

FIRST AMENDMENT LAW

FOURTH EDITION

by

KATHLEEN M. SULLIVAN

Stanley Morrison Professor of Law and
Former Dean of the School of Law,
Stanford University

GERALD GUNTHER

Late William Nelson Cromwell Professor of Law Emeritus,
Stanford University

FOUNDATION PRESS
2010



THOMSON REUTERS

TABLE OF CONTENTS

PREFACE.....	v
TABLE OF CASES	xiii
TABLE OF AUTHORITIES.....	xxiii

CHAPTER 1 Freedom of Speech—Why Government Restricts Speech—Unprotected and Less Protected Expression 2

Section

1. Free Speech: An Overview.....	2
First Amendment History	3
First Amendment Theory.....	5
First Amendment Jurisprudence.....	9
2. Incitement to Violence.....	14
<i>Schenck v. United States</i>	15
The “Clear and Present Danger” Test	16
<i>Abrams v. United States</i>	19
Refinements of and Alternatives to Clear and Present Danger.....	22
<i>Masses Publishing Co. v. Patten</i>	25
Comparing the Holmes and Hand Approaches.....	28
<i>Gitlow v. New York</i>	29
<i>Whitney v. California</i>	33
Criminal Anarchy and Syndicalism Laws.....	38
<i>Dennis v. United States</i>	39
“Clear and Present Danger” After Dennis.....	44
<i>Brandenburg v. Ohio</i>	46
The Meaning and Implications of <i>Brandenburg</i>	48
3. Fighting Words and Hostile Audiences.....	52
“Fighting Words”	52
<i>Cohen v. California</i>	56
Hostile Audiences and the Heckler’s Veto.....	60
<i>Feiner v. New York</i>	61
Distinguishing <i>Feiner</i> in Later Cases	62
4. Injury to Reputation and Sensibility	66
<i>Beauharnais</i> and Group Libel	66
Libel	68
<i>New York Times Co. v. Sullivan</i>	68
The Meaning and Implications of <i>New York Times</i>	71
Extension of <i>New York Times</i> to Other Settings	73
Torts Other Than Defamation	78
Hate Speech.....	85
<i>R.A.V. v. City of St. Paul</i>	88
The Meaning and Implications of <i>R.A.V.</i>	95
<i>Virginia v. Black</i>	99
5. Sexually Explicit Expression.....	103
Obscenity	104
<i>Roth v. United States; Alberts v. California</i>	104
Obscenity Between <i>Roth</i> and <i>Miller</i>	106
<i>Miller v. California</i>	109
<i>Paris Adult Theatre I v. Slaton</i>	112

Section	
Obscenity Law After Miller and Paris	116
Child Pornography	121
Pornography as Subordination of Women	127
<i>American Booksellers Ass'n v. Hudnut</i>	129
Sexually Explicit but Nonobscene Expression	133
Nudity Bans	134
"Erogenous Zoning"	137
Indecency Bans in the Communications Media	145
<i>FCC v. Pacifica Foundation</i>	145
The Limits of Pacifica	149
<i>Reno v. American Civil Liberties Union</i>	155
Indecency Regulation on the Internet After Reno	160
6. Commercial Speech	164
<i>Virginia Pharmacy Board v. Virginia Citizens Consumer Council</i> ...	165
Commercial Speech and First Amendment Theory	169
Commercial Speech After Virginia Pharmacy	173
What Standard of Scrutiny for Commercial Speech?	177
<i>Central Hudson Gas v. Public Service Comm'n</i>	177
Commercial Speech Regulation After Central Hudson	180
<i>44 Liquormart, Inc. v. Rhode Island</i>	186
Commercial Speech Regulation After Liquormart	190

CHAPTER 2 Freedom of Speech—How Government Restricts Speech—Modes of Abridgment and Standards of Review 197

Section	
1. The Distinction Between Content-Based and Content-Neutral Regulations	197
Content-Based vs. Content-Neutral Laws	198
Content-Neutral Regulation and Symbolic Conduct	208
<i>United States v. O'Brien</i>	209
The Significance of O'Brien	212
Flag Desecration	216
<i>Texas v. Johnson</i>	218
The Aftermath of Texas v. Johnson	224
Nude Dancing	226
2. Government's Power to Limit Speech in its Capacity as Landlord, Educator, Employer and Patron	232
Speech in Public Forums and Other Government Property	232
Early Public Forum Cases	232
The "Time, Place and Manner" Test	243
Public Order and Safety	243
Aesthetics	246
<i>Members of City Council v. Taxpayers for Vincent</i>	248
<i>Clark v. Community for Creative Non-Violence</i>	253
Tranquility, Privacy and Repose	257
Invalid Time, Place or Manner Regulation	266
Speaker Access to Public Places Other Than Traditional Public Forums	267
Libraries, Jails and Schools	268
Buses, Theaters, and Military Bases	271
Traditional, Designated and Nonpublic Forums	276
Religious Speech on Public Property	292
First Amendment Access Rights to Private Property?	298

Section	
Speech in Public Schools	300
Speech and Association by Public Employees and Contractors	311
Public Employee Speech	312
<i>Connick v. Myers</i>	313
Pickering vs. Connick	316
Public Employee Political Party Affiliation	323
Speech–Restrictive Conditions on Public Funds	329
3. Impermissible Methods of Restricting Speech: Overbreadth, Vague- ness and Prior Restraint	344
Overbreadth	344
Vagueness	358
Prior Restraint	360
Licensing	361
Injunctions	368
<i>Near v. Minnesota</i>	369
Prior Restraint and National Security	372
<i>New York Times Co. v. United States [The Pentagon Papers Case]</i>	372
The Scope and Limits of Pentagon Papers	377
Prior Restraint and Fair Trial	379

CHAPTER 3 Rights Ancillary to Freedom of Speech..... 382

Section	
1. Compelled Speech: The Right <i>Not</i> to Speak	382
Compelled Individual Speech	383
Compelled Access for the Speech of Others	387
2. Freedom of Expressive Association	396
Compelled Disclosure of Membership	397
<i>NAACP v. Alabama</i>	398
<i>Shelton v. Tucker</i>	399
<i>Gibson v. Florida Legislative Investigation Comm.</i>	400
Compelled Disclosure of Political Campaign Contributions	402
Restrictions on Organizational Activity	405
<i>NAACP v. Button</i>	406
The Meaning and Implications of <i>NAACP v. Button</i>	407
Denial of Government Benefits Because of Association	411
Compelled Association: The Right <i>Not</i> to Associate	414
Freedom of Association and Political Party Procedures	428
3. Money and Political Campaigns	435
<i>Buckley v. Valeo</i>	435
Buckley’s Approach and Aftermath	442
Parties, Corporations, PACs and Political Money	447
Enactment of and Constitutional Challenges to BCRA	453
<i>McConnell v. Federal Election Commission</i>	454
<i>Federal Election Comm’n v. Wisconsin Right to Life</i>	461
McConnell vs. WRTL and Citizens United	466
<i>Citizens United v. Federal Election Commission</i>	468
After Citizens United	475
4. Freedom of the Press	477
Press Access to Government Information	479
Governmental Demands for Information From the Press	489
<i>Branzburg v. Hayes</i>	494
Journalistic Privilege After Branzburg	496
Laws Singling Out the Press	496

Section	
<i>Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue</i>	496
The Implications and Limits of Minneapolis Star	500
The First Amendment and the Broadcast Media	505
Scarcity, Access and the Broadcasting Media	506
New Media: Cable Television and the Internet	511

CHAPTER 4 The Religion Clauses: Free Exercise and Establishment..... 517 ---

Section	
1. An Overview of the Religion Clauses	518
2. The Free Exercise of Religion	527
Laws Discriminating Against Religion	527
<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i>	528
Identifying Antireligious Purpose	532
<i>Locke v. Davey</i>	533
Neutral Laws Adversely Affecting Religion	535
<i>Sherbert v. Verner</i>	537
Free Exercise Exemptions From Sherbert to Smith	539
<i>Employment Division, Dept. of Human Resources v. Smith</i>	547
Smith and Religious Exemptions	554
3. The Establishment Clause	560
Public Use of Religious Rituals or Symbols	561
<i>Zorach v. Clauston</i>	561
Prayer in Public Schools	564
<i>Lee v. Weisman</i>	567
School Prayer After Lee v. Weisman	573
Religion in the Public School Curriculum	576
<i>Edwards v. Aguillard</i>	578
Public Displays of Religious Symbols Outside the Schools	582
<i>Lynch v. Donnelly</i>	584
Public Religious Symbols After Lynch	590
<i>McCreary County v. ACLU of Kentucky</i>	595
<i>Van Orden v. Perry</i>	600
Public Financial Aid to Religious Institutions	607
<i>Everson v. Board of Education</i>	608
Aid to Parochial Education Since Everson	610
<i>Mueller v. Allen</i>	612
Religious Inclusion in Public Subsidies: Everson vs. Mueller	615
<i>Zelman v. Simmons-Harris</i>	623
The Meaning and Implications of Zelman	630
Accommodation of Religion	631