Mass Media Law 20th 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 A-heading titled "Prior Restraint" and (more interesting for students) the C-heading titled "Real-Life Violence: Blaming Movies, Video Games and Books."

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

1. Updated examples of self-censorship or community censorship, including major U.S. news outlets not publishing controversial cartoons of Prophet Muhammad in 2015 and ESPN's firing of Curt Schilling for his post on social media in 2016
2. 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"
3. An updated gray-shaded textbox titled "Blasphemy and Counterspeech: How American Values Don't Translate Worldwide" discussing ways in which American values don't translate worldwide
4. A new example of a lawsuit against Snapchat to demonstrate negligence principles in a gray-shaded textbox titled "Should Snapchat Be Held Liable for Traffic Accidents?"
5. A new case example on prior restraints affecting information uploaded to the Internet

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 examples of nongovernmental censorship, often committed by major corporations and appealing to students. Community censorship includes government censorship (which is protected under the First Amendment) and self-censorship that is censorship by corporations and businesses (which is not protected under the First Amendment; that is, there is no First Amendment right to

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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" on the *Dateline NBC* television channel. 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 newspaper articles on the Internet that describe the show or, more specifically, one or both of the cases discussed in this textbox. Supplementing the material in the textbox during class time with newspaper 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 "Real-Life Violence: Blaming Movies, Video Games and Books" details modern content and may be of particular interest to students. This heading includes a discussion of the U.S. Supreme Court's decision in the violent video game case of *Brown v. Entertainment Merchants Association* in 2011. Violent video games are an increasingly popular target for lawmakers seeking to be "parent friendly." Many college students today play video games, so the appeal of this section is obvious. Importantly, this heading discusses two key concepts—the strict scrutiny test that applies to content-based laws (laws that single out a particular type of content or subject matter for regulation but leave out the other untouched topics and ideas of the content or subject matter) and the void for vagueness doctrine. If you are teaching a class that is narrowly focusing on press law or targeting only journalism students, you can probably skip this unit. But if you have students who are "media studies" majors, the heading will be particularly interesting for those studying the effects of the media.

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What Might I Skip in Chapter 2?

As just noted, the heading titled "Real-Life Violence: Blaming Movies, Video Games and Books" 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.

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 one for one's speech after it is spoken). This edition of the textbook features more information on prior restraints (including information on the Internet) than the previous editions, 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 individuals like Julian Assange and his WikiLeaks website, 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 choose.

Some of the new material in Chapter 3 for the twentieth edition of the text includes the

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following:

1. Updated examples of censorship of content in student newspapers at high schools
2. A new gray-shaded textbox titled "PUNISHING STUDENTS FOR DISPLAYING THEIR 'SEXUALITY' ON T-SHIRTS: VIEWPOINT-BASED DISCRIMINATION AGAINST SPEECH?" describing a lawsuit filed by a student against her school administrators after she was sent home from school for refusing to change out of a T-shirt that said, "Nobody knows I'm a lesbian"
3. Updated content in the gray-shaded textbox titled "STUDENT SPEECH RIGHTS ON THE WEB: THE ISSUE THE SUPREME COURT MUST ADDRESS" involving the ability of schools to punish its students for their speech directed at the school administrators while off campus on their personal computers
4. Updated examples of book-banning lawsuits
5. Updated material on the Clery Act, which requires universities to disclose crime data and to provide timely warnings of crimes on campus
6. Updated examples and content on student newspapers that were stolen at their college campuses
7. New discussion of a 2016 appellate court case striking down a state law banning "ballot selfies" because the law failed intermediate scrutiny
8. A new gray-shaded textbox titled "SOCIAL MEDIA AND TRUE THREATS" highlighting the U.S. Supreme Court's decision in the 2015 case *Elonis* v. *United States* regarding social media, rap music, and true threats
9. A new gray-shaded textbox titled "DEFENDING SPEECH OUTSIDE OF ABORTION CLINICS" discussing the U.S. Supreme Court's decision in the 2014 case *McCullen* v. *Coakley* where the Court struck down a Massachusetts law that regulated abortion protests
10. An updated section on net neutrality, with a particular focus on the FCC's Open Internet Order released in March 2015

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 Schools: This section appeals to college students as they 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.
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 (http://www.splc.org).
3. The First Amendment and the Information Superhighway: This section has updated content

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on net neutrality that discusses the FCC's Open Internet Order which was released in March 2015.

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.

   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 the 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

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

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disturbances or disorders on the school premises in fact occurred."

Clinton's case is similar to *Tinker* v. *Des Moines* 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, Clinton's T-shirt is also political in nature. It is a form of political speech criticizing a well-known political figure.
- Similar to *Tinker* v. *Des Moines*, the message in Clinton'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 Clinton'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 Clinton'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 Clinton's T-shirt is not sponsored by her school, and it is not part of the school curriculum.
- *Bethel School District* v. *Fraser*: This case is not applicable to this scenario because the speech in question on Clinton'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 Clinton'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 Clinton's case involved passive (printed) speech.

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

Answer: Yes, Clinton 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).

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- 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 2017. 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.

   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

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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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Mass Media Law

20th Edition

Don Pember

Clay Calvert

Chapter 2

The First Amendment

The Meaning of Freedom

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Freedom of the Press in England, 1

The British devised several means to restrict press in England

- ***Seditious Libel*** laws
  - Used to punish citizens who criticized the government, and it did not matter whether the criticism was truthful or not
- ***Licensing or Prior Restraint*** laws
  - Required printers to obtain prior approval from the government or the church before printing their handbills, pamphlets, or newspapers

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Freedom of the Press in England, 2

- ***Bonds***
  - Money deposited with the government that would be forfeited if the government felt the material should have not been published

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Freedom of the Press in Colonial America, 1

Licensing lasted until the mid-1720s in the American colonies

Most publishers refused to buy the tax stamps, and there was little retribution by the British

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Freedom of the Press in Colonial America, 2

Trial of John Peter Zenger

- Zenger was the publisher of the *New York Weekly Journal*
- His newspaper was sponsored by Lewis Morris and James Alexander, political opponents of the unpopular colonial governor, William Cosby
- Zenger was jailed in November 1734 after publishing several articles criticizing Cosby
  - Although Zenger was clearly guilty under the seditious libel laws in place at the time, a jury acquitted him
    - This is called jury nullification today

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Trial of John Peter Zenger

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Community Censorship, Then and Now, 1

The plight of the pro-British printer in Boston in the 1770s is not a unique chapter in American history

Today such community censorship still exists and is growing in some instances

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Community Censorship, Then and Now, 2

Heckler's veto

- When a crowd or audience's reaction to a speech or message is allowed to control and silence that speech or message

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Community Censorship, Then and Now: Contemporary Examples

Radio stations in the United States refused to play music by the band Dixie Chicks because of the lead singer's political statements

In 2015, several major media organizations in the United States chose not to publish controversial cartoons depicting the Prophet Muhammad

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The First Amendment: The New Constitution

Inclusion of a Bill of Rights was not discussed until the last days of the Constitutional Convention

The Bill of Rights was introduced and advocated by James Madison of Virginia during the First Congress

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The First Amendment

The New Constitution

- The First Amendment to the United States Constitution
  - *Congress shall make no law respecting an 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*

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Freedom of Expression in the 18th Century

Original Intent of the Constitution

- The meaning intended by the framers of the First Amendment

What did the First Amendment mean in 1791?

- No prior restraint
- No licensing
- No punishment after publication

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Freedom of Expression Today

The First Amendment means today what the Supreme Court of the United States says it means

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Seven First Amendment Theories

Absolutist Theory

Ad Hoc Balancing Theory

Preferred Position Balancing Theory

Meiklejohnian Theory

Marketplace of Ideas Theory

Access Theory

Self-realization Theory

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The First Amendment: Absolutist Theory

Absolutist Theory

- "No law" means no law; the First Amendment presents an absolute protection against government censorship
- Few Supreme Court justices have adopted this position; no Supreme Court majority has ever adopted an absolutist position

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Ad Hoc Balancing Theory

When free speech and press rights conflict with other important rights, courts must balance these freedoms with other values

- Freedom of expression is determined solely on a case-by-case basis

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Preferred Position Balancing Theory

Courts have attempted to balance the rights of free speech and press with the constitutionally guaranteed right of a fair trial

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Meiklejohnian Theory

Public Speech

- Speech or press that advances self-governance
- Should always be protected by the First Amendment

Private Speech

- Speech or press that addresses anything other than self-governance
- Should not be protected absolutely by the First Amendment

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Marketplace of Ideas Theory, 1

This metaphor, first introduced in the Supreme Court by Justice Oliver Wendell Holmes, Jr., currently dominates the Supreme Court's discussion of freedom of speech

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Marketplace of Ideas Theory, 2

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out

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Marketplace of Ideas Theory, 3

Critics of the Marketplace of Ideas theory say that:

- It allows hate speech with little value to be circulated
- Those with more resources are able to own and control the mass media

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Access Theory

Freedom of expression has little meaning if a citizen does not have the economic means to exercise this right

If media will not voluntarily allow use of airwaves or print, then government should force such access

Access Theory was struck down by the United States Supreme Court in *Miami Herald versus Tornillo*

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Self-Realization or Self-Fulfillment Theory

Speech can be inherently valuable to a person regardless of its effects on others, and it can be an end in itself

Example: expressing one's identity through speech

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The Meaning of Freedom

Seditious Libel and the Right to Criticize the Government

- The right to discuss, criticize, and oppose the government is central to people's political philosophy in the United States

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Critical Dates in the History of Sedition Law, 1

1735: Acquittal of John Peter Zinger

1791: Adoption of First Amendment

1798: Alien and Sedition Acts of 1798

1917: Espionage Act

1918: Sedition Act

1919: Clear and present danger test first created

1927: Brandeis sedition test in *Whitney* versus *California*

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Critical Dates in the History of Sedition Law, 2

1940: Smith Act adopted

1951: Smith Act ruled constitutional

1957: Scope of Smith Act narrowed

1969: *Brandenburg versus Ohio substantially curbs sedition prosecutions*

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Alien and Sedition Acts of 1798, 1

Forbade false, scandalous, and malicious publications against the United States government, Congress, and the president

Punished persons who sought to stir up sedition or urged resistance to federal laws

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Alien and Sedition Acts of 1798, 2

John Adams, a Federalist, who was the president at the time the law was passed and Thomas Jefferson, a Republican, were rivals

Law aimed at silencing criticism of Federalists in Jeffersonian political newspapers

There were 15 prosecutions under the Sedition Act, including editors of eight Jeffersonian newspapers

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Alien and Sedition Acts of 1798, 3

Adams lost his bid for re-election in 1800 largely because of his unsuccessful attempts at silencing critics with the Sedition Act

The Sedition Act expired in 1801

- Jefferson, now president, pardoned all those who had been convicted under the Act

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Sedition in World War I, 1

Espionage Act of 1917 made it a crime to:

- Willfully convey a false report with the intent to interfere with the war effort
- Cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty
- Willfully obstruct recruiting or enlistment

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Sedition in World War I, 2

Sedition Act of 1918 made it a crime to attempt to obstruct the recruiting service

- Made it criminal to utter or print or write or publish disloyal or profane language that was intended to cause contempt of, or scorn for, the federal government, the Constitution, the flag, or the uniform of the armed forces

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Sedition Act of 1918, 1

Under the Act, the United States Post Office Department censored thousands of newspapers, books, and pamphlets

- Those found to violate the Act often lost government-subsidized second class mailing privileges or found that their mail was never delivered

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Sedition Act of 1918, 2

States also adopted statutes aimed at dissenters

States passed ***criminal syndicalism*** statutes that prohibited the display of a red or a black flag

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The Meaning of Freedom: The Smith Act of 1940, 1

Made it a crime to:

- Advocate or conspire to advocate the violent overthrow of the government
- Organize a group that advocated the violent overthrow of the government
- Be a member of a group that advocated the violent overthrow of government

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The Meaning of Freedom: The Smith Act of 1940, 2

In the 1990s, Civil War–era sedition statutes were used to prosecute those involved with the World Trade Center bombing as they conspired to overthrow, put down, or to destroy by force the Government of the United States

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Mass Media Law 20th edition Calvert Solutions Manual

The Meaning of Freedom: The Smith Act of 1940, 3

In 2006, a federal judge allowed charges to proceed under the Espionage Act of 1917, when two former lobbyists for the American Israel Public Affairs Committee allegedly obtained classified United States defense information and then communicated it to the Israeli officials

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Defining the Limits of Freedom of Expression, 1

The Clear and Present Danger Test

- Holmes in *Schenck,* 1919: "But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used, are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

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Defining the Limits of Freedom of Expression, 2

The Clear and Present Danger Test

- Brandeis in *Whitney*, 1927: “. . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.”

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The Clear and Present Danger Test, 1

Chief Justice Vinson in the *Dennis* versus the United States, 1951 case

- Clear and *probable* danger test
- "In each case courts must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

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The Clear and Present Danger Test, 2

Brandenburg versus Ohio in 1969

- According to the high court, "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except *where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions*."

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Real-Life Violence: Blaming Movies, Video Games, and Books, 1

- The *Brandenburg* test for incitement to violence is used by courts in wrongful death, negligence, and product liability lawsuits against media products that play some part in inciting a person to commit illegal acts

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Real-Life Violence: Blaming Movies, Video Games, and Books, 2

Media products that have been challenged in court include:

- Movies: The Basketball Diaries
- Video Games: Grand Theft Auto, Mortal Kombat, and Resident Evil
- Books: Hit Man

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Real-Life Violence: Blaming Movies, Video Games, and Books, 3

To justify regulations based on content, the ***strict scrutiny*** standard of judicial review must be satisfied

- Under ***strict scrutiny***, the state or municipality must prove that:
  - It has a compelling interest that justifies the games' regulation
  - The regulation restricts no more speech than absolutely necessary to serve that allegedly compelling interest

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The *Gitlow* Ruling and the Incorporation Doctrine

Incorporation doctrine: Gitlow states that freedom of speech is protected by the 14th Amendment

The free speech and free press clauses of the First Amendment have been "incorporated" through the 14th Amendment due process clause as fundamental liberties to apply to state and local government entities and officials, not just to Congress

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Prior Restraint, 1

Near versus Minnesota in 1931

- Jay M. Near and Howard Guilford, publishers of the Saturday Press, published articles attacking corruption in the city government and defaming leading government officials
- A Minnesota statute empowered courts to declare any obscene, lewd, lascivious, malicious, scandalous, or defamatory publication a public nuisance
  - The *Saturday Press* was declared a public nuisance and was enjoined from printing any further editions

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Prior Restraint, 2

The Pentagon Papers in 1971

- High court ruled 6-3 in favor of The New York Times and the Washington Post and refused to block the publication of the Pentagon Papers
  - The Court did not say the *Times* and *Post* had a First Amendment right to print this story, just that the government failed to show the court why such a restraint should be imposed on the two newspapers

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Progressive Magazine Case, 1

United States versus *Progressive* in 1979

- Issued a preliminary injunction stopping publication of a magazine article that specified “with particularity the three key concepts necessary to construct a hydrogen weapon”

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Progressive Magazine Case, 2

Eight years later the Progressive magazine was enjoined from publishing an article about thermonuclear weapons

The decision was of little precedential value, as it was the opinion of only one federal district court judge, not an appellate court

- *Before the decision worked its way up the appellate court ladder, a newspaper in Wisconsin published the same information, thus rendering moot the case against the publishers of the Progressive magazine*

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United States versus Bell

A federal appellate court upheld a permanent injunction barring Thurston Paul Bell from promoting and selling unlawful tax advice on his website

- Ruled that prior restraints bear a heavy presumption against their constitutional validity "does not apply to restriction on unprotected speech, including false or unlawful commercial speech"

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