

THE FIRST AMENDMENT

FOURTH EDITION

by

DANIEL A. FARBER
Sho Sato Professor of Law
University of California at Berkeley

CONCEPTS AND INSIGHTS SERIES®

 FOUNDATION
PRESS

TABLE OF CONTENTS

ACKNOWLEDGMENTS	V
-----------------------	---

PART I. FOUNDATIONAL ISSUES

Chapter 1. Free Expression and the Constitution.....	3
I. Why Protect Speech?	4
A. Self-Realization and the Search for Truth	5
B. Self-Government and Social Stability	7
C. The Limits of Theory	8
II. First Amendment History	10
A. Origins of the First Amendment	10
B. Free Speech and the Fourteenth Amendment.....	12
C. The Evolving Judicial Role	13
III. Overview of Current Doctrine	15
A. “Unprotected” Speech.....	15
B. Regulation of “Fully Protected” Speech	17
C. Critiques of Current Doctrine.....	18
IV. The Road Ahead.....	19
A. Roadmap to the Book	19
B. Pervasive Issues	20
Chapter 2. The Content Distinction	23
I. The Content Distinction in Operation	23
A. Origins.....	23
B. Content Regulation	25
C. Content Neutrality	27
II. Refining the Content Distinction	28
A. Defining Content Neutrality.....	29
B. Defining Viewpoint Discrimination.....	31
C. Application to “Unprotected” Speech	33
D. Other Exceptions	34
III. The Future of the Content Distinction.....	36
A. The Scholarly Debate	36
B. Domesticating the Content Distinction.....	38
Chapter 3. The First Amendment Toolkit.....	43
I. Has There Been an “Abridgment” of “Speech”?	43
A. Speech Versus Conduct.....	44
B. The Right to Remain Silent	45
C. Inducements Versus Coercion	47
II. What Kind of “Abridgment”?	49
A. The Rule Against Prior Restraints.....	50
B. Chilling Effects: The Overbreadth and Vagueness Doctrines	53
III. The Question of Deference	57

PART II. THE CATEGORICAL APPROACH

Chapter 4. Illegal Advocacy.....	65
I. The Rise of “Clear and Present Danger”	65
A. Historical Background	65
B. The Great Dissenters	67
C. Free Speech Takes Root.....	70

TABLE OF CONTENTS

II.	The McCarthy Era and Its Aftermath	71
A.	The <i>Dennis</i> Ruling	71
B.	Post- <i>Dennis</i> Opinions	73
C.	Assessing "Clear and Present Danger"	74
III.	<i>Brandenburg</i> and Beyond	75
A.	The Current Test	76
B.	Is <i>Brandenburg's</i> Approach Justified?	78
IV.	Other Restrictions on Subversive Speech	80
A.	Prior Restraints	80
B.	Investigations	81
C.	Loyalty Oaths	83
D.	Threats	83
E.	Material Support for Terrorists	84
V.	<i>Brandenburg</i> as Paradigm	85
Chapter 5. Defamation and Other Torts		89
I.	The <i>New York Times</i> Case	89
A.	Background	90
B.	The Court's Opinion	93
C.	Appraising the <i>New York Times</i> Rule	95
II.	Applying the <i>New York Times</i> Rule	97
A.	Who Is a Public Figure?	97
B.	What Is Defamatory?	99
C.	What Is Malice?	100
III.	Private Libels	102
A.	The <i>Gertz</i> Rule	102
B.	Does the Defendant's Identity or the Nature of the Topic Matter?	103
IV.	Other Torts	105
A.	"False Light"	105
B.	Disclosing Private Facts	106
C.	Infliction of Emotional Distress	108
V.	Conclusion	109
Chapter 6. Offensive Language and Hate Speech		113
I.	Regulation of Offensive Expression	113
A.	Fighting Words and Hostile Audiences	113
B.	Offensive Language, Captive Audiences, and Public Civility	117
II.	<i>R.A.V.</i> and the Content Distinction	119
III.	University Regulation of Hate Speech	122
A.	Regulations Keyed to the Racist Content of Speech	122
B.	Penalty Enhancement Based on Racist Motivation	124
C.	Regulation Ancillary to Prohibitions on Discriminatory Conduct	126
IV.	Critiques of Current First Amendment Doctrine	127
A.	Uniqueness of Harm	129
B.	Equality Versus Liberty	130
Chapter 7. Sexual Material		137
I.	The Development of Obscenity Law	137
A.	The <i>Roth-Memoirs</i> Test	138
B.	Obscenity and the Two-Tier Theory	140
C.	The Defendant's Conduct	142

TABLE OF CONTENTS

II.	Current Obscenity Law	143
III.	The "Zoning" Approach	146
	A. "Second Class" Protected Speech?	147
	B. Secondary Effects	149
IV.	The "Civil Rights" Approach	152
	A. Proposed Legislation	152
	B. Pornography and Sexism	154
	C. Pornography and Violence Against Women.....	155
	D. Problems of Interpretation.....	157

Chapter 8. Commercial Speech 161

I.	The Road to Protected Status	161
	A. Creation and Erosion of Unprotected Status.....	161
	B. <i>Virginia Board</i>	163
	C. Should Commercial Speech Be Protected?.....	164
II.	The Current Status of Commercial Speech	167
	A. The Boundaries of Commercial Speech.....	167
	B. The <i>Central Hudson</i> Test.....	168
	C. Should Commercial Speech Be Fully Protected?.....	171
III.	Specific Types of Advertising.....	173
	A. Advertising by Lawyers	174
	B. High-Risk Forms of Consumption	176
IV.	The Future of the Categorical Approach.....	178

PART III. SPEECH IN SPECIAL SETTINGS

Chapter 9. Public Property 183

I.	Development of Public Forum Doctrine	183
	A. Access, Equality, and Discretion	183
	B. Public Demonstrations and the Warren Court.....	186
	C. The Modern Approach	187
II.	Regulation in Traditional Forums.....	190
	A. Content Regulation	190
	B. Time, Place, and Manner Regulations	192
	C. Licenses	194
	D. Injunctions	195
III.	Classifying Forums.....	197
	A. Streets and Walkways.....	198
	B. Metaphorical Forums	199
	C. Assessing <i>Perry</i>	201
IV.	The Future of Public Forum Doctrine.....	202

Chapter 10. Speech in the Public Sector..... 205

I.	Custodial Institutions	205
	A. Schools.....	205
	B. Prisons.....	209
	C. The Military	210
II.	Public Employees.....	211
	A. Dissenters in the Workplace.....	211
	B. Partisan Activities	214
III.	Government Funding	216
	A. Doctrinal Developments.....	217
	B. The Subsidy Puzzle	220

TABLE OF CONTENTS

Chapter 11. The Media.....	225
I. The Media and the Criminal Justice System	226
A. Protection of Sources	226
B. Fair Trial/Free Press	228
C. Access by the Media	231
II. Access to the Media	233
A. Broadcasting	234
B. Other Media	235
III. The Future of Media Law	237
A. Conflicting Models	238
B. Straws in the Wind	239

Chapter 12. Associations, Parties, and Political

Campaigns	243
I. Freedom of Association	243
A. Regulating Group Membership	244
B. Collective Action	248
II. Political Parties	250
A. Internal Party Affairs.....	250
B. Ballot Access	251
III. Campaign Financing	253
A. The <i>Buckley</i> Decision.....	254
B. <i>McConnell v. Federal Election Commission</i>	257
C. <i>Citizens United</i> and Beyond.....	258
IV. Concluding Thoughts on Quasi-Public Speech	260

PART IV. RELIGION

Chapter 13. Free Exercise.....	265
I. The Constitutional Status of Religion	265
A. Religious Freedom in American History	266
B. Free Exercise Values	268
C. Defining "Religion"	269
II. Exemptions for Religious Conduct	271
A. The Era of the Compelling Interest Test	271
B. <i>Smith</i> and Religious Exemptions	274
C. <i>Smith</i> and Original Intent	276
D. <i>Smith</i> and Constitutional Values	277
III. The Current Status of Free Exercise	279
A. Targeted Regulation of Religion	279
B. The Inviolability of Theological Claims	281
C. Selection of Ministers	282
D. Exemptions from Neutral Laws After <i>Smith</i>	283

Chapter 14. The Establishment Clause	287
I. The Basics	288
A. The Origin of the Establishment Clause	288
B. Doctrinal Evolution	291
C. Separationists Versus Accommodationists	293
II. Current Judicial Approaches.....	295
A. Secular Purpose and Effect.....	295
B. Endorsement.....	296
C. Coercion.....	297

TABLE OF CONTENTS

III.	Doctrinal Evolution: Moving Beyond Chaos?	298
A.	Religion in Public School Programs	299
B.	Aid to Parochial Schools.....	302
C.	Religious Symbolism	304
IV.	The Accommodation Problem	305
A.	War Between the Clauses?	306
B.	Possible Resolutions	306
C.	Impermissible Accommodations	307
V.	Concluding Thoughts on Current First Amendment Law	309
	TABLE OF CASES	313
	INDEX.....	317