
UNIVERSITY CASEBOOK SERIES®

FIRST AMENDMENT LAW

SIXTH EDITION

KATHLEEN M. SULLIVAN

Partner, Quinn Emanuel Urquhart & Sullivan, LLP
Former Professor of Law and Dean of the School of Law,
Stanford University
Former Professor of Law, Harvard University

NOAH FELDMAN

Felix Frankfurter Professor of Law,
Harvard University

 FOUNDATION
PRESS

TABLE OF CONTENTS

PREFACE.....	V
TABLE OF CASES.....	XV
TABLE OF AUTHORITIES	XXIII
FIRST AMENDMENT	XXXIII

Chapter 1. Freedom of Speech—Categories of Speech—

Degrees of Protected Expression	1
Section 1. Free Speech: An Overview	1
First Amendment History	2
First Amendment Theory	5
First Amendment Jurisprudence.....	10
Section 2. Incitement to Violence or Subversion	16
Schenck v. United States.....	16
The “Clear and Present Danger” Test	18
Abrams v. United States	20
Alternatives to Clear and Present Danger	24
Masses Publishing Co. v. Patten.....	26
Comparing the Holmes and Hand Approaches.....	29
Gitlow v. New York.....	30
Whitney v. California.....	34
Criminal Anarchy and Syndicalism Laws.....	39
Dennis v. United States.....	40
“Clear and Present Danger” After Dennis	46
Brandenburg v. Ohio	48
The Meaning and Implications of Brandenburg	50
Section 3. Fighting Words and Hostile Audiences.....	55
Fighting Words.....	56
Chaplinsky v. New Hampshire	56
Fighting Words Since Chaplinsky	57
Hostile Audiences and the Heckler’s Veto.....	60
Early Hostile Audiences Cases.....	60
Feiner v. New York	63
Distinguishing Feiner in Later Cases.....	65
Cohen v. California	68
Offensive Speech	72
Section 4. Injury to Reputation, Sensibility, Dignity, Equality.....	72
Libel	72
Beauharnais v. Illinois.....	73
The Legacy of Beauharnais	74
First Amendment Limits on Libel	75
New York Times Co. v. Sullivan	76
The Meaning and Implications of New York Times	79
The Scope of New York Times.....	82
Gertz v. Robert Welch, Inc.....	84
Defamation of Private Parties After Gertz.....	89

Privacy Torts	90
Bartnicki v. Vopper	93
Intentional Infliction of Emotional Distress.....	97
Hustler Magazine v. Falwell.....	97
Snyder v. Phelps	99
Hate Speech.....	103
Collin v. Smith.....	103
R.A.V. v. City of St. Paul.....	107
The Meaning and Implications of R.A.V.	114
Virginia v. Black	119
Section 5. Sexually Explicit Expression	125
Obscenity	126
Roth v. United States; Alberts v. California	126
Obscenity Between Roth and Miller	128
Miller v. California	131
Paris Adult Theatre I v. Slaton	134
Obscenity Law After Miller and Paris	138
Sexually Explicit but Nonobscene Expression	144
Regulating Pornography as Subordination of Women.....	145
American Booksellers Ass'n v. Hudnut.....	146
Hudnut and the Social Harms of Pornography	150
Nudity Bans	151
Erznoznik v. Jacksonville	151
Nudity Bans After Erznoznik	153
Zoning Commercial Sexual Expression	154
Young v. American Mini Theatres	154
Renton v. Playtime Theatres, Inc.	158
City of Los Angeles v. Alameda Books, Inc.	160
Zoning Laws and Secondary Effects.....	163
Child Pornography	164
New York v. Ferber	164
Child Pornography as Unprotected Speech	167
Section 6. Speech in New Media	169
Indecent and Sexual Speech in New Media	169
FCC v. Pacifica Foundation	169
The Limits of Pacifica.....	174
Sable Communications, Inc. v. FCC.....	177
Total Bans on Indecent Speech on Cable and Online	179
Reno v. American Civil Liberties Union	181
Online Regulations After Reno.....	186
Ashcroft v. Free Speech Coalition	190
Violent Speech in New Media.....	193
United States v. Stevens.....	193
Regulating Violent Speech in New Media After Stevens.....	195
Brown v. Entertainment Merchants Ass'n	196
Section 7. Commercial Speech.....	199
Virginia Pharmacy Board v. Virginia Citizens Consumer Council....	200
Commercial Speech and First Amendment Theory	204
Commercial Speech After Virginia Pharmacy	207

Central Hudson Gas v. Public Service Comm'n	209
Commercial Speech Regulation After Central Hudson	212
44 Liquormart, Inc. v. Rhode Island	216
Commercial Speech Regulation After Liquormart	220
Chapter 2. Freedom of Speech—Modes of Regulation and	
Standards of Review	225
Section 1. Content-Based and Content-Neutral Regulations	225
The Distinction Between Content-Based and Content-Neutral	
Laws	226
Reed v. Town of Gilbert	226
Content-Neutral Regulation and Symbolic Conduct	243
United States v. O'Brien	243
The Significance of O'Brien	247
Flag Desecration	251
Texas v. Johnson	253
Texas v. Johnson and Its Aftermath	259
Holder v. Humanitarian Law Project	262
The Implications of Humanitarian Law Project	269
Nude Dancing	271
Section 2. Government's Power to Limit Speech as Quasi-Private	
Actor	276
Public Forums and Public Property	276
Early Public Forum Cases	277
The "Time, Place, and Manner" Test	287
Public Order and Safety	288
Aesthetics	291
Members of City Council v. Taxpayers for Vincent	293
Clark v. Community for Creative Non-Violence	298
Tranquility, Privacy and Repose	302
Invalid Time, Place, or Manner Regulation	311
Speaker Access to Public Places Other than Traditional Public	
Forums	313
Libraries, Jails, and Schools	314
Buses, Theaters, and Military Bases	317
Public and Nonpublic Forums	321
Religious Speech on Public Property	345
Spheres of Government Control: Government as Educator,	
Employer, and Patron	352
Student Speech in Public Schools	352
Speech and Association by Public Employees and	
Contractors	365
Public Employee Speech	366
Connick v. Myers	367
Pickering and Connick Compared	371
Public Employee Political Party Affiliation	378
Speech-Restrictive Conditions on Public Funds	385
Agency for International Development v. Alliance for Open	
Society International, Inc.	401

Section 3. Overbreadth, Vagueness, and Prior Restraint	406
Overbreadth.....	407
Vagueness	422
Prior Restraint.....	424
Licensing	425
Injunctions	432
Near v. Minnesota ex rel. Olson	433
Prior Restraint and National Security	436
New York Times Co. v. United States [The Pentagon Papers Case]	436
The Scope and Limits of Pentagon Papers	441
Prior Restraint and Fair Trial	444
 Chapter 3. Beyond Speaking—Compelled Speech, Association, Money, and the Media.....	 447
Section 1. Compelled Speech: The Right <i>Not</i> to Speak.....	447
Compelled Individual Speech	448
State Compelled Access to Private Forums	457
Compelled Speech, Commercial Speech, and Economic Regulation	463
Compelled Speech and Private Discrimination.....	469
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston [GLIB]	469
Hurley's Reach.....	470
Section 2. Freedom of Expressive Association	473
Compelled Disclosure of Membership.....	474
NAACP v. Alabama.....	474
Compelled Disclosure in the Civil Rights Era.....	475
Compelled Disclosure of Political Campaign Contributions	478
Restrictions on Organizational Activity	482
NAACP v. Button	482
The Meaning and Implications of NAACP v. Button.....	484
Denial of Government Benefits Because of Association	490
Compelled Association: The Right Not to Associate	494
Boy Scouts of America v. Dale	502
Dale and Compelled Speech and Association	505
Freedom of Association and Political Party Procedures	506
Section 3. Money and Political Campaigns	513
Buckley v. Valeo	513
Buckley's Approach and Aftermath	521
Parties, Corporations, PACs, Super PACs and Political Money	525
Enactment of and Constitutional Challenges to BCRA.....	531
McConnell v. Federal Election Commission	533
Federal Election Comm'n v. Wisconsin Right to Life	539
McConnell Compared with WRTL	543
Citizens United v. Federal Election Commission.....	547
After Citizens United	555
McCutcheon v. F.E.C.	559

Section 4. Journalism and Media	564
Press Access to Government Information	566
Governmental Demands for Information from the Press.....	578
Branzburg v. Hayes	578
Journalistic Privilege After Branzburg	583
Laws Singling Out the Press.....	585
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue	585
The Implications and Limits of Minneapolis Star	590
The First Amendment and the Broadcast Media	595
Scarcity and Access.....	596
The Information Age.....	601

Chapter 4. The Religion Clauses: Free Exercise and

Establishment.....	609
Section 1. A History of the Religion Clauses.....	610
Section 2. The Definition of "Religion"	618
The Limits of Judicial Inquiry into Religious Belief	620
Section 3. The Free Exercise of Religion	621
Laws Discriminating Against Religion.....	622
Church of the Lukumi Babalu Aye v. City of Hialeah.....	623
Identifying Antireligious Purpose.....	626
Religious Exemptions	628
Sherbert v. Verner	630
Limiting the Scope of Mandatory Religious Exemptions?	633
Employment Division, Dept. of Human Resources v. Smith	641
Smith and Religious Exemptions.....	648
Constitutional Law by Statute: Legislative Responses to Smith	654
Section 4. The Establishment Clause.....	663
Public Financial Aid to Religious Institutions	664
Everson v. Board of Education	665
Maintaining a "Wall of Separation"?	667
Mueller v. Allen	671
Religious Inclusion in Public Subsidies: Everson vs. Mueller....	675
Zelman v. Simmons-Harris	683
The Meaning and Implications of Zelman	690
Religion in Public Schools	692
Prayer in Public Schools	692
Lee v. Weisman	696
Coercion vs. Endorsement	702
Religion and the Public School Curriculum	705
Edwards v. Aguillard	708
Defining Religion vs. Science	712
Public Displays of Religious Symbols	713
Lynch v. Donnelly	718
Applying the Endorsement Test	724
McCreary County v. ACLU of Kentucky	730
Van Orden v. Perry	736

Section 5. Reconciling the Religion Clauses	743
Values Reconciling the Religion Clauses	743
Refusing to Grant Religious Exemptions	744
Legislative Accommodation of Religion	746
INDEX.....	755