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# Foreword

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## FOREWORD

HONORABLE PETER T. FAY

*UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

This issue of the *University of Miami Law Review* continues its practice of devoting one issue each year to a review of some of the work of the United States Court of Appeals for the Eleventh Circuit. Our court continues to be one of the busiest in the country. With twelve active judges and four senior judges, the court handled over 7000 cases last year. The issues involved in these cases ranged over a broad spectrum, encompassing both federal and state law. Handling appeals from the district courts in the states of Alabama, Georgia and Florida, along with appeals from many federal agencies, the work of the court is diverse, demanding and extremely important since our rulings influence the lives of over thirty-two million people who seem to have little reluctance to bring matters to court. And, for the most part, we are a court of last resort since the Supreme Court rarely takes more than a handful of our cases for review.

The articles presented in this issue all focus on different aspects of the First Amendment. The authors include outstanding professors, experienced and highly respected practitioners, and very bright students. The subjects being dealt with range from state laws controlling lobbyists,<sup>1</sup> prayer at county commission meetings<sup>2</sup> and high school gradua-

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1. See Samuel A. Terilli, *Inartful Drafting Does Not Necessarily a Void, as Opposed to a Vague, Statute Make—Even Under the First Amendment: The Eleventh Circuit Applies Common Sense to “Common Understanding” in Void-for-Vagueness Challenges to Lobbying Regulations*, 63 U. MIAMI L. REV. 793 (2009).

2. See Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713 (2009).

tions,<sup>3</sup> prisoner mail,<sup>4</sup> adult business zoning,<sup>5</sup> retaliation toward public employees and prisoners,<sup>6</sup> academic freedom of teachers and educational institutions,<sup>7</sup> to the recent case of library books in public schools.<sup>8</sup>

Illustrative of the timeliness of these articles is the post-script in the piece dealing with the removal of *Vamos a Cuba* from the elementary school libraries in South Florida. Between the writing of this paper and publication, our court issued its opinion which has reversed the ruling of the district court and continued the controversy. Only time will tell if our court will review the matter en banc (there is a strong dissent) or if the Supreme Court will grant a petition for certiorari.

All of the articles deal with “cutting edge” issues that are being hotly litigated nationwide. Some of the questions being posed include: What are the rules regarding prayers at a variety of public functions and events? How do we protect the rights of prisoners to communicate privately with their attorneys and the courts and yet give the prison authorities the necessary tools to keep the prisons safe and secure? What is required of local governments should they choose to regulate “adult businesses”? How do we balance the rights of School Boards to control the curriculum with the academic freedom of teachers and the First Amendment rights of students? When are public employees speaking out on matters of public concern as opposed to matters within their official duties? Those of us on the court are wrestling with these questions on a daily basis.

While some of these articles are critical of our rulings, all recognize the complexity of trying to follow the Supreme Court’s writings which often do not include a clear majority opinion. And, “constructive criticism” is helpful. All of us on the Court of Appeals appreciate the thoughtful suggestions made by those devoting their efforts to making our legal system work better. We are deeply grateful for the scholarly

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3. See Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in Adler v. Duval County*, 63 U. MIAMI L. REV. 835 (2009).

4. See Sanford L. Bohrer & Matthew S. Bohrer, *Just the Facts, Ma’am—Determining the Constitutional Claims of Inmates to the Sanctity of Their Legal Mail*, 63 U. MIAMI L. REV. 893 (2009).

5. See Daniel R. Aaronson, Gary S. Edinger & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741 (2009).

6. See Bruce S. Rogow, *Two Years of the First Amendment in the United States Court of Appeals: The 2007 and 2008 Yin and Yang Over Speech and Punishment*, 63 U. MIAMI L. REV. 813 (2009).

7. See JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit’s Post-Garcetti Jurisprudence*, 63 U. MIAMI L. REV. 761 (2009).

8. See Joelle C. Achtman, *Pico Takes A Visit to Cuba: Will Pretext Become Precedent in the Eleventh Circuit?*, 63 U. MIAMI L. REV. 943 (2009).

presentations made by counsel appearing before us and by legal writers evaluating and commenting on our work.

The forty-five words in the First Amendment read:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Over the years the courts have been faced with a plethora of controversies involving unique issues. The length of hair on males in the workplace and educational institutions spawned numerous lawsuits.<sup>9</sup> Judges had to decide if employers could restrict bumper stickers on vehicles parked in the business parking areas as well as messages on clothing being worn in the workplace.<sup>10</sup> Multiple cases arose from the messages protesters placed on clothing and placards.<sup>11</sup> Many groups challenged the fees charged by local governments when issuing permits for parades demonstrating over political issues.<sup>12</sup> Who would have guessed the Supreme Court would declare that women dancing “bare breasted” were expressing themselves under the First Amendment.<sup>13</sup> At present, the Supreme Court is deliberating on the ability of individuals and corporations to expend large sums on projects (including documentary films) designed to influence political campaigns.<sup>14</sup> It appears that campaign financing is going to spawn continuing activity in our federal courts.

In recent years our court has been faced with many questions surrounding commercial speech and regulations aimed at restricting the size and placement of billboards.<sup>15</sup> Residents of some condominiums have sued over the right to display our national flag. Newspapers and printed publications have been given broad legal protections because of the importance of a free press. All of these issues are of great importance to the litigants and most are equally important to us as a nation.

The First Amendment has become a cornerstone of the republic built by our forefathers. Those of us privileged to be members of the legal profession have a solemn obligation to ensure that there is real meaning in its words and the principles announced. In my opinion, the articles in this issue of the Law Review are in furtherance of that goal.

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9. *See, e.g.*, *Kelley v. Johnson*, 425 U.S. 238 (1976).

10. *See, e.g.*, *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

11. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971).

12. *See, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

13. *See, e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (“[N]ude dancing is not without its First Amendment protections from official regulation.”).

14. *See Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008), *cert. granted*, 129 S. Ct. 594 (Nov. 14, 2008) (No. 08-205).

15. *See, e.g.*, *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261 (11th Cir. 2006).