Combining the Best of Gunther and Sullivan

CONSTITUTIONAL LAW, 13th Edition. By Gerald Gunther[†] and Kathleen M. Sullivan.[‡] Westbury, New York: Foundation Press, 1997. Pp. xcv, 1553.

Reviewed by James Weinstein[*]

I. INTRODUCTION

Trying to improve a classic can prove perilous. Just ask the guy who had the bright idea of a "new and better" Coca-Cola. In the field of casebooks, there are few classics, but Gerald Gunther's *Constitutional Law* has long been viewed as one of them. More than twenty years ago it was heralded in the Harvard Law Review as "the *Hart and Wechsler* of constitutional law."[1] After decades of solo authorship, Gunther is joined on the 13th edition by Kathleen Sullivan,[2] who was primarily responsible for revising (among other sections) the chapters on freedom of expression.[3] This partnership has succeeded in improving what was already perhaps the strongest section of the book.

In this review I will examine the organization of the free expression materials, consider the selection and editing of cases, and comment on the notes and questions. But this casebook is not merely a teaching tool; it is also a scholarly work bristling with ideas. At the end of this review I will identify and engage an overarching view that finds expression in the notes and more subtly in the organization of the free speech material.

Before beginning a detailed critique, a few overall remarks about the casebook and its improvement are in order. Over the years, the strength of the casebook has been its comprehensiveness and the sophistication with which it approaches constitutional questions. These

---

† William Nelson Cromwell Professor of Law Emeritus, Stanford University.

‡ Stanley Morrison Professor of Law, Stanford University.

* Professor of Law, Arizona State University.

1. Kenneth Karst, *Book Review*, 89 HARV. L. REV. 1028, n.3 (1976).

2. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).

3. *Id.* at 1022-1460.

two qualities are interrelated. Both in his casebook and in his other works, Gunther has had an abiding concern not just with the results of constitutional adjudication but with the Court's methodology.[4] There is thus much discussion of such matters as the proper level of scrutiny, or whether a balancing or a categorization approach is preferable.[5] At a deeper level there is concern with judicial honesty and integrity.

These methodological issues, however, cannot be examined in a casebook that contains only skeletal summaries of the cases. Rather, such an inquiry requires that large sections of important opinions be reproduced. But there's the rub. More than any other area of the law, constitutional law is constantly on the move, especially in the area of individual liberties. Unfortunately for authors of constitutional casebooks, and for those of us who teach in the area, the dozens of important constitutional cases decided each year rarely supplant what has come before; most often they supplement or refine previous doctrine. Twenty years ago it was still common to have a single constitutional law course covering federalism, separation of powers and individual liberties. Today it is difficult even to cover all the basic material in a single individual liberties course. Making matters worse, the decisions are often fractured in ways that make it difficult to tell exactly what the Court has held.

Despite the constant stream of important constitutional decisions and the proliferation of lengthy separate opinions, Gunther has over the years fought a gallant battle to avoid editing cases "into a potpourri of skeletal segments of opinions."[6] By thoughtful editing and case selection, the 12th edition retained sufficiently full cases to allow examination of the methods of constitutional adjudication. On the other hand, due to this methodological emphasis, it seemed to me that this edition occasionally lost focus on the more basic doctrinal issues. This problem resulted not because there was too much emphasis on methodological issues per se, but because increasing doctrinal complexity required a change in emphasis.

The main improvement of the free speech materials in the 13th edition is that the proper balance between methodological concern and doctrinal explication has been restored. In addition, some dated

---

4. *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Gerald Gunther, *The Subtle Vices of the "Passive Virtues" - A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1968).

5. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 995-1008 (12th ed. 1991).

6. GUNTHER & SULLIVAN, *supra* note 2, at v-vi.

methodological concerns have been replaced with more contemporary problems.

II. ORGANIZATION

The free expression materials in this casebook comprise three chapters: Chapter 11, "Freedom of Speech—Why Government Restricts Speech—Unprotected and Less Protected Expression;"[7] Chapter 12, "Freedom of Speech—How Government Restricts Speech—Modes of Abridgment and Standards of Review;"[8] and Chapter 13, "Rights Ancillary to Freedom of Speech."[9] The first two chapters, which together amount to just over 300 pages, supply the basic free speech material for a constitutional law or individual rights course. It is on these chapters that I will primarily focus in this review. The third chapter supplies another 100 pages on "advanced" topics, and although it might be profitably dipped into to supplement a basic constitutional law or individual rights course, it is primarily for use in courses devoted entirely to freedom of expression or in free speech seminars.

The basic organization represented by the three chapters could not be better. The trick was not so much how to divide the basic material from the advanced, for this is fairly obvious. Rather, the problem was how to coherently organize the ever growing mass of basic materials. By dividing this material into one chapter that focuses on the nature of the speech being regulated and another that focuses on the nature of the regulation, the authors underscore an important development in modern doctrine. A subtle but important change in the free speech jurisprudence that has marked the last twenty years has been the Court's growing emphasis on the nature of the regulation (e.g., whether the regulation is content oriented or content neutral) rather than on the nature of the speech (e.g., is speech protected or unprotected). Thus the division between Chapters 11 and 12 neatly calls attention to this trend while at the same presenting the material in more or less chronological order.

Chapter 11 is subdivided into 6 sections: (1) Free Speech: An Overview;[10] (2) Incitement;[11] (3) Fighting Words and Hostile Audiences;[12] (4) Injury to Reputation and Sensibility;[13] (5) Sexually

7. GUNTHER & SULLIVAN, *supra* note 2, at 1022-1202.
8. *Id.* at 1203-1360.
9. *Id.* at 1361-1460.
10. *Id.* at 1022-33.
11. *Id.* at 1034-75.
12. *Id.* at 1076-90.

Explicit Material;[14] and (6) Commercial Speech.[15] This organization is quite sensible and in one important respect improves upon the 12th edition.

Immediately after the materials on incitement, the previous edition had a section entitled "Content Regulations Assertedly Warranting Reduced or No First Amendment Protection: Categorization or Balancing."[16] The section focused on the categorical exclusion approach first adopted by the Court in *Chaplinsky v. New Hampshire*,[17] and demonstrated both the frailties of this methodology and its evolution into the more speech protective "definitional balancing" approach of *New York Times v. Sullivan*.[18] Within this methodological framework, this section of the previous edition enveloped cases on fighting words, libel, privacy, obscenity, pornography, hate speech, offensive and indecent speech and commercial speech.[19] The current edition breaks up this large, somewhat unwieldy section into smaller sections denominated by the type of speech at issue (i.e., sections 3-6 listed above).[20] Discussion of methodology is by no means abandoned, but by eliminating it as a central organizing theme in this section the new edition strikes a better balance between exploring methodology and explicating what the law is.

If the strongest part of previous editions of the casebook was its free speech section, then the strongest part of the free speech section was the incitement materials. This section begins with *Schenck v. United States*,[21] in which Justice Holmes announces the "clear and present danger" test.[22] As an abstract matter, the test promised to strike the proper balance between protecting the dissent essential to a democracy and allowing government to avoid those harms that all organized government must have the power to prevent. Yet as the cases selected in the casebook demonstrate (perhaps most notably a case which upheld the conviction of the Socialist presidential candidate,

---

13. GUNTHER & SULLIVAN, *supra* note 2, at 1091-124.
14. *Id.* at 1125-74.
15. *Id.* at 1175-1202.
16. GUNTHER, *supra* note 5, at 1069-1137.
17. 315 U.S. 568 (1942), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1077.
18. 376 U.S. 254 (1964), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1094.
19. GUNTHER, *supra* note 5, at 1069-1189.
20. GUNTHER & SULLIVAN, *supra* note 2, at 1176-1202.
21. 249 U.S. 47 (1919), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1036; reprinted in GUNTHER, *supra* note 5, at 1010.
22. GUNTHER & SULLIVAN, *supra* note 2, at 1037; GUNTHER, *supra* note 5, at 1011.

Eugene Debs, for criticizing American involvement in World War I),[23] Holmes' test inadequately protected dissent essential to a democracy.

Two years before *Schenck*, Learned Hand, then a young district court judge, took a different approach. Rather than focusing on the imminency of the danger, Hand, in *Masses Publishing v. Patten*, inquired whether the words used objectively advocated the commission of the crime.[24] Although meeting with "practically no professional approval whatever" when decided,[25] this case would, as the casebook demonstrates, have an important influence on modern doctrine.[26] As Professor Kenneth Karst pointed out in a 1976 review of the 9th edition of the casebook, it was Gunther who first introduced modern constitutional law students to this belatedly seminal decision.[27]

Discussion prompted by the materials in the incitement section about what went wrong with the Court's early attempt to draw the line between protected and unprotected political advocacy has for me been a highlight of constitutional law class both as a student and a teacher. Similarly, the progression from the early "clear and present danger" cases to the modern incitement test provides an elegant example of constitutional law evolving in the best common law tradition. The materials show how Hand's emphasis on the objective language of incitement was kept alive in Brandeis' concurrence in *Whitney v. California*[28] and masterfully utilized by Harlan in latter Smith Act cases.[29] The modern test announced in *Brandenburg v. Ohio*[30] thus combines "the best of Hand and Holmes"—"the most protective ingredients of Hand's incitement emphasis in *Masses* with the most useful elements of Holmes' clear and present danger heritage."[31]

In the 13th edition the authors have the good sense to leave superb enough alone. They make only minor revisions to the

---

23. Debs v. United States, 249 U.S. 211 (1919), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1038.

24. 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1046.

25. GUNTHER & SULLIVAN, *supra* note 2, at 1049 n.1 (quoting Learned Hand from one of his letters discussed in GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 160 (1994)).

26. GUNTHER & SULLIVAN, *supra* note 2, at 1074.

27. Karst, *supra* note 1, at 1030.

28. 274 U.S. 357, (1927) (Brandeis, J., concurring), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1054, 1055.

29. *See* Yates v. United States, 354 U.S. 298 (1957); and Noto v. United States, 367 U.S. 290 (1961), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1068-69.

30. 395 U.S. 444 (1969), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1071.

31. GUNTHER & SULLIVAN, *supra* note 2, at 1074.

incitement section, most of which are helpful. The rather verbose section heading, "Regulation of Political Speech Because of Its Content," is concisely revised to "Incitement."[32] In addition, a pre-*Brandenburg* case, *Bond v. Floyd*,[33] which appeared after *Brandenburg* in the 12th edition,[34] now comes before *Brandenburg*.[35] Another pre-*Brandenburg* decision, *Watts v. United States*,[36] is similarly moved before *Brandenburg*. Unlike *Bond*, however, which like the World War I cases, involved political advocacy that arguably promoted illegal conduct (draft resistance)[37] *Watts* involved an alleged threat against the President of the United States.[38] It seems to me that this case more properly belongs in the very useful note on the scope of *Brandenburg*.[39]

The next section, "Fighting Words and Hostile Audiences," is substantially revised.[40] As mentioned above, these two topics, which in the previous edition were included within a much more comprehensive section, are now placed together in a separate section. In addition, *Chaplinsky v. New Hampshire*, in which the Court upheld the conviction of a proselytizing Jehovah's Witness for calling a law enforcement official a "damned fascist,"[41] is usefully juxtaposed with *Cantwell v. Connecticut*.[42] In *Cantwell*, the Court reversed the conviction of a proselytizing Jehovah's Witness who offended a street corner audience by playing a record condemning organized religion, particularly the Roman Catholic Church, as instruments of Satan.[43] This pairing forces the student to focus on the narrow scope of the "fighting words" doctrine (i.e., face-to-face use of abusive epithets), while at the same time testing the coherence of this limitation. (In the previous edition, *Cantwell* did not appear until late into the next chapter as part of the public forum materials).

---

32. *Compare*, GUNTHER & SULLIVAN, *supra* note 2, at 1034 *with* GUNTHER, *supra* note 5, at 1008.

33. 385 U.S. 116 (1966), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1070.

34. GUNTHER, *supra* note 5, at 1067.

35. GUNTHER & SULLIVAN, *supra* note 2, at 1070.

36. 394 U.S. 705 (1969), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1071.

37. *Bond*, 385 U.S. 116 (1966), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1070.

38. Speaking at an anti-Vietnam war rally Watts declared: "If they ever make me carry a rifle, the first man I want to get my sights on is L.B.J." *Id.* at 706, *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1071.

39. GUNTHER & SULLIVAN, *supra* note 2, at 1075.

40. *Id.* at 1076-91.

41. 315 U.S. 568 (1942), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1077, 1078.

42. 310 U.S. 296 (1940), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1076.

43. *Id.*

Even more significantly, *Cohen v. California*, one of cornerstones of modern free speech jurisprudence, is introduced in this section.[44] While perhaps more logically reserved to a section on offensive and lower value speech as it was in the 12th edition,[45] or until the chapter on content-discriminatory regulations, where it makes a reappearance in the present edition, this early introduction is again justified by its bracketing of the "fighting words" rationale. Similarly, the placement of the entire topic of "hostile audiences" in this section, rather than in the section on public forums where it previously was found, serves to complete the overview of attempts to regulate speech because of its power to offend or anger listeners. On the other hand, the cases on permit requirements that follow (*Kunz v. New York*[46] and *Forsyth County v. Nationalist Movement*[47]), although underscoring the problem of unbridled discretion inherent in the "hostile audience" doctrine, seem premature and perhaps should have been reserved to the public forum discussion in Chapter 12.

The material dealing with First Amendment limitations on libel actions and other dignitary torts, expounded in *New York Times v. Sullivan*[48] and its progeny, is quite properly given its own section in this new edition.[49] In the introductory notes to this section, entitled "Injury to Reputation and Sensibility,"[50] the authors explain that the section does not cover the doctrine in detail, leaving such coverage for courses in torts and media law, but rather focuses "on the Court's methodology in bringing [this area of tort law] into the First Amendment ballpark, and on the bearing of the Court's analysis on other First Amendment problems."[51] Despite the emphasis on methodology, the cases and notes in this section nonetheless provide a clear, concise, yet fairly comprehensive overview of this area of the law.

The next section is on hate speech, and here the authors faced a dilemma. The only modern Supreme Court ruling on the merits of a hate speech regulation is *R.A.V. v. City of St. Paul*, which reversed the conviction of a youth for burning a cross on a black family's lawn.[52] *R.A.V.* is a prime example of the Court's tendency to focus on the

44. 403 U.S. 15 (1971), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1081.
45. GUNTHER, *supra* note 5, at 1138.
46. 340 U.S. 290 (1951), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1090.
47. 505 U.S. 123 (1992), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1090.
48. 376 U.S. 254 (1964), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1094.
49. GUNTHER & SULLIVAN, *supra* note 2, at 1091-1125.
50. *Id.* at 1091-92.
51. *Id.*
52. 505 U.S. 377 (1992), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1115.

nature of the regulation rather than the nature of the speech. The Court makes clear that such reprehensible conduct is not protected speech and thus could have been constitutionally punished pursuant to any number of statutes.[53] Nevertheless, it reverses the conviction because it was obtained pursuant to a content-oriented regulation of unprotected speech.[54]

For two reasons, introducing *R.A.V.* at this point in the materials is problematic. First, the decision turns on the distinction between content-neutral and content-oriented regulations,[55] a distinction not considered until the next chapter.[56] In addition, the expression involved (cross burning) is symbolic conduct, another topic not explored until the next chapter.[57] Second, a chapter on hate speech without *R.A.V.* is like playing Hamlet without the Prince of Denmark. Moreover, the decision offers an interesting reprise of the fighting words doctrine: although the statute at issue was in fact a quite broadly worded hate speech regulation, the Minnesota Supreme Court construed it to ban only racial fighting words.[58]

The authors recognize this dilemma, but opt for including *R.A.V.* at this point in the materials. In their view, postponing *R.A.V.* until the next chapter "would leave unfinished the hate speech discussion, which makes sense to conduct right after the discussion of incitement, fighting words and *Beauharnais*."[59] It's a tough call, but I think that it would have been preferable to reserve *R.A.V.* for the materials on the distinction between content-oriented and content-neutral regulation. The solution to the problem of "the unfinished hate speech discussion" is not to start it, at least in a major way, in this chapter.

Unlike fighting words, libel or obscenity, there has never been any indication in the case law that racist speech is categorically "outside" the ambit of the First Amendment; nor, unlike pornography, has there ever been any indication that racist speech is "lower value" expression. It is true that some academic commentary has argued for categorically excluding racist speech from constitutional protection, and thus a note considering this possibility and the Court's rejection of it is certainly

---

53. *Id.*

54. *Id.* at 1115-17.

55. *Id.* at 1117.

56. GUNTHER & SULLIVAN, *supra* note 2, at 1203-34.

57. *Id.*

58. R.A.V. v. City of St. Paul, 505 U.S. 123 (1992), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1115, 1117.

59. GUNTHER & SULLIVAN, CONSTITUTIONAL LAW, TEACHER'S MANUAL 135 (13th ed. 1997) [hereinafter TEACHER'S MANUAL].

in order. But an entire section at this point in the book seems unwarranted. This conclusion is fortified by the fact that the other recent developments considered in this section mostly concern the regulation of hate speech on campus. This problem involves the government's power to regulate speech in its capacity as an educator or employer, a topic that is not discussed until the second section of the next chapter.[60]

The hate speech section is followed by a section entitled "Sexually Explicit Expression," and includes materials on obscenity and pornography.[61] With regard to the cases on regulation of sexually explicit but nonobscene expression, the authors faced a problem similar to the one they confronted in the hate speech section. The case law in this area (especially *Renton v. Playtime Theatres*[62] and its dubious secondary effects rationale) requires a firm understanding of the distinction between content-neutral and content-oriented regulations. But unlike their handling of hate speech, here I think the authors were correct in including this material where they did. Regulation of sexually explicit but nonobscene expression is intimately connected with obscenity regulation; a discussion of the constitutional doctrine of obscenity is just not complete without discussion of nonobscene pornography. No such intimate relationship exists between hate speech and any other topic in this chapter. In any event, the difficulties of presenting cases that invoke the distinction between content-neutral and content-based regulations in both this and the hate speech section could have been mitigated somewhat if this chapter included a short preview of that distinction.

The next section is dedicated to commercial speech[63] and nicely rounds out a chapter that traces the refinement, and to a large extent abandonment, of the categorical exclusion methodology. For me the most important lesson taught by this survey is that an approach to speech regulation that may seem entirely sensible as an abstract matter may prove entirely unworkable in practice. But the material supplied by Gunther and Sullivan is sufficiently rich and generally well organized that there are many other lessons to be learned as well.

Chapter 12 is divided into three sections: (1) The Distinction Between Content-Based and Content-Neutral Regulations;[64] (2) Government's Power to Limit Speech in its Capacity as Proprietor,

60. GUNTHER & SULLIVAN, *supra* note 2, at 1234-1325.
61. GUNTHER & SULLIVAN, *supra* note 2, at 1125-74.
62. 475 U.S. 41 (1986), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1162-64.
63. GUNTHER & SULLIVAN, *supra* note 2, at 1174-1202.
64. *Id.* at 1203-34.

Employer and Patron;[65] and (3) Impermissible Forms of Speech Restrictive Law: Overbreadth, Vagueness and Prior Restraint.[66] The overall organization of material into a chapter focusing on *how* government regulates speech, with special emphasis on the distinction between content-oriented and content-neutral regulation, is both innovative and sensible. However, a few of the specific organizational choices within this framework are questionable.

At the beginning of section 1, the authors divide content-based regulation into four categories: (1) viewpoint restrictions; (2) subject matter restrictions; (3) speaker restrictions; and (4) communicative impact on the audience.[67] This is a laudable attempt to bring order to a messy area of the law. The first three categories are firmly rooted in case law; the fourth, however, especially as explicated in the casebook, is problematic.

Introducing this fourth category, the authors tell us that "[l]aws barring speech that is deemed likely to cause a certain response in the audience based on its content are typically viewed as skeptically as direct content restrictions."[68] As examples the authors list *Forsyth Co. v. Nationalist Movement*, which invalidated a regulation gearing the price of a parade permit to the anticipated hostility of the audience,[69] and *Cohen v. California*, which reversed the conviction of an antiwar protester for wearing a jacket bearing the message, "Fuck the Draft."[70]

But in what sense is *Cohen* any less a direct content restriction than subject matter or viewpoint restrictions? *Cohen*, it seems to me, is more properly included, along with the flag burning cases, in a separate category of regulations forbidding the use of offensive words or symbols. (Or perhaps in a slightly larger but somewhat more vague category of laws that seek to protect "civility norms," i.e., those conventions designed to protect people's sensibilities.) Cases like *Forsyth Co.* could then be assigned to a category of indirect content restrictions, or perhaps more generally to a residual category of all other restrictions that turn on audience reaction to the speech.

A significant improvement over previous editions is that the all important test for content-neutral "time, place, and manner" restrictions makes a prominent appearance by way of contrast at the end of

65. *Id.* at 1234-1325.
66. *Id.* at 1325-60.
67. *Id.* at 1204-08.
68. GUNTHER & SULLIVAN, *supra* note 2, at 1208.
69. 505 U.S. 123 (1992), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1208.
70. 403 U.S. 15 (1971), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1208.

the discussion of content-based laws.[71] But this good work is somewhat undone by beginning the subsection on content-neutral laws, not with the basic "time, place, and manner" cases, but with the much more complex symbolic conduct cases.[72] Exploration of even the basic "time, place, and manner" cases are postponed until the public forum cases in the next section.[73] In my view, this is a mistake. While it is true that the tests for symbolic conduct and content-neutral "time, place, and manner" restrictions amount to the same thing, I find it preferable to acquaint students with the easily understandable "time, place, and manner" cases before dealing with the metaphysical abstrusities raised by the symbolic speech cases.

Of course, placing the symbolic content cases ahead of the "time, place, and manner" cases might be understandable if Gunther and Sullivan were trying to emphasize the importance of the speech/conduct distinction. But the authors, who are quite critical of this distinction,[74] tend to minimize its importance.

Section 2 is entitled "Government's Power to Limit Speech in Its Capacity as Proprietor, Educator, Employer and Patron."[75] This section, which has no counterpart in previous editions, underscores the fact that the strong presumption against government engaging in content-based speech regulations often disappears when government acts, not in its usual sovereign capacity, but as a proprietor or manager.[76] This is a very important point often neglected in basic constitutional law courses. My one small criticism of this section is that its title does not encompass the subsection on public forums. Contrary to what is most likely an inadvertent implication of the title, the public forum cases often involve government acting in its sovereign capacity.

Section 3 completes the discussion on how government regulates speech, introducing material on overbreadth, vagueness and prior restraint.[77] These are highly technical areas of the law and are properly reserved for last. Just enough material is included to give students a basic understanding of the doctrine without overwhelming

71. GUNTHER & SULLIVAN, *supra* note 2, at 1209-11.
72. *Id.* at 1212.
73. *Id.* at 1244-60.
74. *See* GUNTHER & SULLIVAN, *supra* note 2, at 1216.
75. GUNTHER & SULLIVAN, *supra* note 2, at 1234.
76. *Id.* at 1235-1325.
77. *Id.* at 1325-60.

them. The subsection on prior restraint, moreover, usefully separates the licensing from the injunction cases.[78]

Whereas Chapters 11 and 12 comprehensively cover the basic free speech material, Chapter 13, entitled "Rights Ancillary to the First Amendment," collects the "advanced" material.[79] It is divided into four sections: (1) Compelled Speech: The Right *Not* to Speak;[80] (2) Freedom of Association;[81] (3) Money and Political Campaigns;[82] and (4) Freedom of the Press.[83] This basic division is sensible and properly includes political contributions and expenditures as a featured topic. Although most of the material in this chapter is not geared for use in basic constitutional law courses, an instructor wanting to supplement the basic course with a few select "advanced" topics (e.g., the different treatment of the broadcast and print media) will find this chapter useful. Its primary use, though, is for a course dedicated to the First Amendment, or as a resource for a seminar devoted to advanced topics in free speech.

The materials in these three chapters are, in my view, more comprehensive and better organized than casebooks recently on the market dedicated entirely to the First Amendment. While I question a few of the organizational details, the organization of the free speech materials in the 13th edition is generally quite good, and in a few places even inspired.

III. CASE SELECTION AND EDITING

The case selection is near perfect: The most important cases and ones that best explicate doctrine and methodology are included as principal cases; other cases needed for a full understanding of an area are included as "squib" cases or are described in the notes. There is a refreshing absence of that idiosyncratic case selection that too often plagues legal casebooks. Indeed, I can find only one selection to question—the inclusion of *Clark v. Community for Creative Non-Violence* as a principal case.[84] *Clark* rejected a First Amendment challenge to a National Park Service regulation that prohibited camping in certain parks.[85] The regulation was challenged by activists who

78. *Id.* at 1339-60.
79. *Id.* at 1361.
80. *Id.* at 1361-74.
81. *Id.* at 1374-1400.
82. *Id.* at 1400-20.
83. *Id.* at 1420-60.
84. 468 U.S. 288 (1984), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1254.
85. *Id.*

wanted to sleep in a Washington D.C. park to call attention to the plight of the homeless.[86] Although these facts raise some interesting theoretical issues, as a doctrinal matter the result seems clearly controlled by *O'Brien* and the recent "time, place, and manner" cases. As such, it seems hardly worth the nearly five and half pages of text devoted to it.

One of the best features of previous editions of the casebook was the case editing. This edition continues in the tradition of including enough of the case to give the reader access to the Court's arguments and methodology, but at the same time not burying the reader with unnecessary detail. With so many cases to prune, though, even the most thoughtful editors will occasionally leave out material that should have been included. One such instance in this book is in the editing of *R.A.V.*, the bizarre hate speech case discussed above.[87]

One explanation of *R.A.V.* is that the Court's hostility to the speech regulation at issue was prompted by the plainly viewpoint-oriented justification of the ordinance proffered by the city and the Minnesota Supreme Court. Thus the Court notes that the Minnesota court "repeatedly emphasized" that the prohibition was aimed at "messages 'based on virulent notions of racial supremacy,'"[88] and that St. Paul argued that "a general 'fighting words' law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the 'group hatred' aspect of such speech 'is not condoned by the majority.'"[89] The authors, however, leave out this important (perhaps even essential) part of the opinion.

The only other significant omission I noticed was in the hate crimes case, *Wisconsin v. Mitchell*.[90] In this case the state argued that a law increasing the penalty for bias-motivated crimes did not punish bigoted thought but instead punished only "conduct."[91] While acknowledging that the state's argument is "literally correct," and also observing that the conduct at issue was not "by any stretch of the imagination expressive conduct protected by the First Amendment,"[92] the Court nonetheless stated that this argument "does not dispose of Mitchell's First Amendment challenge."[93] This statement is both

86. *Id.* at 1254-55.
87. *See supra* notes 52-59 and accompanying text.
88. 505 U.S. 377 at 392.
89. *Id.*
90. 508 U.S. 476 (1993), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1123.
91. *Id.*
92. *Mitchell*, 508 U.S. at 484.
93. *Id.* at 476.

doctrinally interesting and important: interesting because it raises the issue of why a physical assault is categorically excluded from the realm of expressive conduct, even if otherwise meeting the test for expressive conduct;[94] it is important because for the first time the Court suggests that even the regulation of nonexpressive conduct is entitled to some level of First Amendment scrutiny.

The authors' failure to include this statement most likely stems from the organizational problem with the hate speech section mentioned above. *Mitchell*, quite naturally, is included in the hate speech section, immediately after *R.A.V.*[95] Because the topics of symbolic speech and the speech/conduct distinction have not yet been introduced, however, the significance of the material quoted above would not be apparent to the students. Rather than omit the material altogether, the authors might have included it in the later discussion of symbolic speech and the speech/conduct distinction.[96]

Despite diligent effort, I have found very little to criticize in the case selection and editing. My few criticisms should therefore be seen as praising with faint damns.

IV. NOTES AND QUESTIONS

In reviewing the Ninth edition of the book more than twenty years ago, Kenneth Karst wrote that the notes and questions "will stimulate inquiry and deepen understanding for students both on and off the classroom platform."[97] The same is true of the notes and questions in the free speech materials in this edition. Indeed, these notes and questions are in one respect an improvement over previous editions, for here the introductory materials do an even better job of setting the stage.

Particularly helpful are the series of hypotheticals and follow-up questions at the beginning of Chapter 12 that introduce the distinction between content-based and content-neutral restrictions.[98] These

94. *Compare* Texas v. Johnson, 491 U.S. 397, 404 (1989) (finding flag burning to be expressive conduct because there was "[a]n intent to convey a particularized message and . . . the likelihood was great that the message would be understood be those who viewed it.") (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

95. GUNTHER & SULLIVAN, *supra* note 2, at 1109-25.

96. Perhaps what is really at issue here is substantive disagreement with the authors' apparent view that the speech/conduct distinction is not ultimately a very important one. To me this distinction is as basic as the content-based/content-neutral distinction (although not nearly as often litigated). Thus, as the authors acknowledge (GUNTHER & SULLIVAN, *supra* note 2, at 1123), a sharp speech/conduct distinction is the only way to reconcile *Mitchell* with *R.A.V.*

97. Karst, *supra* note 1, at 1028 n.3.

98. GUNTHER & SULLIVAN, *supra* note 2, at 1203-04.

hypotheticals[99] neatly demonstrate not only the distinction between content-based and content-neutral restrictions, but also explore different types of content-based and content-neutral restrictions. The hypotheticals are followed by a note that observes that "while each of these laws would have the identical effect" of preventing certain speech (in this case, speech in favor of Republican candidates), "the Court would scrutinize them quite differently."[100] The authors then inquire as to why this should be so.[101]

As in the previous editions, the notes and questions following the principal cases provide both a scholarly discussion of ideas as well as a guide to understanding the doctrinal landscape. A good example of the scholarly quality of the notes is the material following *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*.[102] In a note entitled "Commercial Speech And First Amendment Theory," the authors discuss the various theoretical justifications for protecting commercial advertising, such as self-government, truth and autonomy.[103] But the notes in this section also elucidate doctrine by, for instance, focusing on the definition of commercial speech[104] and by explaining the division within the Court as to level of scrutiny applicable to regulations of such speech.[105]

Similarly helpful are the notes about the scope of *Brandenburg*, which ask about the applicability of that case to such areas as the communication of information that may lead to crimes;[106] the notes in the section on the public forum that describe two different approaches to the problem;[107] the notes for the material on speech in

---

99. Suppose that a municipality enacted laws prohibiting the construction or maintenance, even on private property, of:

1. any billboard supporting a Republican candidate
2. any political billboard
3. any political message on a billboard owned by a Republican
4. any billboard tending to arouse political anger or hostility
5. any billboard
6. any structure, except a building, exceeding 12 feet in height
7. any message on a billboard during the three weeks preceding a general election
8. any billboard in any area zoned for residential use
9. any billboard larger than 12 by 40 feet.

Id. at 1204-05.

100. *Id.* at 1204.

101. *Id.*

102. 425 U.S. 748 (1976), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1176-81.

103. GUNTHER & SULLIVAN, *supra* note 2, at 1181-85.

104. *Id.* at 1184.

105. *Id.* at 1201-02.

106. *Id.* at 1075.

107. *Id.* at 1268.

public schools, which emphasize that unlike the public forum, "[t]he classroom is a place of structured dialogue bounded by teacher authority and rules of decorum;"[108] and the introductory notes on sexually explicit but nonobscene speech that concisely explicate doctrine in a particularly murky area of the law.[109]

My sole criticism of the notes and questions relates to the material in the general introduction to the free speech materials (section 1 of chapter 11). The notes on First Amendment history and theory are useful, although perhaps a touch too long. But the subsection entitled "First Amendment Jurisprudence" is far too lengthy and much too detailed for an introductory note.[110] Excerpts from the abstruse debate between Justices Black and Frankfurter about absolutes or balancing are sure to go right over the heads of students who have not yet read their first free speech case. Similarly, the materials on "Justifying special protection for speech" seem dated, and in any event, are not worth nearly two pages of text.[111] In contrast, the discussion of categorization versus balancing is of more contemporary importance.[112] But even here the details of this discussion, along with some of the materials on history and theory, would perhaps be more helpful if integrated into later sections rather than presented as introductory material.

This discussion of notes and questions would not be complete without mentioning the teacher's manual. This is the first edition of the casebook to include a teacher's manual and the entire enterprise is better for it. The manual concisely summarizes each major area of the law covered in the casebook and candidly gives the authors' view of the questions it poses.[113] It thus serves as a miniconstitutional law treatise geared to the casebook. In addition, it offers useful hypotheticals for classroom use.[114]

This is not to say that I agree with all of the answers or approaches in the manual. Like the casebook itself, the manual is full of ideas; it is not surprising, therefore, that others who spend their time thinking about free speech issues might find something with which to disagree. To honor the scholarly nature of this casebook and teacher's manual, I will end this review by engaging one of the many interesting

108. *Id.* at 1293.
109. *Id.* at 1155-56.
110. *Id.* at 1029-34.
111. *Id.* at 1031-32.
112. *Id.* at 1032-34.
113. TEACHER'S MANUAL, *supra* note 59.
114. *See, e.g., id.* at 129-30.

ideas raised in these materials. I will begin by taking issue with a comment in the teacher's manual which, although not itself of overarching importance, reflects a deeper, more significant area of disagreement.

In the teacher's manual, Gunther and Sullivan correctly state that the Court in *Chaplinsky* offers three justifications for excluding fighting words from First Amendment protection: "1. they're unnecessarily vulgar ('no essential part of any exposition of ideas'), 2. they offend the listener ('by their very utterance inflict injury'), or 3. they trigger fistfights ('tend to incite an immediate breach of the peace')."[115] Much more controversially, the authors contend that after *Cohen*, which upheld the right of an antiwar protester to wear a jacket in public with the message "Fuck the Draft," only the third justification survives.[116] "After Cohen," they insist, "vulgarity is protected insofar as the medium is the message, and offense to the listener is not enough to regulate speech."[117]

I disagree that *Cohen* is inconsistent with either *Chaplinsky's* "inflict[ion] of [psychic] injury" rationale or its "no essential part of any exposition of ideas" basis. Gunther and Sullivan overlook that in *Cohen* the Court emphasized that the state had no power to excise offensive words from, as Justice Harlan put it, "the public discourse."[118] Later in that opinion Harlan explained that the First Amendment "is designed and intended to remove governmental restraints *from the arena of public discussion* . . ."[119] But not all human utterances are part of "the public discourse" or "arena of public discussion."[120] The line between public discourse and other speech is difficult, perhaps impossible, to draw. But in *Chaplinsky* the Court distinctly put face-to-face verbal assaults on the "not public discourse" side of the line.[121] This is the significance of its finding such expression to be "no essential part of any exposition of ideas."

Nothing in *Cohen* suggests that the Court has changed its mind and now finds "fighting words" to be part of public discourse. To the contrary, the Court goes to great lengths to explain why the message

115. TEACHER'S MANUAL, *supra* note 59, at 130.
116. *Id.* at 130.
117. *Id.*
118. 403 U.S. at 15, 22.
119. *Id.* at 24.
120. *Id.* at 25.
121. *Chaplinsky*, 315 U.S. 568, 571.

on Cohen's jacket was not "fighting words."[122] Relatedly, and more significantly, nothing in *Cohen* suggests that its holding, disabling the state from barring the use of offensive language, applies beyond the sphere of "public discourse" or "the arena of public discussion." It is true that other decisions have cast doubt on the continued validity of the fighting words doctrine.[123] But none of these decisions has taken issue with *Chaplinsky's* insight that such directed verbal abuse is not, as an abstract matter, properly part of the public debate essential to either the discovery of truth or democratic self-governance.

The problem with the fighting words doctrine has been one of practical administration, most crucially in its misapplication to speech that *is* part of the debate on matters of public concern. (*Chaplinsky* itself may be an example of this.) Additionally, there has been the troubling tendency of law enforcement officials to selectively apply fighting words restrictions to the politically unpopular.[124] But to the extent that the fighting words doctrine does survive, the infliction of emotional injury rationale does also. Thus, contrary to Gunther and Sullivan's suggestion, I very much doubt the Court would reverse a fighting words conviction that it would otherwise be inclined to uphold just because there was no danger that the verbal assault would lead to physical violence (e.g., the fighting words were addressed to a quadriplegic). Certainly nothing in *Cohen*, or in any other of the Court's decisions, forecloses the state from protecting against unprovoked, intentional infliction of emotional injury outside of the realm of pubic discourse.[125]

A prevalent misconception about modern First Amendment doctrine, even among those who should know better, is that the strong presumption against content discrimination, represented by *Cohen* and similar cases, applies to all government regulation of expression. I recently attended a faculty seminar by a prominent law professor who argued (or more accurately, assumed) that *Cohen*'s suspension of civility norms applies to the public school classroom. In their

---

122. Cohen v. California, 403 U.S. 15 (1971), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1082-83.

123. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (reversing "fighting words" conviction on overbreadth grounds), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1079. As the authors of the casebook point out, the Court "has not sustained a conviction on the basis of the fighting words doctrine since *Chaplinsky*." GUNTHER & SULLIVAN, *supra* note 2, at 1078.

124. *Gooding*, for instance, involved a black antiwar protester involved in an altercation with a white Georgia policeman. *Id.* at 1079.

125. For an elaboration of this point see Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990).

organization of and introductory notes to the material entitled "Government's Power to Limit Speech in Its Capacity as Proprietor, Educator, Employer and Patron," Gunther and Sullivan quite properly emphasize that this is not the case.[126] But even here lurks what is in my view a problem related to these authors' overreading of *Cohen* as nullifying all but *Chaplinsky*'s risk of violence rationale.

The basic organization of the casebook suggests a general rule that content-based regulation of speech is presumptively unconstitutional, except where government acts other than in its usual lawmaking sovereign capacity (e.g., as proprietor, educator, employer or patron). Specifically, this organization suggests that if government is not acting in any of these other capacities, but is regulating speech in its usual sovereign capacity, the "usual" rule against content discrimination applies. While this is a plausible way to describe modern free speech jurisprudence, I suggest that it may have more of a normative element to it than Gunther and Sullivan perhaps realize.

In my view a more accurate description of the general First Amendment landscape is this: The strong protection of speech represented by the rule against content discrimination, and particularly the suspension of civility norms represented by cases such *Cohen* and the flag burning cases, is limited primarily to the realm of debate on matters of public concern.[127] More specifically, even when government is regulating speech in its usual sovereign capacity there is no general rule against content discrimination. This position is supported by cases such as *Dun & Bradstreet v. Greenmoss Builders*,[128] which, in stark contrast to cases such as *New York Times v. Sullivan*[129] and *Gertz v. Welch*,[130] found that the First Amendment did not impose limitations on state law defamation actions where a private plaintiff sought recovery for speech not of public concern.[131] This position is also supported by the numerous content-based restrictions that

126. GUNTHER & SULLIVAN, *supra* note 2, at 1293.

127. For an elaboration of this view see James Weinstein, *A Brief Introduction to Free Speech Doctrine*, 29 ARIZ. ST. L. J. 461, 468-69 (1997). For the view that the suspension of civility norms represented by Cohen and the flag burning cases is limited *exclusively* to the realm of public discourse, see Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L. J. 473, 481 (1997). For criticism of Post's perspective and the usefulness of the concept of "public discourse" in free speech jurisprudence, see Paul Bender, *Comment on Robert C. Post's Community and the First Amendment*, 29 ARIZ. ST. L. J. 485 (1997). *See also* Robert C. Post, *Reply to Bender*, 29 ARIZ. ST. L. J. 495 (1997).

128. 472 U.S. 749 (1985).

129. 376 U.S. 254 (1964), *reprinted in* GUNTHER & SULLIVAN, *supra* note 2, at 1094.

130. 418 U.S. 323 (1974), *discussed in* GUNTHER & SULLIVAN, *supra* note 2, at 1102.

131. *Greenmoss Builders*, 472 U.S. at 749.

government routinely places on financial speech (e.g., rules regulating insider trading or the content of proxy statements), which no one seriously thinks violate the First Amendment.

In organizing the materials and writing the notes and question in the 13th edition of *Constitutional Law*, Gunther and Sullivan exhibit the objectivity and detachment that most scholars cherish but few attain. But in a work of this magnitude it is impossible (and perhaps not even desirable) to completely separate the descriptive from the normative. Thus Gunther and Sullivan's free speech materials may represent a somewhat more speech-protective and autonomy-based perspective than other scholarly accounts.

V. CONCLUSION

The free speech materials in the 13th edition of Gunther and Sullivan's Constitutional Law materials are well organized, the case selection and editing peerless, the notes and questions informative and stimulating. In my view these are the best materials on the market, either for use in a basic constitutional law course or one dedicated solely to free speech. I might add that, as a prominent constitutional law practitioner wrote about a previous edition,[132] this casebook will also prove enormously valuable to lawyers involved in free speech cases. And needless to say, any one involved in First Amendment scholarship should have this book close at hand.

As good as the free speech materials were in previous editions, these materials in the 13th edition are even better, combining the best of Gunther and Sullivan.

132. John Frank, Book Review, 68 ABA JOURNAL 593 (1982).