

# TABLE OF CONTENTS

---

PREFACE .....	V
ACKNOWLEDGMENTS .....	VII
FEATURED CASES .....	XIII
TABLE OF CASES .....	XXV
UNITED STATES CONSTITUTION .....	XXIX
<b>Chapter One. Introduction</b> .....	<b>1</b>
Chaplinsky v. New Hampshire .....	1
Questions .....	3
West Virginia State Board of Education v. Barnette .....	3
Questions .....	13
Additional Readings .....	13
<b>Chapter Two. James Madison</b> .....	<b>15</b>
Joseph J. Ellis, Founding Brothers .....	15
Stanley Elkins & Eric McKittrick, The Age of Federalism .....	18
Vincent Blasi, School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance .....	25
James Madison, A Memorial and Remonstrance .....	26
Question .....	29
Ralph Ketcham, James Madison: A Biography .....	29
Gary Rosen, American Compact: James Madison and the Problem of Founding .....	29
Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic .....	32
Ralph Ketcham, James Madison: A Biography .....	33
Judith N. Shklar, A New Constitution for a New Nation .....	34
The Federalist, Number Ten (Madison) .....	35
The Federalist, Number Fifty-One (Madison) .....	41
James Madison, Speech to the Virginia Ratifying Convention .....	44
Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic .....	44
James Madison to Thomas Jefferson .....	45
Madison's Original Draft of His Amendment Regarding the Freedom of Speech .....	48
James Madison, Speech to the United States House of Representatives .....	48
Gordon Wood, Empire of Liberty: A History of the Early Republic 1789–1815 .....	49
Questions .....	50
James Roger Sharp, American Politics in the Early Republic .....	51

James Madison to Thomas Jefferson .....	52
James Madison, Public Opinion .....	53
James Madison, Parties .....	53
James Madison, Spirit of Governments .....	54
James Madison, Property .....	55
Colleen A. Sheehan, James Madison and the Spirit of Republican Self-Government.....	56
Question .....	57
Anthony Lewis, Make No Law .....	57
The Sedition Act of 1798.....	63
<b>James Madison, Report on the Virginia Resolutions</b> .....	64
Questions .....	76
Alan Gibson, Veneration and Vigilance: James Madison and Public Opinion, 1785–1800.....	76
Jeffrey L. Pasley, “The Tyranny of Printers”: Newspaper Politics in the Early Republic .....	77
Richard Hofstadter, The Idea of a Party System .....	77
Gordon S. Wood, Revolutionary Characters .....	78
Near v. Minnesota .....	79
Question .....	83
New York Times Co. v. Sullivan Oral Argument .....	83
New York Times Co. v. Sullivan.....	84
Harry Kalven, Jr., The New York Times Case: A Note on “The Central Meaning of the First Amendment” .....	90
Question .....	91
Floyd Abrams, Speaking Freely: Trials of the First Amendment.....	91
New York Times Co. v. United States .....	101
The Intelligence Identities Protection Act.....	107
Questions .....	108
Brandenburg v. Ohio.....	108
Questions .....	117
Buckley v. Valeo .....	117
Citizens United v. Federal Election Commission.....	120
Questions .....	139
Ralph Ketcham, James Madison: A Biography .....	140
Judith N. Shklar, The Liberalism of Fear .....	140
Questions .....	143
Additional Readings .....	143
<b>Chapter Three. John Stuart Mill</b> .....	<b>147</b>
Bernard Wishy, Introduction.....	147
John Skorupski, Why Read Mill Today?.....	151
John Stuart Mill, Utilitarianism.....	153
John Skorupski, John Stuart Mill.....	158
<b>John Stuart Mill, On Liberty</b> .....	<b>159</b>
Questions .....	209
John Stuart Mill, Civilization—Signs of the Times .....	210

Question .....	211
John Stuart Mill, Essay on Coleridge .....	211
Alan Ryan, Introduction .....	212
Alan Ryan, J. S. Mill .....	212
Vincent Blasi, Shouting “Fire!” in a Theater and Vilifying Corn Dealers .....	213
C. L. Ten, Mill on Liberty .....	215
Question .....	216
James Fitzjames Stephen, Liberty, Equality, Fraternity.....	216
Frederick Schauer, Free Speech: A Philosophical Enquiry .....	217
Question .....	219
Richard Vernon, John Stuart Mill and Pornography: Beyond the Harm Principle .....	219
Frederick Schauer, Free Speech: A Philosophical Enquiry .....	223
American Booksellers Association v. Hudnut .....	224
Questions .....	229
Catharine A. MacKinnon, Only Words .....	230
Questions .....	232
Ronald Dworkin, Freedom’s Law: The Moral Reading of the Constitution .....	232
Question .....	234
Jeremy Waldron, Mill and the Value of Moral Distress .....	234
Kingsley International Pictures Corp. v. Regents of the University of the State of New York .....	243
Hill v. Colorado.....	244
Heidi Kitrosser, From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment .....	249
Questions .....	250
Beauharnais v. Illinois.....	250
Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus .....	255
Jeremy Waldron, Dignity and Defamation: The Visibility of Hate.....	260
Question .....	261
Jonathan Riley, Racism, Blasphemy, and Free Speech.....	262
Question .....	263
Elena Kagan, Regulation of Hate Speech and Pornography After <i>R.A.V.</i> .....	263
George Kateb, Freedom of Worthless and Harmful Speech .....	266
Questions .....	266
Isaiah Berlin, John Stuart Mill and the Ends of Life .....	267
Additional Readings .....	270
<b>Chapter Four. Learned Hand .....</b>	<b>273</b>
David M. Rabban, Free Speech in Its Forgotten Years .....	273
Lisa Sokolowski, Learned Hand: An Examined Life .....	275
Gerald Gunther, Learned Hand: The Man and the Judge .....	283
Learned Hand, The Speech of Justice.....	285

John Patrick Diggins, <i>The Rise and Fall of the American Left</i> .....	286
<b>Masses Publishing Co. v. Patten</b> .....	287
Questions .....	296
Masses Publishing Co. v. Patten .....	296
James Weinstein, <i>The Story of Masses Publishing Co. v. Patten:</i> Judge Learned Hand, <i>First Amendment Prophet</i> .....	297
United States v. Nearing .....	297
Martin Luther King, Jr., <i>Letter from Birmingham Jail</i> .....	299
Question .....	301
Gerald Gunther, <i>Learned Hand and the Origins of Modern First</i> <i>Amendment Doctrine: Some Fragments of History</i> .....	301
Learned Hand to Oliver Wendell Holmes .....	302
Oliver Wendell Holmes to Learned Hand .....	303
Oliver Wendell Holmes to Learned Hand .....	304
Learned Hand to Zechariah Chafee, Jr. ....	304
Question .....	305
Learned Hand, <i>Is There a Common Will?</i> .....	306
Learned Hand, <i>Sources of Tolerance</i> .....	308
Brandenburg v. Ohio .....	309
Texas v. Johnson .....	310
Questions .....	317
Additional Readings .....	317
<b>Chapter Five. Oliver Wendell Holmes</b> .....	<b>319</b>
Robert W. Gordon, <i>Introduction: Holmes's Shadow</i> .....	319
James M. McPherson, <i>Battle Cry of Freedom: The Civil War Era</i> .....	322
Liva Baker, <i>The Justice from Beacon Hill</i> .....	323
Oliver Wendell Holmes, Jr., <i>The Common Law</i> .....	323
Oliver Wendell Holmes, Jr., <i>The Path of the Law</i> .....	324
Lochner v. New York .....	324
Oliver Wendell Holmes, Jr., <i>Natural Law</i> .....	325
Harry Kalven, Jr., <i>A Worthy Tradition</i> .....	328
Oliver Wendell Holmes, Jr. to Harold J. Laski .....	333
Richard Polenberg, <i>Fighting Faiths: The Abrams Case, The Supreme</i> <i>Court, and Free Speech</i> .....	333
William E. Leuchtenburg, <i>The Perils of Prosperity 1914–32</i> .....	335
<b>Abrams v. United States</b> .....	337
Questions .....	347
Sheldon M. Novick, <i>The Unrevised Holmes and Freedom of</i> <i>Expression</i> .....	347
Learned Hand to Oliver Wendell Holmes .....	348
William E. Leuchtenburg, <i>The Perils of Prosperity 1914–32</i> .....	348
Gitlow v. New York .....	349
United States v. Schwimmer .....	351
Gertz v. Robert Welch, Inc. ....	353
Richard A. Posner, <i>Introduction</i> .....	353
Oliver Wendell Holmes to Learned Hand .....	355

Oliver Wendell Holmes, Jr., Introduction.....	355
Oliver Wendell Holmes, Jr. to Sir Frederick Pollock .....	355
Thomas C. Grey, Holmes and Legal Pragmatism .....	355
Question .....	361
Irene M. Ten Cate, Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Oliver Wendell Holmes's Free Speech Defenses .....	361
Alexander Meiklejohn, Free Speech and Its Relation to Self- Government .....	363
Margaret Jane Radin, Contested Commodities .....	364
Vincent Blasi, Holmes and the Marketplace of Ideas .....	366
Bernard Williams, Truth and Truthfulness: An Essay in Genealogy .....	371
Questions .....	372
Reed v. Town of Gilbert.....	372
Questions .....	379
Arizona Free Enterprise Club PAC v. Bennett .....	380
Questions .....	399
Lillian R. Bevier, Rehabilitating Public Forum Doctrine: In Defense of Categories .....	400
Perry Educ. Ass'n v. Perry Local Educators' Ass'n .....	402
Lillian R. Bevier, Rehabilitating Public Forum Doctrine: In Defense of Categories .....	404
Question .....	404
Christian Legal Society v. Martinez .....	404
Questions .....	419
Thomas C. Grey, Holmes, Pragmatism, and Democracy .....	419
Louis Menand, The Metaphysical Club .....	424
Additional Readings .....	427
<b>Chapter Six. Louis Brandeis .....</b>	<b>429</b>
Eric Foner, The Story of American Freedom .....	429
Philippa Strum, Brandeis: Beyond Progressivism .....	430
Melvin I. Urofsky, Louis D. Brandeis .....	437
Alpheus Thomas Mason, Brandeis: A Free Man's Life .....	440
Henry J. Friendly, Mr. Justice Brandeis: The Quest for Reason .....	442
Louis D. Brandeis, Hours of Labor.....	442
Louis D. Brandeis to Robert W. Bruere .....	442
<b>Whitney v. California .....</b>	<b>443</b>
Questions .....	451
James Boyd White, Living Speech: Resisting the Empire of Force .....	452
Pericles, Funeral Oration .....	452
Ashutosh A. Bhagwat, The Story of Whitney v. California: The Power of Ideas .....	453
Harry Kalven, Jr., A Worthy Tradition .....	456

Robert M. Cover, <i>The Left, The Right, and the First Amendment, 1918–1928</i> .....	457
<i>New State Ice Co. v. Liebmann</i> .....	458
<i>Louis K. Liggett Co. v. Lee</i> .....	460
<i>Thornhill v. State of Alabama</i> .....	461
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> .....	463
<i>Central Hudson Gas &amp; Electric Corp. v. Public Service Commission of New York</i> .....	467
Questions .....	468
<i>Sorrell v. IMS Health, Inc.</i> .....	469
Questions .....	480
Robert C. Post, <i>The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell</i> .....	480
<i>Snyder v. Phelps</i> .....	481
Questions .....	491
Vincent Blasi, <i>The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California</i> .....	492
Questions .....	494
Additional Readings .....	495
<b>Chapter Seven. Alexander Meiklejohn</b> .....	<b>497</b>
John Patrick Diggins, <i>The Proud Decades: America in War and Peace 1941–1960</i> .....	497
Geoffrey R. Stone, <i>Perilous Times: Free Speech in Wartime</i> .....	499
Pallavi Guniganti, <i>Alexander Meiklejohn: Teacher and Citizen</i> .....	500
<b>Alexander Meiklejohn, Free Speech and Its Relation to Self-Government</b> .....	506
<b>Alexander Meiklejohn, Testimony Presented Before the Subcommittee on Constitutional Rights, United States Senate Committee on the Judiciary</b> .....	515
<b>Alexander Meiklejohn, The First Amendment Is an Absolute</b> .....	527
Questions .....	533
Adam R. Nelson, <i>Education and Democracy: The Meaning of Alexander Meiklejohn 1872–1964</i> .....	534
Question .....	535
<i>United States v. Dennis</i> .....	535
<i>Dennis v. United States</i> .....	538
Question .....	539
John Patrick Diggins, <i>The Proud Decades: America in War and Peace 1941–1960</i> .....	540
<i>Keyishian v. Board of Regents of the University of the State of New York</i> .....	544
<i>Holder v. Humanitarian Law Project</i> .....	547
Questions .....	566

Robert Post, Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse .....	567
Question .....	568
Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence .....	569
Questions .....	572
Robert Post, Citizens Divided.....	573
Frederick Schauer, Constitutions of Hope and Fear .....	573
Questions .....	574
Jack M. Balkin, The Future of Free Expression in the Digital Age .....	574
Additional Readings .....	576
<b>Chapter Eight. The Contemporary Turn Toward Individual-Centered Theories .....</b>	<b>579</b>
Steven H. Shiffrin, The First Amendment, Democracy, and Romance .....	580
Question .....	585
Lee C. Bollinger, The Tolerant Society .....	585
Vincent Blasi, Free Speech and Good Character: From Milton to Brandeis to the Present .....	586
Questions .....	593
Glickman v. Wileman Brothers & Elliott, Inc. ....	594
Frederick Schauer, Free Speech: A Philosophical Enquiry .....	594
Question .....	600
Susan H. Williams, Free Speech and Autonomy: Thinkers, Storytellers, and a Systemic Approach to Speech .....	600
Cohen v. California.....	602
Questions .....	608
David A. Strauss, Persuasion, Autonomy, and Freedom of Expression.....	609
Questions .....	612
United States v. Alvarez.....	612
Questions .....	620
Seana Valentine Shiffrin, Speech Matters: On Lying, Morality and the Law.....	620
Geoffrey R. Stone, Autonomy and Distrust .....	621
United States v. Stevens.....	623
18 U.S.C.A. § 48—Depiction of Animal Cruelty .....	636
Questions .....	638
Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty.....	638
Thomas A. Spragens, Jr., Civic Liberalism .....	641
Joseph Raz, Liberalism, Skepticism, and Democracy.....	644
Joseph Raz, Free Expression and Personal Identification .....	649
Questions .....	660
Brown v. Entertainment Merchants Association.....	661
Questions .....	680

Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech .....	681
Questions .....	691
Additional Readings .....	692
INDEX.....	695