

TABLE OF CONTENTS

PART I: FOUNDATIONAL ISSUES

Chapter 1. Free Expression and the Constitution	1
I. Why Protect Speech?	2
A. Self-Realization and the Search for Truth	3
B. Self-Government and Social Stability	5
C. The Limits of Theory	6
II. First Amendment History	8
A. Origins of the First Amendment	8
B. Free Speech and the Fourteenth Amendment	10
C. The Evolving Judicial Role	12
III. Overview of Current Doctrine	13
A. “Unprotected” Speech	13
B. Regulation of “Fully Protected” Speech	15
C. Critiques of Current Doctrine	16
IV. The Road Ahead	17
A. Roadmap to the Book	17
B. Pervasive Issues	18
 Chapter 2. The Content Distinction	 21
I. The Content Distinction in Operation	21
A. Origins	21
B. Content Regulation	23
C. Content Neutrality	25
II. Refining the Content Distinction	27
A. Defining Content Neutrality	27
B. Defining Viewpoint Discrimination	29
C. Application to “Unprotected” Speech	31
D. Other Exceptions	32
III. The Future of the Content Distinction	34
A. The Scholarly Debate	34
B. Domesticating the Content Distinction	36
 Chapter 3. The First Amendment Toolkit	 39
I. Has There Been An “Abridgement” of “Speech”?	39
A. Speech versus Conduct	40
B. The Right to Remain Silent	41
C. Inducements versus Coercion	42
II. What Kind of “Abridgement”?	45
A. The Rule Against Prior Restraints	46
B. Chilling Effects: The Overbreadth and Vagueness Doctrines	49
III. The Question of Deference	53

PART II: THE CATEGORIAL APPROACH

Chapter 4. Illegal Advocacy	57
I. The Rise of “Clear and Present Danger”	57
A. Historical Background	57
B. The Great Dissenters	60
C. Free Speech Takes Root	62
II. The McCarthy Era and Its Aftermath	63
A. The <i>Dennis</i> Ruling	63
B. Post- <i>Dennis</i> Opinions	65
C. Assessing “Clear and Present Danger”	66
III. <i>Brandenburg</i> and Beyond	68
A. The Current Test	68
B. Is <i>Brandenburg</i> ’s Approach Justified?	71
IV. Other Restrictions on Subversive Speech	72
A. Prior Restraints	73
B. Investigations	74
C. Loyalty Oaths	75
IV. <i>Brandenburg</i> as Paradigm	76
 Chapter 5. Defamation and Other Torts	 79
I. The <i>New York Times</i> Case	79
A. Background	80
B. The Court’s Opinion	83
C. Appraising the <i>New York Times</i> Rule	85
II. Applying the <i>New York Times</i> Rule	87
A. Who is a Public Figure?	87
B. What is Defamatory?	90
C. What is Malice?	92
III. Private Libels	93
A. The <i>Gertz</i> Rule	93
B. Does the Defendant’s Identity or the Nature of the Topic Matter?	94
IV. Other Torts	96
A. “False Light”	96
B. Disclosing Private Facts	97
C. Infliction of Emotional Distress	98
V. Conclusion	99
 Chapter 6. Offensive Language and Hate Speech	 103
I. Regulation of Offensive Expression	103
A. Fighting Words and Hostile Audiences	103
B. Offensive Language, Captive Audiences, and Public Civility	107
II. <i>R.A.V.</i> and the Content Distinction	109
III. University Regulation of Hate Speech	112
A. Regulations Keyed to the Racist Content of Speech	112
B. Penalty Enhancement Based on Racist Motivation	114
C. Regulation Ancillary to Prohibitions on Discriminatory Conduct	116

IV. Critiques of Current First Amendment Doctrine	117
A. Uniqueness of Harm	119
B. Equality Versus Liberty	120
Chapter 7. Sexual Material	127
I. The Development of Obscenity Law	127
A. The <i>Roth-Memoirs</i> Test	128
B. Obscenity and the Two-Tier Theory	130
C. The Defendant's Conduct	132
II. Current Obscenity Law	133
A. <i>Miller v. California</i>	133
III. The "Zoning" Approach	136
A. "Second Class" Protected Speech?	137
B. Secondary Effects	139
IV. The "Civil Rights" Approach	141
A. Proposed Legislation	141
B. Pornography and Sexism	143
C. Pornography and Violence Against Women	144
D. Problems of Interpretation	146
 PART III: SPEECH IN SPECIAL SETTINGS	
Chapter 8. Commercial Speech	149
I. The Road to Protected Status	149
A. Creation and Erosion of Unprotected Status	149
B. <i>Virginia Board</i>	151
C. Should Commercial Speech be Protected?	152
II. The Current Status of Commercial Speech	154
A. The Boundaries of Commercial Speech	155
B. The <i>Central Hudson</i> Test	156
C. Should Commercial Speech be Fully Protected?	158
III. Specific Types of Advertising	160
A. Advertising by Lawyers	161
B. High-risk Forms of Consumption	163
IV. The Future of the Categorical Approach	165
Chapter 9. Public Property	167
I. Development of Public Forum Doctrine	167
A. Access, Equality, and Discretion	167
B. Public Demonstrations and the Warren Court	170
C. The Modern Approach	172
II. Regulation in Traditional Forums	174
A. Content Regulation	175
B. Time, Place, and Manner Regulations	176
C. Licenses	177
D. Injunctions	179
III. Classifying Forums	181
A. Streets and Walkways	181

B. Metaphorical Forums	182
C. Assessing <i>Perry</i>	183
IV. The Future of Public Forum Doctrine	185
Chapter 10. Speech in the Public Sector	187
I. Custodial Institutions	187
A. Schools	187
B. Prisons	190
II. Public Employees	193
A. Dissenters in the Workplace	193
B. Partisan Activities	196
III. Government Funding	200
A. Doctrinal Developments	201
B. The Subsidy Puzzle	202
Chapter 11. The Media	207
I. The Media and the Criminal Justice System	208
A. Protection of Sources	208
B. Fair Trial/Free Press	211
C. Access by the Media	213
II. Access to the Media	216
A. Broadcasting	216
B. Other Media	218
III. The Future of Media Law	220
A. Conflicting Models	220
B. Straws in the Wind	223
Chapter 12. Associations, Parties, and Political Campaigns	225
I. Freedom of Association	225
A. Regulating Group Membership	226
B. Collective Action	228
II. Political Parties	230
A. Internal Party Affairs	231
B. Ballot Access	232
III. Campaign Financing	234
A. The <i>Buckley</i> Decision	235
B. Post- <i>Buckley</i> Developments	237
C. Future Directions	239
IV. Concluding Thoughts on Quasi-Public Speech	241

PART IV: RELIGION

Chapter 13. Free Exercise 243

- I. The Constitutional Status of Religion 243
 - A. Religious Freedom in American History 244
 - B. Free Exercise Values 246
 - C. Defining “Religion” 247
- II. Exemptions for Religious Conduct 249
 - A. The Era of The Compelling Interest Test 249
 - B. *Smith* and Religious Exemptions 252
 - C. *Smith* and Original Intent 254
 - D. *Smith* and Constitutional Values 255
- III. The Current Status of Free Exercise 257
 - A. Targeted Regulation of Religion 257
 - B. The Inviolability of Theological Claims 259
 - C. Exemptions from Neutral Laws After *Smith* 260

Chapter 14. The Establishment Clause 263

- I. The Basics 263
 - A. The Origin of the Establishment Clause 264
 - B. Doctrinal Evolution 267
 - C. Separationists versus Accommodationists 269
- II. Current Judicial Approaches 271
 - A. Secular Purpose and Effect 271
 - B. Endorsement 272
 - C. Coercion 273
- III. Doctrinal Chaos 274
 - A. Religion in Public School Programs 275
 - B. Aid to Parochial Schools 277
 - C. Religious Symbolism 278
- IV. The Accommodation Problem 280
 - A. War Between the Clauses? 280
 - B. Possible Resolutions 281
 - C. Impermissible Accommodations 282
- V. Concluding Thoughts on Current First Amendment Law 283

Acknowledgements 287

Table of Cases 289

Index 293