Defending the First

Commentary on First Amendment Issues and Cases

Edited by Joseph Russomanno

DEFENDING THE FIRST

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COMMENTARY ON FIRST AMENDMENT ISSUES AND CASES

Edited by

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freedom of expression
and to those willing to fight for it
yesterday, today, and tomorrow.

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FOREWORD

Nadine Strossen[1]

Defending the First is an enlightening collection of fascinating first-hand accounts of some recent major free speech cases. Each essay is a compelling narrative in its own right, and together, they all underscore important conclusions and ongoing questions about First Amendment principles, especially when viewed through the lens of Joseph Russomanno's thought-provoking introductions to each chapter. Each of these introductions manages to frame complex legal questions with remarkable conciseness—this book should provide an exciting introduction for the First Amendment neophyte. Additionally, for First Amendment experts, this work offers a stimulating re-examination of timeless concerns. Although I was thoroughly familiar with the cases and issues discussed—because I have taught them in my constitutional law classes, and the ACLU was directly involved in almost all of the cases, I still gained valuable new insights from each chapter and its thoughtful introduction. In short, no matter how little or how much First Amendment background any reader might bring to this book, he or she should find it illuminating, as well as engaging.

NO FIGHT FOR FREE SPEECH EVER STAYS WON

The ACLU's principal founder, Roger Baldwin, observed that "No fight for civil liberties ever stays won."[2] *Defending the First* underscores that important insight in the free speech context. For example, Dan Johnston's chapter explains how the case of *Tinker v. Des Moines Independent Community School District*[3] (in which he was acting as a "cooperating attorney" for the ACLU's

[1]Professor of Law, New York Law School; President, American Civil Liberties Union.

[2]Lindsey Gruson, *Second Thoughts on Moments of Silence in the Schools*, N.Y. TIMES, Mar. 4, 1984, at 6E.

[3]393 U.S. 503 (1969).

Iowa affiliate) constitutes not a new victory for students' free speech rights in wartime, but rather a reaffirmation of earlier such victories. Even so, *Tinker* still deserves its usual accolade as a "landmark" case, because we can never take for granted that the Supreme Court will uphold basic constitutional liberties, including free speech rights, in times of war or other national crisis—especially when the speakers are politically powerless, as is the case with students too young to vote.

Consistent with our nation's historical pattern of suppressing dissenting voices during wartime, *Tinker*'s reaffirmation of students' right to criticize the government's war policies has not "stayed won" in the nation's ongoing post-9/11 "War on Terrorism," as indicated by a more recent ACLU case, on behalf of Michigan high school student Bretton Barber. In 2003, Bret Barber was disciplined for wearing a T-shirt with a message criticizing President Bush's Iraq policies, despite the fact that Bret expressly cited the *Tinker* precedent to his school officials. Although Bret Barber's rights were ultimately vindicated in court,[4] it is still disturbing that his school authorities did not voluntarily honor the longstanding First Amendment principles at stake. Accordingly, Dan Johnston's comment concerning the *Tinker* student plaintiffs remains true today concerning Bret Barber and other student plaintiffs: "The failure of their school authorities…to recognize [their free speech rights] demonstrates the fragility of the rule of law in times of war."

In addition to Dan Johnston's chapter, the chapters by Marjorie Heins, Edward J. Cleary, Rodney A. Smolla, Bruce Rogow, Paul M. Smith, and John B. Morris, Jr., also all bear witness to the necessity of regularly refighting old free speech battles so that they can "stay won" in new circumstances. For one thing, the Heins, Smith, and Morris chapters illustrate the constant struggle to ensure that courts and other government officials will apply the First Amendment's guarantee of "the freedom of speech" to new media for conveying speech. As Marjorie Heins reminds us, when the Supreme Court first considered a challenge to censorship of the then-new film medium in 1915, the Court concluded that movies did not constitute "speech" that is sheltered by the First Amendment.[5] Even more astonishing, from our current vantage point, is the fact that the Court did not overturn that ruling until four decades later, in 1952, when it finally acknowledged that cinema is "a significant medium for the communication of ideas"[6] and hence subject to First Amendment protection.

Likewise, Paul Smith and John Morris remind us that when the Internet burst onto the public and political radar screen little more than a decade ago, the government strongly argued that it constituted only second-class speech, subject to strict government regulation of its content, similar to that imposed on the broadcast media. Although the Supreme Court resound-

[4]Barber v. Dearborn Public Schools, 286 F. Supp. 2d 847 (E.D. Mich. 2003).
[5]Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915).
[6]Burstyn v. Wilson, 343 U.S. 495, 505-06 (1952).

ingly rejected that government argument in its unanimous ruling in *Reno v. ACLU*[7] that ruling was not at all a foregone conclusion, given the Court's past reluctance to bring new media fully into the First Amendment fold, as evidenced by its treatment of both film and broadcasting.

The Heins chapter illustrates the constant struggle to protect free speech not only in emerging new media, but also from religiously motivated censorship. Although her chapter focuses on the suppression of film content from the 1930s until the 1950s, in response to pressure from the Catholic Church, she also cites several much more recent examples—from 1988 through 2002—of religiously inspired suppression of artistic expression.

Even more recently, in 2004, the Federal Communications Commission actually incorporated religious concepts into its broad, vague description of *indecent* expression that is barred from the broadcast media. The FCC's standards for forbidden broadcast *indecency* now proscribe anything that is *profane*. This term explicitly harks back to notions of *blasphemy* or *sacrilege*, such as those that animated the 1951–1952 crusade against Roberto Rossellini's acclaimed film *The Miracle*, which Heins recounts. Moreover, the ban on broadcast *profanity* was adopted in response to a concerted campaign by leaders of the so-called "Religious Right" for the FCC to crack down on broadcast expression that offends their religious and moral sensibilities. This campaign was stimulated by the brief flash of Janet Jackson's breast during the January 2004 televised Super Bowl halftime show.

Still more recently, in the wake of the 2004 elections, with some polls indicating that "moral values" may have played a decisive role in many voters' minds, "Religious Right" organizations and spokespersons have renewed their calls for further restrictions on expression that they deem inconsistent with their moral or religious values. Therefore, the kinds of religiously inspired threats to free expression that Heins describes are likely to be of as much concern in the immediate future as they have been in the more distant past.

Bruce Rogow's chapter cites many examples of government officials violating what former Supreme Court Justice William Brennan termed the *bedrock principle*[8] of our free speech law: the concept of *content neutrality* or *viewpoint neutrality*, which holds that government may never limit speech just because any listener—or even, indeed, the majority of the community—disagrees with or is offended by its content or the viewpoint it conveys. Accordingly, as Rogow's chapter chronicles, he repeatedly had to fight for this fundamental free speech precept in cases involving expression that was offensive to particular politically powerful, vocal constituencies, ranging from Republican Party leaders who were offended by David Duke's white supremacist statements, to Cuban-Americans who were offended by

[7]521 U.S. 844 (1997).
[8]Texas v. Johnson, 491 U.S. 397, 414 (1989).

artistic expression emanating from Cuba. (Rogow handled many of these important First Amendment cases as a "cooperating attorney" for the ACLU of Florida.)

As Rogow noted, all of these cases should have been "easy" in light of the government's responsibility to adhere to the core First Amendment commands of content and viewpoint neutrality. "Easy" as those cases should have been in light of these established constitutional law principles, it is nevertheless hard for members of the public and politicians to understand or accept such principles, and even some judges sometimes depart from them, as Rogow's chapter illustrates.

In particular cases involving expression that is unpopular at the time, and in the circumstances in which it is conveyed, courageous attorneys such as Bruce Rogow constantly have to stand up for "freedom for the thought we hate," to quote former Supreme Court Justice Oliver Wendell Holmes.[9] Similarly principled—and "politically incorrect"—stances have been taken by Edward Cleary and Rodney Smolla, whose chapters describe their efforts to uphold neutral free speech tenets in the context of an especially vilified form of expression, cross-burning. These brave free speech advocates recurrently have to remind both courts of law, and the court of public opinion, that what is at stake is not only the freedom of the specific client in the specific case, but also, more fundamentally, the overall freedom of all mature individuals to make our own decisions about the (de)merits of any idea or expression.

It is a positive testament to our contemporary society's widespread rejection of racist ideology that one of the most reviled forms of expression is the burning cross, given its association with the Ku Klux Klan. However, in opposing laws that broadly stifled cross-burning, as they vividly recount, both Cleary and Smolla were standing up for neutral free speech principles that have been essential for combating racist and other discriminatory ideologies. Thus, any apparent "victory" in terms of suppressing even such a hated symbol as the flaming cross might well in fact be a pyrrhic victory for civil rights, because—as Cleary and Smolla explain—it empowers the government selectively to suppress certain ideas, a power that could well be unleashed against not only political minorities, but also racial and other minority groups.

DEFENDING THE FIRST AMENDMENT: PRIVATE SECTOR AND GOVERNMENT THREATS

In addition to reminding us about the constant need to refight old free speech battles in new factual contexts and new historical circumstances, *Defending the First* also reminds us that free speech is constantly threatened by

[9]United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

many strategies—not only traditional, direct government censorship, but also more subtle yet equally dangerous government strategies, as well as efforts by many kinds of nongovernmental actors. In that sense, the fight for free speech is one that must invoke not only First Amendment law, which directly constrains only government conduct, but also the more general values that underlie the First Amendment, cherishing the free flow of ideas and information and resisting any inhibition by anyone, including private sector actors.

As noted previously, Marjorie Heins' chapter describes the dramatic negative impact that certain religious groups had in stifling free expression in films during the first half of the last century, leading to suppression of not "only" particular words and images—itself an enormous cost to free speech—but also entire subjects and themes, ranging from racial desegregation to women's rights. Heins also describes the significant contributions toward this repression of film content that were made by other nongovernmental actors, including: investment bankers who threatened to withhold financing from films with certain content; and film company executives, who capitulated to threats of audience boycotts, quite likely exaggerating the real danger posed by such threats, as Heins suggests.

John Morris's chapter provides a potent current example of private power to suppress—or to enhance—free speech in the still-evolving realm of online communications. He stresses the increasingly critical role that is being played by the computer scientists and others in the private sector who are developing the Internet's technical parameters, in ways that will either facilitate or thwart free speech.

In their respective chapters, Jerome Barron and Elliot Rothenberg explain how even private sector entities that are committed to First Amendment values in most contexts—the news media—can themselves at least potentially undermine the free speech of others. Because newspapers have the First Amendment right to print unfavorable (and also inaccurate) commentary about individuals without affording the individuals any "right of reply," doesn't that deter individuals from expressing their views on matters of public concern, as Barron maintains? And isn't the same problem posed by newspapers' asserted First Amendment right to breach confidentiality pledges to sources, which they pressed in *Cohen v. Cowles Media Co.*,[10] as described in Rothenberg's chapter? Wouldn't that asserted right deter potential whistleblowers and other sources of information of public concern from stepping forward, influencing them not to provide such information to newspapers, as Rothenberg posits? When one entity or individual asserts a free speech right that adversely affects the free speech interests of other

[10]501 U.S. 663 (1991).

entities or individuals, which should prevail? As Jerome Barron noted in his chapter, "the difficulty of the access issue is that it presents competing First Amendment rights."

NEW MEDIA, ONGOING ISSUES

Given the proliferation of media outlets, thanks to the burgeoning of the Internet and other "new media," conflicts between competing free speech rights and interests will also continue to proliferate. For example, is an investigator's online dissemination of private information about someone, which is obtained from online databases, a protected exercise of that investigator's free speech-based rights to obtain and convey information, in furtherance of the public's right to receive information? Or is it a violation of the free speech-based right of the subject of the private information to withhold it from the public, consistent with the right not to speak? Likewise, Elliot Rothenberg's contention that the media should not be immunized from generally applicable laws also takes on new urgency in the Internet age, when any individual with a Weblog or Website can plausibly claim to be a member of "the media."

The foregoing issues arising from the expansion of cybercommunications are only a sample of the important unresolved issues and problems to which this book points. Among the other ongoing problems are what Jerome Barron terms the Court's "schizophrenic" treatment of broadcast media and other media; the Court's seemingly anomalous treatment of "commercial" speech as a First Amendment stepchild, which Rogow questions; and the Court's failure, in its four major cyberspeech cases, to specify clearly the extent to which government may regulate Internet content, in ways that make it less accessible to adults, for the sake of shielding minors from certain expression, which Smith stresses. Just as each case described in this book constitutes an essential building block of our current free speech law and culture, consistent with the common-law "case method," each cases also raises at least as many questions as it answers.

Along with other constitutional guarantees, the First Amendment is not self-executing, but can only be enforced at the behest of individuals who actually assert and defend the rights it guarantees in the abstract. The Supreme Court, as well as other courts, can only resolve First Amendment cases that are initiated by individuals who are willing to stand up for their free speech rights—and, by extension, the free speech rights of everyone else in this country. Therefore, the continued enforcement and expansion of these rights will continue to depend on not only vigorous enforcement of free speech principles by Supreme Court Justices and other judges, but also, at least as much, on vigorous advocacy by lawyers who follow in the fine footsteps of the lawyers who have contributed to this book, as well as the coura-

geous clients they represented. These essential efforts are, appropriately, lauded in Joseph Russomanno's dedication of *Defending the First* to "those willing to fight for" freedom of expression "yesterday, today, and tomorrow."

I hope and trust that these collected narratives by and about principled, dedicated free speech advocates will go beyond informing the readers of this book, and will also inspire them to stand up for their own—and, thereby, others'—free speech rights. As the early 20th century free speech philosopher Zechariah Chafee declared, "In the long run, in this country people will have as much freedom of speech as they want."[11]

New York, New York
January 1, 2005

[11]ZECHARIAH CHAFEE, Jr., FREE SPEECH IN THE UNITED STATES 500 (4th ed. 1948).

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Preface

It didn't matter that a bitterly cold December rain—wind-driven and icing the streets outside—had already been pelting Washington, D.C. for hours early that morning. It didn't matter that most local schools were closed for the day. It really didn't matter that most of the people present inside had gone to great effort just to be there, many of them lined up and bundled up outside for hours before the doors opened. All that mattered for the next hour were the words that would be spoken by a dozen people situated inside within a few feet of one another.

"Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting…." It is difficult to imagine any American who values justice not being moved upon hearing those words as the most powerful jurists in the land enter the room. It is equally difficult to imagine any attorney about to argue before the U.S. Supreme Court whose pulse doesn't quicken as those words are uttered.

The accounts on the pages that follow were each authored by individuals who have stood in those shoes, many as the primary litigator, others as members of a team of attorneys before the Court. On that wet December morning, as on many other days, that room housed a clash of constitutional rights and values.

Those who face the Court are required to handle a barrage of information as they deal with the ebbs and flows of the arguments. "Like a quarterback using all his powers of feel and experience and peripheral vision to desperately read a defense in the midst of a furious blitz," writes Rodney A. Smolla in chapter 6 about his encounter, "my every advocate's sense and instinct took in all that was happening in the adrenal rush of the crisis."

Like others who have faced the Supreme Court justices, Mr. Smolla could observe a wall painting high above them. It depicts a battle between Good and Evil. It is reminiscent of Milton's celebrated reference to truth: "Let her and falsehood grapple … in a free and open encounter."[1] Perhaps the quintessential example of such grappling on this planet occurs in this "marble palace." Values, ideals, and principles oppose one another. But here, truth and falsehood, good and evil, are often barely discernible, hardly ever clear and unambiguous. Those are among the reasons cases reach this level. They are difficult, demanding, and replete with thorny issues, with resolution a challenging assignment. They are cases that merit deliberation and reflection by the nation's supreme judicial arbiters.

It is those nine individuals who become a major focus of the Supreme Court attorney. As some of those attorneys discuss in the pages that follow, the art of persuasion in this venue is not an easy task. Beyond that, understanding one's own case, its lineage, and its likely impact all become part of the formula for success. The reader of this volume's essays—and that includes the Foreword—is provided the unique perspective of those who have been on the front lines of some of this era's most important First Amendment cases. Some have written about their experiences at the Supreme Court many years after being there, and with the perspective that affords. Other experiences are analyzed from a more recent vantage point. One Supreme Court attorney offers a historical analysis of a case replete with a variety of First Amendment issues, both deep-rooted and contemporary.

In summary, wherever readers turn in this volume, they will be taken into a realm of First Amendment analysis that is unique—told by some of those at the forefront of the battle to defend "the First."

—Joseph Russomanno

[1]John Milton, *Areopagitica, reprinted in* THE STUDENT'S MILTON 751 (Frank Allen Patterson ed. 1933)(1654).

Chapter 1

Creating a New First Amendment Right

Miami Herald Publishing Co. v. Tornillo and the Story of Access to the Media

Jerome A. Barron*

EDITOR'S INTRODUCTION

"I don't have time for any cases."

"You will want this one."

Thus began Jerome Barron's journey to the U.S. Supreme Court. Actually, as he describes in chapter 1, the journey's roots extend to his interest in the right-of-access issue. And to his seminal 1967 Harvard Law Review *article on the topic.*

Professor Barron had concluded that there were inconsistencies in First Amendment law. It protected ideas once they entered the marketplace, but little in the way of assuring entry into the marketplace initially. In an era when the tip of the iceberg of concentration of media ownership was just emerging, this seemed to make sense. The idea was that the First Amendment could be construed as a safeguard for making a variety of ideas public. But instead of the idea making sense for many, it was a catalyst for criticism.

Allowing the free market to operate and govern the system would be fine—if only the market was free. Instead, it is not open to all. Just try to buy a major newspaper or station. The extremely wealthy dominate the media scene. The sentiment against government involvement with the media—for example, providing citizens a right of access—is

*Jerome A. Barron is Harold H. Greene Professor of Law, George Washington University Law School, Washington, D.C.

deep within our national DNA. For more than two centuries the First Amendment has been equated with the notion that the media cannot be regulated or restricted. That's a false assumption. The First Amendment has become a mechanism for protecting class privilege rather than the interests of the public, such as promoting democracy.

One of the great First Amendment philosophers in America was Alexander Meikeljohn. He believed that the primary purpose of the First Amendment is that all citizens shall, so far as possible, understand the issues that bear upon our common life. That is why, he said, no idea, no opinion, no belief, no counter belief, no relevant information may be kept from them.

*Is the First Amendment serving that end? The First Amendment stands for a free flow of ideas. Debate on issues of public importance should be "uninhibited, robust, and wide open" (*New York Times v. Sullivan*). Is that happening? Or has media content become little more than spending-friendly, mood-establishing background noise between advertisements?*

*Who does the First Amendment serve? The public? Owners of the media? As the U.S. Supreme Court has said in justifying broadcast regulation that may infringe on the privileges of station owners, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).*

Broadcast regulation has been justified by the U.S. Supreme Court because broadcasting is a scarce, limited resource. Today, it is arguable the same can be said of all news media. Not only is the information provided to the citizenry scarce, so too are the news outlets themselves. Their numbers have increased, but the concentration of ownership has grown exponentially. Like wealth, in general, the biggest part of the pie is in the hands of a relative few. Entry into the privileged club is made more difficult by the day. True access would enhance the possibility of the news being a forum for a diverse marketplace of ideas.

Five years after his Harvard Law Review *article was published, the phone in Professor Barron's office rang. When he answered, a door was opened to a path that would eventually lead him to the U.S. Supreme Court.*

* * *

This is the story of a Supreme Court case that had its origin in a law review article. *Access to the Press—A New First Amendment Right* appeared in the *Harvard Law Review* in 1967.[1] Seven years later, the Supreme Court considered the ideas expressed in that article. Typically, law review articles discuss, an-

[1]Jerome A. Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).

alyze, and criticize Supreme Court cases after they have been announced. But a law review article that generates a Supreme Court case is more unusual. When I wrote *Access to the Press—A New First Amendment Right,* I did not have litigation in mind—much less a Supreme Court case. My goal, instead, was to call attention to what I saw as a fundamental shortcoming in the law. Once ideas managed to secure entry to the so-called marketplace of ideas, existing First Amendment law protected them to a substantial extent. But suppose the media marketplace erected barriers to the entry of ideas in the first place? The plain fact was that entry to the media marketplace was at the sufferance of its owners and managers.

FIRST AMENDMENT LAW AND THE ACCESS PROBLEM

I first began to understand the nature of this problem when, as a law school teacher, I started to teach and write in the areas of First Amendment law and broadcast law. In so doing, I found myself confronting at least three basic inconsistencies in the law. First, at that time—the 1960s—broadcasting law provided some measure of access for ideas of individuals to be heard and seen on broadcasting. Yet in the print media no such rights existed. This seemed to me both illogical and wrong. The second inconsistency was that First Amendment law was entirely directed to the protection of speech once it had entered into the marketplace. But it was quite indifferent to the obstacles that obstruct the entry of ideas and individuals into the marketplace of ideas in the first place. The third inconsistency was that First Amendment law was extremely sensitive to government restraints on expression but quite indifferent to media restraints on expression. I began to see the need for a right of access to the media. I believed that it was entirely consistent with First Amendment to allow those whom the media attacked to respond. This prompted me to write—and to urge—the recognition of a new First Amendment right—a right of access to the press.

The article drew much more attention than I would have ever dreamed possible. In fact, it drew immediate fire. Clifton Daniel of the *New York Times* argued that it would be impossible to write an access law that would not in the end result in government control of the press.[2] Ben Bagdikian, journalist and press critic, lampooned the idea of a right of access to the press. *Editor & Publisher,* the voice of the print media, he contended, would have to print the press releases of the National Association of Broadcasters praising the virtues of the electronic media. Anti-regulation *Broadcasting* magazine, the organ of

[2]Clifton Daniel, *Right of Access to Mass Media-Government Obligation to Enforce the First Amendment*, 48 TEX. L. REV. 783 (1970).