AMERICAN CASEBOOK SERIES

IDEAS OF THE FIRST AMENDMENT

Second Edition

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WEST

610 Opperman Drive
St. Paul, MN 55123
1–800–313–9378

Printed in the United States of America

ISBN: 978–0–314–26797–9

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To Nancy,
who asks all the right questions,
and cares about the answers.

Preface to the Second Edition

The most important change from the first edition is the inclusion of six new decisions of the Supreme Court, each handed down within the last two years, each offering a clash of skillfully argued, intellectually and doctrinally ambitious, passionate opinions joining issue over fundamental, heretofore open questions regarding the meaning and scope of the freedom of speech. Whatever one thinks of the overall direction in which the Roberts Court is taking the First Amendment, it is difficult to consider the recent output to be anything short of a pedagogic boon. Because these six decisions—*Citizens United v. FEC, Christian Legal Society v. Martinez, Snyder v. Phelps, Holder v. Humanitarian Law Project, United States v. Stevens, and Brown v. Entertainment Merchants Association*—are so intriguing, I have reproduced the opinions in unusually full measure. (The shortest entry, *Snyder v. Phelps*, takes up ten pages in the casebook, the longest, *Citizens United*, twenty-one pages.)

The canonical thinkers, historical events, and philosophical questions that constitute the building blocks of these teaching materials continue to generate high-quality secondary writing. This second edition contains 54 new entries from the secondary literature. The Milton, Madison, Mill, and Individual–Centered chapters have benefited the most from this fresh infusion of critical commentary.

As has been true throughout its history, the changes in the ways people communicate with each other inevitably influence how the principles embodied in the First Amendment are understood, elaborated, and debated. In the first edition, 4 entries taking up 36 pages were devoted to First Amendment issues specific to the Internet. In the current edition, Internet speech is the dominant subject of 8 entries totaling 52 pages.

In trying to improve and update the first edition, I have been aided immeasurably by constructive criticisms from my students at Columbia and the University of Virginia, as well as by extremely helpful feedback from colleagues around the country who have taught courses and seminars using the book. Andrew Koppelman of Northwestern University deserves special thanks for his many good ideas and for the example he offers all of us of what dedication to teaching can mean. My research assistants for this edition, Michael Druckman and Lisa Sokolowski, were far more than intellectual gofers; they taught and challenged me at every turn. As always, the work ethic and organizational talents of Gabriel Soto freed me from ever having to worry about the logistics of production.

PREFACE

This book is as much about doctrinal ideas of First Amendment law as it is about philosophical ideas concerning the political and moral principle of freedom of speech. It is designed to facilitate a course in which the central project is to examine and answer such questions as: (1) Should it make an important difference whether the method of regulating speech is "prior," as with licensing requirements and injunctions, or "subsequent," as with criminal and civil sanctions? (2) Why, if at all, should regulations of speech that turn on the viewpoint expressed by the speaker be considered far more problematic than regulations that are "viewpoint neutral" in form but nevertheless highly speech-restrictive in their impact? (3) Should speech that is likely to cause harm in a short time frame and by means of a direct causal sequence be more subject to prohibition than speech the predicted consequences of which are delayed and contingent yet eventually very damaging? (4) Should only speech that conveys opinions, grievances, proposals, and observations of a political nature be accorded protection under the First Amendment? Or do the best reasons for a strong free speech principle apply as well to other expressive, communicative, or inquisitive endeavors such as artistic expression, scientific inquiry, and personal criticism? Does "the freedom of speech" extend to communications that are integral to, or that may even in themselves constitute, commercial transactions or discriminatory practices? Does the First Amendment imply a right to express oneself by means of symbolic conduct? A right not to reveal one's beliefs or political associations? A right to capture the (at least momentary) attention of unwilling audiences? In short, what counts as a First Amendment activity? (5) Ought reasons for regulating speech that are "paternalistic" in character, designed to protect audiences from their own susceptibilities, be categorically disallowed? (6) Is it ever permissible to limit the speech of some participants in public debate in order to prevent them from drowning out the voices of others? (7) Should the regulation of speech by means of civil sanctions or the denial of benefits be considered less problematic than the punishment of speech by means of criminal sanctions? (8) Does the First Amendment require that certain publicly-owned spaces and other resources be made available to facilitate speech by private citizens?

It is the thesis of this book that these and no more than three or four additional doctrinal ideas of comparable scope and importance ought to form the spine of an introductory course on the First Amendment. Furthermore, it is the (more original) thesis of this book that such questions are best studied not by examining, necessarily at a breathless pace, snippets of vast numbers of Supreme Court opinions that elaborate three-part tests and ever-proliferating doctrinal subcategories, but rather by engaging some of the greatest writings on the freedom of speech that have been generated in the Anglo–

American tradition, and asking how those writings—some political polemics, some judicial opinions—might help one to think about the pivotal doctrinal questions.

A considerable advantage of this approach to the subject is that students can study, indeed *must* study, how some of the finest practitioners of the art of persuasion went about building their arguments. Because the canonical writings are few in number and reprinted virtually unedited, and because their rich arguments are the focal point of the course, the rushed treatment that diminishes too many law school courses can be avoided. The luxury of devoting one or two weeks to a single essay or opinion provides an opportunity to examine in a systematic fashion the different types of arguments that an advocate might employ: from consequences, from commitment, from coherence, from entitlement, from identity, from experience, from necessity, from character, from institutional capacity, from nature, from design, etc. When I teach these materials, I devote classroom time to studying the art of making concessions, anticipating and refuting counter-arguments, choosing illustrations, invoking authority, appealing to common sense and shared experience, delimiting contentions, rationing eloquence, ordering one's arguments, and not overreaching. Ideas of the First Amendment can be, in part, a course in elementary rhetoric—a subject that ought to play a larger role in a legal education than it currently does.

Although the book is not organized along conventional doctrinal lines, most of the leading Supreme Court opinions interpreting the First Amendment are included, each presented in juxtaposition with one of the canonical writings in order to facilitate critical evaluation and interpretation of both. The cumulative effect of using the cases in this way is that virtually all of the traditional doctrinal categories are covered. The book includes cases on: the advocacy of crime or revolution, libel, obscenity and pornography, campaign finance, publishing classified material, flagburning, prior restraint, compelled speech and association, racial hate speech, on-site abortion protests, immigration and naturalization, broadcast regulation, the right of reply, selective subsidies for speech, labor picketing, commercial advertising, denials of public employment, guilt by association, library internet censorship, face-to-face insults, offensive speech, nude dancing, public demonstrations, and the freedom of expressive associations to practice forms of discrimination that are illegal in other contexts. Two issues that I consider especially basic and instructive, the pledge of allegiance and campaign finance, surface in almost every chapter.

Finally, this book is intended to help aspiring lawyers improve their writing. One of the best ways to become a better writer is to read good writers. The subject of freedom of speech has inspired some memorable prose. Each of the seven thinkers around whom these materials are organized was a great writer; two of them (Milton and Holmes) number among the finest stylists ever to employ the English language. This book puts that prose front and center.

Acknowledgments

So many students and colleagues contributed to this book that I cannot possibly list them all. Three outstanding teachers, Stanley Fish, Kent Greenawalt, and Seana Shiffrin, taught from these materials at various times and gave me the benefit of their experiences. On two occasions, I had the special pleasure of team teaching the course, first with Stanley Fish and later with Seana Shiffrin. Of the many students who offered suggestions that have been incorporated in the book, Micah Schwartzman deserves special mention for coming up with the idea for Chapter Nine. During the final months of preparing the materials for publication, I was aided in countless ways by Nicole Altman, Pallavi Guniganti, and Nathan Johnson. I could not have completed the book without their intelligent, energetic, and wise assistance. I have been fortunate to work at two law schools that encourage pedagogic innovations and facilitate them in every way possible. Among the many persons at Columbia Law School and the University of Virginia School of Law who have supported this project, I want especially to thank Pam Messina, Betty Snow, and Gabriel Soto for assistance (and patience) far beyond the call of duty. My greatest debt by far is to the remarkable students in the nineteen courses on Ideas of the First Amendment that I have taught at Columbia and the University of Virginia since 1992. Their thoughtful papers from those courses continue to educate me; they constitute my most valuable resource in preparing for class. What a privilege it has been to teach such talented and inquisitive students.

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