

# Table of Contents

---

	Page
PREFACE . . . . .	v
ACKNOWLEDGMENTS . . . . .	vii
TABLE OF CASES . . . . .	xxv

## Chapter One (Introduction)

1) <i>Minersville School District v. Gobitis</i> (1940). . . . .	1
2) Vincent Blasi & Seana Shiffrin, <i>The Story of West Virginia State Bd. of Educ. v. Barnette: The Pledge of Allegiance and the Freedom of Thought</i> . . . . .	5
3) <i>Chaplinsky v. New Hampshire</i> (1942). . . . .	7
4) Kent Greenawalt, <i>Fighting Words: Individuals, Communities, and Liberties of Speech</i> . . . . .	10
5) <i>West Virginia State Board of Education v. Barnette</i> (1943) . . . .	14
6) <i>Wooley v. Maynard</i> (1977) . . . . .	28

## Chapter Two (John Milton)

1) William Bouwsma, <i>Venice and the Defense of Republican Liberty</i> . . . . .	34
2) J. Max Patrick, Introduction to <i>The Prose of John Milton</i> . . . .	41
3) N. H. Keeble, <i>Milton and Puritanism</i> . . . . .	48
4) Vincent Blasi, <i>Milton's Areopagitica and the Modern First Amendment</i> . . . . .	52
5) <b>John Milton, <i>Areopagitica: A Speech for the Liberty of Unlicensed Printing (1644)</i></b> . . . . .	56
6) John Milton, <i>The Doctrine and Discipline of Divorce</i> . . . . .	94
7) Samuel Johnson, <i>Lives of the Poets</i> . . . . .	95
8) Sharon Achinstein, <i>Milton and the Revolutionary Reader</i> . . . .	95
9) Barbara K. Lewalski, <i>The Life of John Milton</i> . . . . .	96
10) David Loewenstein, <i>Milton and the Drama of History</i> . . . . .	98
11) Arthur E. Barker, <i>Milton and the Puritan Dilemma</i> . . . . .	100
12) Vincent Blasi, <i>Milton's Areopagitica and the Modern First Amendment</i> . . . . .	102
13) Stanley Fish, <i>Driving from the Letter: Truth and Indeterminacy in Milton's Areopagitica</i> . . . . .	107
14) Ernest Sirluck, Introduction to <i>Complete Prose Works of John Milton</i> . . . . .	124
15) Thomas Corns, <i>John Milton: The Prose Works</i> . . . . .	126
16) Christopher Hill, <i>Milton and the English Revolution</i> . . . . .	128
17) John Illo, <i>Areopagiticus Mythic and Real</i> . . . . .	130
18) John Rumrich, <i>Radical Heterodoxy and Heresy</i> . . . . .	135
19) <i>Near v. Minnesota</i> (1931) . . . . .	139

	Page
<b>Chapter Three (James Madison)</b>	
1) Joseph J. Ellis, Book Review: Founding Brothers . . . . .	146
2) Stanley Elkins & Eric McKittrick, <u>The Age of Federalism</u> . . . . .	150
3) Vincent Blasi, School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance . . . . .	160
4) The Proposed General Assessment . . . . .	161
5) James Madison, A Memorial and Remonstrance . . . . .	162
6) Ralph Ketcham, <u>James Madison: A Biography</u> . . . . .	167
7) Thomas Jefferson, The Statute of Virginia for Religious Freedom . . . . .	168
8) Gary Rosen, <u>American Compact: James Madison and the Problem of Founding</u> . . . . .	169
9) Lance Banning, <u>The Sacred Fire of Liberty</u> . . . . .	171
10) Thomas Hobbes, <u>Leviathan</u> . . . . .	175
11) John Locke, <u>The Second Treatise of Government</u> . . . . .	177
12) Ralph Ketcham, <u>James Madison: A Biography</u> . . . . .	178
13) Leonard W. Levy, <u>Emergence of a Free Press</u> . . . . .	182
14) Anthony Lewis, <u>Make No Law</u> . . . . .	193
15) Geoffrey R. Stone, <u>Perilous Times: Free Speech in Wartime</u> . . . . .	202
16) The Alien and Sedition Acts (1798) . . . . .	204
<b>17) James Madison, Report on the Virginia Resolutions (1799)</b> . . . . .	<b>205</b>
18) James Madison, <u>The Federalist Papers: Nos. 10 and 51</u> . . . . .	217
19) James Madison, Speech to the Virginia Ratifying Convention . . . . .	225
20) James Madison, Letter to Thomas Jefferson, Oct. 17, 1788 . . . . .	225
21) James Madison, Speech to the House of Representatives presenting the proposed Bill of Rights . . . . .	228
22) Lance Banning, <u>The Sacred Fire of Liberty</u> . . . . .	228
23) Ralph Ketcham, <u>Framed for Posterity: The Enduring Philosophy of the Constitution</u> . . . . .	231
24) James Madison, Public Opinion. . . . .	233
25) James Madison, Parties . . . . .	234
26) James Madison, Property . . . . .	234
27) Frank H. Easterbrook, The State of Madison's Vision of the State: A Public Choice Perspective . . . . .	236
28) Stanley Elkins & Eric McKittrick, <u>The Age of Federalism</u> . . . . .	242
29) Jack N. Rakove, <u>James Madison and the Creation of the American Republic</u> . . . . .	247
30) Thomas Jefferson, First Inaugural Address. . . . .	250
31) Transcript of Oral Argument, <i>New York Times v. Sullivan</i> . . . . .	251
32) <i>New York Times v. Sullivan</i> (1964) . . . . .	252
33) Harry Kalven, Jr., The New York Times Case: A Note on the "Central Meaning of the First Amendment" . . . . .	257
34) Floyd Abrams, Speaking Freely: Trials of the First Amend- ment . . . . .	258
35) <i>New York Times v. United States</i> (1971) . . . . .	271

	Page
36) The Intelligence Identities Protection Act . . . . .	277
37) <i>Buckley v. Valeo</i> (1976) . . . . .	278
38) Kathleen M. Sullivan, Political Money and Freedom of Speech . . . . .	282
39) <i>Texas v. Johnson</i> (1989) . . . . .	296

#### Chapter Four (John Stuart Mill)

1) Bernard Wishy, Introduction to <u>Prefaces to Liberty: Selected Writings of John Stuart Mill</u> . . . . .	307
2) Eugene August, <u>John Stuart Mill: A Mind at Large</u> . . . . .	312
3) William Thomas, <u>Mill</u> . . . . .	312
4) Alan Ryan, Introduction to <u>Mill: A Norton Critical Edition</u> . . . . .	315
5) John Skorupski, <u>John Stuart Mill</u> . . . . .	316
<b>6) John Stuart Mill, <u>On Liberty</u> (1859) . . . . .</b>	<b>318</b>
7) John Stuart Mill, <u>Utilitarianism</u> . . . . .	367
8) John Stuart Mill, Civilization—Signs of the Times . . . . .	370
9) John Stuart Mill, Essay on Coleridge . . . . .	371
10) Michael St. John Packe, <u>The Life of John Stuart Mill</u> . . . . .	373
11) James Fitzjames Stephen, <u>Liberty, Equality, Fraternity</u> . . . . .	375
12) Frederick Schauer, <u>Free Speech: A Philosophical Enquiry</u> . . . . .	377
13) John Stuart Mill, <u>The Subjection of Women</u> . . . . .	382
14) Richard Vernon, John Stuart Mill and Pornography: Beyond the Harm Principle . . . . .	383
15) <i>Kingsley Pictures Corp. v. Regents</i> (1959) . . . . .	393
16) <i>American Booksellers Association v. Hudnut</i> (7th Cir. 1985) . . . . .	395
17) Catharine A. MacKinnon, <u>Only Words</u> . . . . .	400
18) Ronald Dworkin, <u>Freedom's Law: The Moral Reading of the Constitution</u> . . . . .	402
19) T. M. Scanlon, Jr., Freedom of Expression and Categories of Expression . . . . .	404
20) Jeremy Waldron, Mill and the Value of Moral Distress . . . . .	405
21) <i>Hill v. Colorado</i> (2000) . . . . .	418
22) <i>Beauharnais v. Illinois</i> (1952) . . . . .	426
23) Charles R. Lawrence III, If He Hollers Let Him Go: Regu- lating Racist Speech on Campus . . . . .	431
24) Henry Louis Gates, Book Review: Let Them Talk . . . . .	438
25) Isaiah Berlin, John Stuart Mill and the Ends of Life . . . . .	444

#### Chapter Five (Learned Hand)

1) David M. Rabban, <u>Free Speech in Its Forgotten Years</u> . . . . .	467
2) Pallavi Guniganti, Learned Hand: A Skeptical Life . . . . .	470
3) Gerald Gunther, <u>Learned Hand: The Man and the Judge</u> . . . . .	477
4) John Patrick Diggins, <u>The Rise and Fall and the American Left</u> . . . . .	481
<b>5) <i>Masses Publishing Co. v. Patten</i> (S.D.N.Y. 1917) . . . . .</b>	<b>488</b>

	Page
6) William Shakespeare, Marc Antony's Funeral Oration from <u>Julius Caesar</u> . . . . .	499
7) Martin Luther King, Jr., Letter From Birmingham Jail . . . . .	506
8) <i>Masses Publishing Co. v. Patten</i> (2d Cir. 1917) . . . . .	509
9) <i>United States v. Nearing</i> (S.D.N.Y. 1918) . . . . .	510
10) Harry Kalven, Jr., <u>A Worthy Tradition</u> . . . . .	511
11) Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History . . . . .	516
12) Learned Hand, Sources of Tolerance . . . . .	536
13) Letter from Learned Hand to Felix Frankfurter, June 8, 1951 . . . . .	539
14) Letter from Learned Hand to Elliot Richardson, Feb. 29, 1952. . . . .	539

### Chapter Six (Oliver Wendell Holmes)

1) Robert W. Gordon, Introduction: Holmes's Shadow . . . . .	542
2) James McPherson, <u>Battle Cry of Freedom</u> . . . . .	545
3) Liva Baker, <u>The Justice From Beacon Hill</u> . . . . .	545
4) Oliver Wendell Holmes, Jr., <u>The Common Law</u> . . . . .	546
5) Oliver Wendell Holmes, Jr., The Path of the Law . . . . .	547
6) <i>Lochner v. New York</i> (1905) (Holmes, J., dissenting) . . . . .	547
7) Oliver Wendell Holmes, Jr., Natural Law . . . . .	548
8) Letter from Oliver Wendell Holmes to Harold J. Laski, May 12, 1919 . . . . .	551
9) Richard Polenberg, <u>Fighting Faiths</u> . . . . .	551
<b>10) <i>Abrams v. United States</i> (1919) . . . . .</b>	<b>561</b>
11) Sheldon M. Novick, The Unrevised Holmes and Freedom of Expression . . . . .	572
12) Oliver Wendell Holmes, Jr., <u>The Common Law</u> . . . . .	572
13) <i>Gitlow v. New York</i> (1925) . . . . .	573
14) <i>United States v. Schwimmer</i> (1929) . . . . .	576
15) <i>Gertz v. Robert Welch, Inc.</i> (1974). . . . .	578
16) Richard A. Posner, Introduction to <u>The Essential Holmes</u> . . . . .	578
17) Oliver Wendell Holmes, Jr., Introduction to Montesquieu, <u>The Spirit of the Laws</u> . . . . .	580
18) Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski, Nov. 7, 1917. . . . .	580
19) Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski, April 6, 1920. . . . .	580
20) Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock, Aug. 30, 1914. . . . .	580
21) Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock, Aug. 30, 1929 . . . . .	581
22) Thomas C. Grey, Holmes and Legal Pragmatism. . . . .	581
23) Richard Rorty, <u>Philosophy and Social Hope</u> . . . . .	593
24) Kathleen M. Sullivan, Free Speech and Unfree Markets. . . . .	597

	Page
25) <i>Red Lion Broadcasting Co. v. Federal Communications Commission</i> (1969) . . . . .	603
26) Thomas W. Hazlett and David W. Sosa, “Chilling” the Internet? Lessons from FCC Regulation of Radio Broadcasting . .	605
27) Cass R. Sunstein, <i>Deliberative Trouble? Why Groups Go to Extremes</i> . . . . .	611
28) <i>Miami Herald Publishing Co. v. Tornillo</i> (1974) . . . . .	611
29) C. Edwin Baker, <u>Human Liberty and Freedom of Speech</u> . . . .	616
30) Alexander Meiklejohn, <u>Free Speech and Its Relation to Self-Government</u> . . . . .	619
31) Margaret Jane Radin, <u>Contested Commodities</u> . . . . .	620
32) Christopher Kendrick, <u>Milton: A Study in Ideology and Form</u>	626
33) Bernard Williams, <u>Truth and Truthfulness: An Essay in Genealogy</u> . . . . .	627
34) <i>National Endowment for the Arts v. Finley</i> (1998) . . . . .	630
35) Elizabeth Anderson, <u>Value in Ethics and Economics</u> . . . . .	640
36) Vincent Blasi, <i>Holmes and the Marketplace of Ideas</i> . . . . .	643
37) Thomas C. Grey, <i>Holmes, Pragmatism, and Democracy</i> . . . .	648
38) Louis Menand, <u>The Metaphysical Club</u> . . . . .	654

### Chapter Seven (Louis Brandeis)

1) Eric Foner, <u>The Story of American Freedom</u> . . . . .	659
2) Philippa Strum, <u>Brandeis: Beyond Progressivism</u> . . . . .	660
3) Alpheus Thomas Mason, <u>Brandeis: A Free Man’s Life</u> . . . . .	667
4) Henry J. Friendly, <i>Mr. Justice Brandeis: The Quest for Reason</i> . . . . .	669
5) Louis D. Brandeis, <i>Hours of Labor</i> . . . . .	669
6) Philippa Strum, <u>Louis D. Brandeis: Justice for the People</u> . . .	670
7) <i>New State Ice Co. v. Liebmann</i> (1932) (Brandeis, J., dissenting) . . . . .	672
8) <i>Liggett Co. v. Lee</i> (1933) (Brandeis, J., dissenting) . . . . .	674
9) Letter from Louis D. Brandeis to Robert W. Bruere, February 25, 1922. . . . .	675
<b>10) <i>Whitney v. California</i> (1927)</b> . . . . .	<b>676</b>
11) Pericles, Funeral Oration, from Thucydides, <u>History of the Peloponnesian War</u> . . . . .	686
12) Ashutosh A. Bhagwat, <i>The Story of Whitney v. California: The Power of Ideas</i> . . . . .	687
13) <i>Near v. Minnesota</i> , Oral Argument . . . . .	691
14) Harry Kalven, Jr., <u>A Worthy Tradition</u> . . . . .	694
15) Robert M. Cover, <i>The Left, The Right, and the First Amendment, 1918–28</i> . . . . .	699
16) <i>Thornhill v. Alabama</i> (1940) . . . . .	702
17) <i>Virginia Board of Pharmacy v. Virginia Citizens Consumer Council</i> (1976) . . . . .	704

	Page
18) <i>Central Hudson Gas &amp; Electric Corp. v. Public Service Commission</i> (1980) (Rehnquist, J., dissenting) . . . . .	706
19) Robert H. Bork, Neutral Principles and Some First Amendment Problems . . . . .	708
20) Robert W. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and <i>Hustler Magazine v. Falwell</i> . . . . .	721
21) Vincent Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in <i>Whitney v. California</i> . . . .	722

### Chapter Eight (Alexander Meiklejohn)

1) John Patrick Diggins, <u>The Proud Decades: America in War and Peace 1941–1960</u> . . . . .	727
2) Geoffrey R. Stone, <u>Perilous Times: Free Speech in Wartime</u> .	733
3) <i>United States v. Dennis</i> (1950) . . . . .	736
4) Martin H. Redish, Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era . . . . .	739
5) Pallavi Guniganti, Alexander Meiklejohn: Teacher and Citizen . . . . .	742
<b>6) Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948)</b> . . . . .	<b>747</b>
7) Letter from Alexander Meiklejohn to the Head of the San Francisco Office of the Federal Bureau of Investigation, Dec. 20, 1951 . . . . .	756
8) Alexander Meiklejohn, What Does the First Amendment Mean? . . . . .	757
<b>9) Alexander Meiklejohn, Testimony Before the Subcommittee on Constitutional Rights, United States Senate Committee on the Judiciary (1955)</b> . . . . .	<b>760</b>
<b>10) Alexander Meiklejohn, The First Amendment Is an Absolute (1961)</b> . . . . .	<b>772</b>
11) Learned Hand, Sources of Tolerance . . . . .	780
12) Frank H. Easterbrook, The State of Madison’s Vision of the State: A Public Choice Perspective . . . . .	780
13) Robert Post, Meiklejohn’s Mistake . . . . .	780
14) Bernard Williams, <u>Truth and Truthfulness: An Essay in Genealogy</u> . . . . .	782
15) Sharon Achinstein, <u>Milton and the Revolutionary Reader</u> . . . .	783
16) William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment . . . . .	785
17) Harry Kalven, Jr., The New York Times Case: A Note on the “Central Meaning of the First Amendment” . . . . .	788
18) <i>Keyishian v. Board of Regents</i> (1967) . . . . .	788
19) Owen M. Fiss, Free Speech and Social Structure . . . . .	791
20) Lillian R. BeVier, Rehabilitating Public Forum Doctrine: In Defense of Categories . . . . .	795

	Page
21) Cass Sunstein, <u>Republic.com</u> . . . . .	799
22) <i>United States v. American Library Association</i> (2003) . . . . .	812
23) Lillian R. BeVier, <i>United States v. American Library Association: Whither First Amendment Doctrine</i> . . . . .	825
24) Lee C. Bollinger, <u>The Tolerant Society</u> . . . . .	827

### Chapter Nine (The Contemporary Turn Toward Individual-Centered Theories)

1) Jack M. Balkin, <i>Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society</i> . . .	833
2) Steven H. Shiffrin, <u>The First Amendment, Democracy, and Romance</u> . . . . .	842
3) <i>Glickman v. Wileman Brothers &amp; Elliott, Inc.</i> (1997) (Thomas, J., dissenting) . . . . .	846
4) Frederick Schauer, <u>Free Speech: A Philosophical Enquiry</u> . . .	847
5) <i>Cohen v. California</i> (1971) . . . . .	859
6) Robert H. Bork, <u>The Tempting of America</u> . . . . .	864
7) Charles Fried, <i>The New First Amendment Jurisprudence: A Threat to Liberty</i> . . . . .	867
8) Christina E. Wells, <i>Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence</i> . . . . .	870
9) Geoffrey R. Stone, <i>Autonomy and Distrust</i> . . . . .	885
10) Vincent Blasi, <i>Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing</i> . . . . .	887
11) <i>Barnes v. Glen Theatre</i> (1991) . . . . .	894
12) <i>City of Erie v. Pap's A.M.</i> (2000) (Scalia, J., concurring) . . . . .	897
13) Joseph Raz, <i>Liberalism, Scepticism, and Democracy</i> . . . . .	899
14) Joseph Raz, <i>Free Expression and Personal Identification</i> . . .	904
15) <i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston</i> (1995) . . . . .	915
16) <i>Boy Scouts of America v. Dale</i> (2000) . . . . .	921
17) Vincent Blasi, <i>Free Speech and Good Character: From Milton to Brandeis to the Present</i> . . . . .	929
18) Robert Post, <i>Reconciling Theory and Doctrine in First Amendment Jurisprudence</i> . . . . .	955
INDEX . . . . .	969