Mass Media Law 21st edition Calvert Solutions Manual

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Chapters 2 and 3
The First Amendment

What's the Big Picture for Chapter 2?

Like Chapter 1, Chapter 2 is also an essential, foundational chapter. It introduces students to the notion of freedom of expression, the First Amendment protections of free speech and press, and numerous theories for interpreting and applying the First Amendment. It also covers several substantive areas where students can see the First Amendment in action, such as the section titled "Prior Restraint" and (more interesting for students) the section titled "Media Liability for Real-Life Violence."

Some of the new material in Chapter 2 for the 21st edition of the text is as follows:

1. A new section on levels of First Amendment scrutiny and distinctions between content-based and content-neutral regulations, using the U.S. Supreme Court's 2018 *National Institute of Family and Life Advocates* v. *Becerra* decision as one example of a content-based regulation of speech.
2. Updated examples of self-censorship or community censorship, including ABC canceling the hit show "Roseanne."
3. Updated data about Americans' general lack of knowledge about the First Amendment in the gray-shaded textbox titled "Do You Know What the First Amendment Says? Many Americans Have No Clue."
4. New discussion of a federal court ruling that President Donald Trump's utterance of the phrase "Get 'em out of here" during a campaign rally did not constitute an unlawful incitement to violence.
5. An updated gray-shaded textbox titled "Blasphemy, Dissent and Counterspeech: How American Values Don't Translate Worldwide," discussing ways in which American values regarding free speech and free press don't always translate around the world.

What in Chapter 2 Is of Current Interest to Students?

While most of the material in Chapter 2 is historical in nature and thus not always appealing to some students, this historical material is nonetheless important for students to understand in order to provide context and perspective. There is, however, a great deal of modern content in Chapter 2.

The heading in Chapter 2 titled "Community Censorship, Then and Now" features many timely

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examples of nongovernmental censorship, often committed by major corporations and appealing to students. Community censorship, or self-censorship, is censorship by private people or business entities. This is different from censorship or punishment imposed by the government, which is protected under the First Amendment. Community censorship is not protected under the First Amendment; that is, there is no First Amendment right to have Walmart sell your video game. The material under this heading, in other words, is nonhistorical. You might ask students in class for examples of "community censorship" that they have either heard or seen in the media or experienced firsthand. This heading teaches students about the concept of a heckler's veto and the principle of viewpoint neutrality, both of which are core concepts for understanding the freedom of expression in the United States.

Chapter 2 also features a gray-shaded textbox titled "What is 'Speech' Anyway?" This textbox discusses the symbolic speech doctrine in which courts treat conduct, such as burning a flag in political protest at a rally, as speech if two elements—one focusing on the actor, the other on the audience—are satisfied:

1. Actor: The person engaging in the conduct must intend to convey a particular or specific message with his or her conduct.
2. Audience: There must be a great likelihood, under the surrounding circumstances in which the conduct takes place, that some people who witness it will reasonably understand the particular message that was intended by the actor.

Another gray-shaded textbox in Chapter 2 is titled "'To Catch a Predator': Media Liability for Suicide and Emotional Distress?" This textbox relates, in part, to a lawsuit filed against NBC for its controversial television series titled "To Catch a Predator." There is also material on the same NBC program relating to a 2011 case called *Tiwari* v. *NBC Universal, Inc*. Many students have heard about the "To Catch a Predator" television series. To supplement the textbook, you might find articles that describe the show or, more specifically, one or both of the cases discussed in this textbox. Supplementing the material in the textbook during class time with articles related to the textbox is a good pedagogical method to get everyone in class on the same page.

In addition, the heading in Chapter 2 titled "Media Liability for Real-Life Violence" details modern content and may be of particular interest to students.

What Might I Skip in Chapter 2?

The heading titled "Media Liability for Real-Life Violence" is popular with students, but it can be skipped if you are teaching a class that is narrowly focusing on press law, targeting only journalism students or looking for ways to save time.

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What about the Seven First Amendment Theories in Chapter 2?

You may choose to emphasize some First Amendment theories over the other theories, or you may choose to cover them all briefly. Alternatively, these theories make for great questions in exams (such as: What is the primary goal of protecting speech under the marketplace of ideas theory? What are the weaknesses of the marketplace of ideas theory? What is the primary goal of protecting speech under Meiklejohnian theory?). They also allow for contrast questions as well as excellent multiple-choice questions.

In the discussion under the "Absolutist Theory," you will find material on the 2010 U.S. Supreme Court decision in *United States v. Stevens* that could be of interest to students because the case involved graphic videos depicting cruelty toward animals.

What about the Section on Prior Restraints in Chapter 2?

Any student who is studying the First Amendment needs to know about prior restraints on speech imposed by the government. A helpful teaching dichotomy for this section is to ensure that students understand the difference between prior restraints on speech (that is, reviewing, regulating or stopping speech before it is spoken) and subsequent punishments on speech (that is, allowing one to tell one's speech and then punishing him or her for the speech after it is spoken). This edition of the textbook features more information on prior restraints (including information on the Internet), but it leaves intact the discussion of the seminal prior restraint case in the United States, *Near* v. *Minnesota*.

You might ask your students the following question: In the age of the Internet and in light of websites like WikiLeaks, do you think that a prior restraint order by a court can ever be truly effective in stifling publication of information?

What's the Big Picture for Chapter 3?

Chapter 3 focuses on contemporary problems affecting the First Amendment guarantee of free speech. It contains many different subjects and topics from which you can pick and choose to cover.

Here are highlights of some of the new material in Chapter 3 for the 21st edition of the book:

1. Two new examples from 2018 of censorship of student newspapers at public high schools.
2. A discussion of the December 2017 decision in *V.A.* v. *San Pasqual Valley Unified* in which a federal district court issued a preliminary injunction stopping a public school district from

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enforcing a policy that banned students from "kneeling, sitting or similar forms of political protest" during the playing or singing of the National Anthem at home and away games.
3. A discussion of a 2018 case involving a public school student who was banned from wearing a T-shirt featuring the word "LOVE" on the front because it was spelled with stylized letters formed by weapon imagery.
4. A discussion of a 2017 controversy involving two public school students who were told by a teacher they could not wear T-shirts sporting President Trump's campaign slogan "Make America Great Again."
5. Updated content on anti-*Hazelwood* statutes that are being adopted in some states in the wake of the Student Press Law Center's "New Voices" initiative.
6. A discussion of the 8th U.S. Circuit Court of Appeals' decision in 2016 in *Keefe* v. *Adams* to apply the Supreme Court's *Hazelwood* test (designed for high schools) at the college level.
7. A discussion of the Department of Education's decision in 2018 to open a Clery Act investigation into Michigan State University's actions regarding Dr. Larry Nasser, who was convicted of sexually assaulting multiple young women, including several prominent gymnasts.
8. Updated content on book banning.
9. A discussion of the 2018 decision by a federal district court judge in *Knight First Amendment Institute* v. *Trump* holding that the "interactive" portion of President Donald Trump's personal Twitter account @realDonaldTrump where people can directly respond to Trump's tweets is a designated public forum.
10. An all-new discussion of what constitutes a limited public forum.
11. Analysis of the U.S. Supreme Court's 2018 decision in *Minnesota Voters Alliance* v. *Mansky* concluding that the interior of a polling place on election day constitutes a nonpublic forum. Additionally, the Supreme Court held in *Mansky* that a Minnesota statute that banned wearing any "political badge, political button or other political insignia" inside a polling place on election day violated the First Amendment because the statute failed to define the key term "political."
12. A discussion of the Supreme Court of Georgia's 2017 decision in *Freeman* v. *Georgia* holding that silently giving a middle-finger gesture from the back of a church at a pastor during a service without doing anything more does not constitute "fighting words."
13. Analysis of two new (one from 2016, one from 2018) federal appellate court decisions involving the true threats doctrine.
14. A discussion of controversial speakers, such as white nationalist Richard Spencer, on public university campuses.
15. A review of the FCC's Restore Internet Freedom Order adopted in 2017.

What in Chapter 3 Is of Current Interest to Students?

Three particular topics that are likely to have the most appeal to students are as follows:

1. **The First Amendment in Public Schools**: This section appeals to college students as they

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might have experienced censorship of expression in their high schools, which has grown greatly in recent years. In addition, this section covers the college press and censorship of student newspapers at high schools and colleges—including a growing problem of the theft of college newspapers by disgruntled students.

New to the 21st edition in this area that might be of particular interest to students is a case called *V.A. v. San Pasqual Valley Unified School District* involving a public high school football player who took a knee during a game during the playing of the national anthem and the resulting policy the school district adopted prohibiting that practice.

2. **Theft of College Newspapers**: This topic is covered in the heading titled "*Problems for College Journalists.*" Students might consider if this problem exists on their campus. Visit the website of the Student Press Law Center (SPLC) to look up current information on the issue of newspaper theft at https://splc.org/newspaper-theft-resources/

3. **The First Amendment and the Internet**: This section has updated content on net neutrality that discusses the FCC's Restore Internet Freedom Order that was adopted in December 2017 along partisan lines (the Republican commissioners voted for it, the Democrats against it) and was quickly challenged in court after taking effect in 2018. Instructors should keep an eye out for developments on the court proceedings and outcomes in this case that will likely continue well after the publication of the 21st edition of the book.

What Might I Skip in Chapter 3?

Although the heading titled "The First Amendment in Schools" is very popular among most students, the sections under this heading on high school expression are less essential than are the sections on censorship of college newspapers and problems for college journalists.

One of the authors of this book sometimes does not teach the heading titled "The First Amendment and Election Campaigns."

Problem Questions

1. In 1971, in the case of *Cohen* v. *California*, the U.S. Supreme Court protected a man's right to wear a jacket emblazoned with the message "Fuck the Draft" during the Vietnam War. Apply Meiklejohnian theory, the marketplace of ideas theory, and the self-realization/self-fulfillment theory discussed in Chapter 2 to make a cohesive and cogent argument that explains why Cohen's offensive and vulgar message deserves protection of his right to free speech guaranteed by the First Amendment.

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Answer: Meiklejohnian theory represents a hierarchical approach to First Amendment theory, with political speech placed at the top of this hierarchy. Under this theory, a broad range of speech is essential to successful self-government, and Meiklejohnian theory includes speech related to education (history, political science, geography, etc.), science, literature, and many other topics. Cohen's speech is about the draft during Vietnam War—a public and political issue and a government policy. On top of this, his speech is dissenting political expression as it challenges an official government policy during a time of war. In a truly self-governing democracy, such speech must be protected. Thus, the Meiklejohnian theory would protect such speech because it can be directly tied to self-government.

The marketplace of ideas theory embodies what First Amendment scholar Daniel Farber calls "the truth-seeking rationale for free expression." The premise of this idealistically free and fair competition of ideas is that truth will be discovered or, at the very least, conceptions of the truth will be tested and challenged. In the case of *Cohen* v. *California,* the topic in question is the draft during the Vietnam War. In determining the truth about the draft—such as whether or not it is a good or bad government policy—all ideas concerning the draft should be identified in the marketplace of ideas. Cohen is merely adding his viewpoint to a very public marketplace (that is, in a public courthouse). The Supreme Court Justice Oliver Wendell Holmes said in *Abrams* v. *United States*, ". . . the best test of truth is the power of the thought to get itself accepted in the competition of the market." Cohen's idea may be offensive, and it may not "get itself accepted in the competition of the market." But to squelch or to censor his speech would be to reject the process of competition of ideas. If only the speech in favor of the draft was allowed, then there would be no competition for the topic and the very premise of the marketplace of ideas would be invalid.

Under the self-realization/self-fulfillment theory, speech is important to an individual regardless of its impact on politics or its benefit to society at large. This theory, thus, supports Cohen's right to identify himself to others and to realize his own identity as an individual who is vehemently against the draft through the speech on his jacket. Under this theory, it does not matter whether Cohen's speech actually changes anyone else's view about the draft or produces a "truth" about the draft. However, protecting Cohen's right to speech about the draft under the theory allows him to realize his identity as a draft dissenter and fulfill his own political passion.

2. One day, a public high school student named Pelosi wears to school a homemade T-shirt that reads, "Donald Trump Is an Idiot." It has a picture of Donald Trump wearing a dunce cap on his head. A few kids react to the T-shirt with laughter, while others tell Pelosi that they believe "Trump rocks." School administrators, however, object to the T-shirt, finding

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it offensive and degrading to President Trump, and they order Pelosi either to wear another T-shirt or to wear the anti-Trump T-shirt turned inside out so that the message is not visible. Pelosi refuses to do so, and she is suspended from attending school for ten days. Pelosi, then, turns around and sues the school for violating her First Amendment right of free speech. As a judge, you should consider whether Pelosi's First Amendment right of free speech has been violated or not.

a. Identify the name of the U.S. Supreme Court case that is most applicable here as the precedent given the facts of Pelosi's case. Then, set forth the rule or test articulated in that case for determining when school administrators may censor speech without violating a student's First Amendment right to free speech. In addition, use the relevant facts to explain and demonstrate why this is the correct precedent to apply.

Answer: The case that is most applicable here as the precedent is the case of *Tinker* v. *Des Moines*. In the case, the Supreme Court ruled that students in the public schools do not shed at the schoolhouse gate their constitutional rights to freedom of speech or expression. The Court concluded that the "record does not demonstrate any facts which might reasonably have led school authorities [in Des Moines] to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."

Pelosi's case is similar to *Tinker* in the following three ways:

- Similar to the issue of wearing black armbands with peace symbols to protest the war in Vietnam at Tinker's school, Pelosi's T-shirt is also political in nature. It is a form of political speech criticizing a well-known political figure.
- Similar to *Tinker*, the message in Pelosi's case is also passive as it is on her clothing rather than in her speech.
- Similar to the students at Tinker's school, students in Pelosi's school who object to the message on her T-shirt can easily ignore it by looking away from the T-shirt.

b. Explain why two other major U.S. Supreme Court cases on the free speech rights of high school students are not applicable here. Be sure to identify the names of those cases in the process of answering this question and to use the relevant facts that distinguish them from Pelosi's case.

Answer: Two other major U.S. Supreme Court cases on the free speech rights of high school students that are not applicable to this scenario are as follows:

- *Hazelwood School District* v. *Kuhlmeier*: This case is not applicable to the scenario because Pelosi's T-shirt is not sponsored by her school, and it is not

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part of the school curriculum.

- *Bethel School District* v. *Fraser*: This case is not applicable to this scenario because the speech in question on Pelosi's T-shirt is not sexually offensive speech—it is not sexually lewd, vulgar, or indecent. Furthermore, the *Bethel School District* v. *Fraser* case involved spoken language to a captive audience of students in an auditorium, whereas Pelosi's message is printed on a T-shirt, and it can easily be ignored. In other words, the *Bethel School District* v. *Fraser* case involved active speech (spoken), whereas Pelosi's case involved passive (printed) speech.

c. Applying the rule or test that you identified in question a, is Pelosi likely to prevail against the school?

Answer: Yes, Pelosi is likely to prevail against her school because of the following reasons:

- The reaction of the students, as given in the facts, does not suggest any substantial and material disruption of the educational atmosphere at the school—in other words, there is no evidence of a disturbance (or a potential disturbance) of any kind (some students even laughed at it).
- The only reason the school administrators gave for censoring the T-shirt was that they found it "offensive and degrading to President Trump." This is not the same as a substantial or material disruption.

3. The Cleveland Political Awareness League, a nonprofit, nonpartisan community group, scheduled a series of eight talks by regional and national political figures in early 2019. Two talks were held each month at the Paramount Theater, a large auditorium, over a four-month period. The speakers represented a variety of viewpoints and political policies. On the evening of the second speech, Art Ferrill, a radical socialist and longtime local political agitator, set up a card table on the public sidewalk outside the theater and tried to sell a book he had written titled, "Government and the End of Civilization." Police outside the theater asked Ferrill to move his table because they said "it was an impediment to the pedestrians using the sidewalk." He refused, and he was arrested for violating a city ordinance on street vending. "He failed to have a vending permit," the police said.

The city's ordinance requires that any person who seeks to sell any merchandise on a city sidewalk must obtain a permit. This permit is issued if the city manager finds that the goods for sale are legitimate and the seller will not endanger public safety or convenience. The city manager should also determine if the sale of the goods is in the "best interest" of the people of Cleveland. The sale of newspapers on street corners to pedestrians and motorists is exempt from the provisions of the ordinance.

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Ferrill challenged the time, place and manner ordinance on First Amendment grounds. He argues that the permit process is unconstitutional. He also argues that if it is permissible to sell newspapers without a permit, it should be permissible to sell books as well.

a. What kind of a forum is a city sidewalk?

Answer: Most courts consider a city sidewalk to be a traditional public forum.

b. In testing whether a time, place and manner rule is constitutional, what criteria do the courts apply?

Answer: The courts developed a set of criteria that is sometimes referred to as the intermediate scrutiny standard of judicial review. These criteria are as follows:

- The rule must be neutral as to content, or what the courts call content neutral, both on its face and in the manner in which it is applied.
- The law must not constitute a complete ban on a kind of communication.
- The state must articulate a substantial interest to justify this restraint on speech.
- The law must be narrowly tailored so that it furthers the state interest that justifies it. However, the law should not restrain more expression than is actually required to further this interest.

c. Does this law meet this test?

Answer: No, it does not. While the language of the law says "any merchandise," the city manager has the discretion to allow the sale of some goods and bar the sale of others, based solely on whether the sale is in the "best interest" of the people of the city. There are no guidelines to guide the city manager. By giving the city manager such unguided discretion, the law fails to meet the test for content neutrality. The law does not constitute a complete ban—there are other ways for Ferrill to sell his book. The state has a substantial interest in protecting pedestrian safety on the sidewalks. However, the law is not narrowly tailored. Crowded sidewalks might be a problem sometimes in some parts of the city, but they might easily accommodate a street vendor at other times in other parts of the city. The fact that newspapers can be sold without a permit is probably not a relevant argument since recent court decisions suggest that a community may discriminate among varieties of speech categories, such as newspapers versus books, so long as there is no discrimination within the speech categories (such as books about sports versus books about politics).

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