organization and overall design of the work, however, have not changed. So, for example, roughly two-thirds of this current edition are addressed to the First Amendment clauses concerning freedom of speech (including the freedom of the press, of assembly and of petition). The remaining third takes the measure of the distinctive twin clauses at the front of that same Amendment separately addressed to the "free exercise" of religion, and of religious establishments whenever and wherever they confront, become entangled with, or otherwise interface with the State. This "uneven" allocation, incidentally, is in no respect meant to reflect some editorial bias of which set of clauses is more (or less) important. Rather, it but seeks accurately to reflect the greater density of materials and of developments in respect to the speech/press clauses overall that even now congest the terrain fraught with controversy respecting "religion" and the State.

As in previous editions, moreover, significant attention is also extended in this edition to other clauses in the Constitution—clauses "unnoticed" by the First Amendment within its text, but clauses nonetheless impinging on it and, indeed, quite often impinging with a significant impact to which one needs to be alert. There are in fact a surprising number of such "additional" clauses (perhaps, in all, as many as fifteen) that have an informing significance for a "first amendment" course. It would be a serious omission to ignore those clauses, even though none is the immediate object of this work. That they may not be ignored, this new edition takes at least some degree of fair notice of those other relevant provisions and of their many influential uses and effects.¹

¹ An obvious easy example of such a clause is the "speech and debate" clause found in Article I, Section 6. (What does it do, whom does it protect, in what measure does it do so, and how, if at all, may it relate to the later-in-time more general "freedom of speech" provision in the First

The division of the book into its two principal parts (Part I on the speech and press clauses and Part II on those concerned with religion and the state) is largely self-explanatory, merely reflecting—as it does—the different specific subject matter treated in each set of clauses within the First Amendment itself. Both subjects are embraced within this single work, however, to make it useful within a single integrated course of reasonably generous semester credit hours (say, five hours).

Additionally, my own experience is that whether this book is used in two separate courses (rather than one), as is the case in a number of schools, it is still helpful to students to have a work at hand encompassing both subjects. Quite apart from the consideration that it will be twice serviceable, one needs to know in advance that there is a strong measure of synergy at work within the First Amendment, i.e., the Amendment *considered as a whole*. So much so that, indeed, the Supreme Court itself not infrequently uses citations from one field (e.g., “freedom of speech” in elaborating doctrine in the other (e.g., “the free exercise of religion”). In fact, it is often just a toss up as to where a given case best fits (whether it is “just” a free exercise case, or “just” a free speech case or, indeed, rather like a double helix with intertwining chromosomal threads drawing strength from more than a single source). This integrated single volume enables one to draw upon pages providing the appropriate materials from either part of the book as they may help inform one’s understanding of the other part as well..

A final, perhaps slightly more personal, point. The history of the speech-and-press clauses, and likewise of the religion clauses, is given serious attention here, even as I sought to do in the earlier editions as well. The earliest, seminal cases laying the foundations of what has brought us into the third century of the American First Amendment have therefore not been abandoned either to save space or on the (errant) thought that we are all so much smarter than those drawing their experiences, directly and vicariously from life, learning and law in the eighteenth or nineteenth centuries when things were much simpler, or, indeed, in the end, that it just doesn’t *really* matter what “they” thought. I do not share that view nor do I think should you, whoever you are. The object here is therefore not merely to provide an up-to-date professional set of materials for law

Amendment itself?) A less obvious example, perhaps, but one that is now increasingly involved in major First Amendment controversies, is the “copyright” clause in Article I, Section 8, Clause 8.) (Does the First Amendment “trump” the pre-existing copyright clause to some extent, or, rather, does the copyright clause carve a corridor through the First Amendment itself?) So, too, there are clauses outside the “religion” clauses of the First Amendment one may want to note and consider for their effects as well, both in the immediate sense and otherwise. Note, for example, the express provision in Article IV, that no “religious Test shall ever be required as a Qualification to any Office or public Trust under the United States” (Just what is a “religious test,” and just what does it mean to say that no such test “shall be required”?)

students (which is a major objective). It is also to provide them and any other educated person interested in the intellectual history of the First Amendment and of its applications inside this fractious country of ours, with a means of better understanding this very important and enduring provision within our Constitution—the oldest, continuously operating, and judicially enforceable Constitution in the world.

WILLIAM VAN ALSTYNE²

Williamsburg, Virginia
July 9, 2010

² With very special thanks (once again!) to Dawn Blalock for her indispensable assistance in the preparation of this work, as in each preceding edition as well.

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