The Courts and Political Controversy

POLI 104I

Where are we going?

- 6/27 - the relationship between law and politics.
- 6/29 - incorporation (OB2 – 4a)
- 7/4 - incitement (OB2 – 5a)
- **7/6 - obscenity (OB2 – 5b (first half))**
- 7/11 - executive power (OB1 – 4a, d)
- 7/13 - election law (OB1 - 8c)
- 7/18 - threats (OB2 – 5b (second half))
- 7/20 - guns (OB2 365-387 + Bruen)
- 7/25 - privacy (OB2 – 11 + Dobbs)
- 7/27 - review

How to Succeed

- Attend the lectures or watch asynchronously
- Do the assigned reading
- Plan ahead for the response memos
  - These will be take-home essay format
  - Responses uploaded to Canvas
  - Prompts distributed in advance

Here's how your final grade will be calculated:

- Response Memo #1 - 25%
- Response Memo #2 - 35%
- Response Memo #3 - 40%

- This is a **writing-intensive course**. The assignments are all take-home essay format, and I'll circulate the prompts several days prior to the due date.
  The UCSD Writing Hub is an excellent resource for help with academic writing.

How to Succeed

- The **response memos** will ask you to make a legal recommendation to a client who is not familiar with the cases we will be studying.
- In the course of making this recommendation, you'll need to consider the points of law favorable to your client, as well as anticipate the argument that opposing counsel will be making.
- If this sounds difficult at the moment, don't worry. Once we've started reading cases, everything will be more clear.

Civil Liberties Protected in the Constitution

- Article 1, Section 9: “No Bill of Attainder or ex post facto Law shall be passed.”
- Article 1, Section 9: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
- Article 1, Section 10: “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”
- Article 4, Section 2: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

Constitutional Amendments

- *Amendments #1-#10 are known as the Bill of Rights (ratified 1791).*

- 1st: 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.

- 2nd: A well regulated Militia, being necessary to the security of a free State, **the right of the people to keep and bear Arms, shall not be infringed.**

- 3rd: No Soldier shall, in time of peace be **quartered in any house**, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Constitutional Amendments

- 4th: The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures**, shall not be violated, and no Warrants shall issue, but upon **probable cause**, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- 5th: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a **presentment or indictment of a Grand Jury**, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to **be twice put in jeopardy** of life or limb; nor shall be compelled in any criminal case to be a **witness against himself**, nor be deprived of life, liberty, or property, without **due process of law**; nor shall private property be taken for public use, without just compensation.

Constitutional Amendments

- 14th: [1868]
- Section 1.
  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are **citizens** of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**.

Reading for 7/6

- obscenity (OB2 – 5b (first half))
  - Regina v. Hicklin
  - Roth v. United States
  - Stanley v. Georgia
  - Miller v. California
  - Reno v. American Civil Liberties Union
  - Ashcroft v. Free Speech Coalition

Obscenity

- O’Brien: “In a pluralistic society, people disagree over what is obscene, pornographic and offensive: no consensus is likely.”
  - “The Supreme Court, in maintaining that obscenity, pornography and fighting words fall outside the scope of First Amendment protection, continues to confront the vexing definitional problems presented by its own line drawing.”

Obscenity

- Regina v. Hicklin (1868)
  - This British case developed a common-law definition of obscenity that was subsequently influential in the United States.
  - Material is obscene if “the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such influences, and into whose hands a publication of this sort may fall.”
- “First employed by a circuit court in the Southern District of New York in United States v. Bennett (1879), a case in which the defendant was convicted of mailing a document advocating legalized prostitution, the Hicklin Test came to justify a wide-ranging official scrutiny of literature and the prosecution of serious works of contemporary fiction. Notable among them were Theodore Dreiser’s An American Tragedy and D. H. Lawrence’s Lady Chatterley’s Lover in 1930; James Joyce’s Ulysses in 1933; Edmund Wilson’s Memoirs of Hecate County in 1948; and Henry Miller’s Tropic of Cancer in 1953.”

Obscenity

- The Comstock Act (1973)
  - Formally the “Federal Anti-Obscenity Act”
- “American courts adopted the Hicklin Test in applying the Federal Anti-Obscenity Act of 1873 (the Comstock Act) and subsequent state anti-obscenity statutes modeled on the federal act.
- The Hicklin Test permitted a conviction for purveyors of obscenity if a publication had a mere tendency to arouse lustful thoughts in the minds of the “most susceptible,” usually youthful, readers.
- Isolated passages could be used to determine whether there was sufficient evidence to infer a defendant’s intention to corrupt public morals. A defendant could not rebut this inference by arguing that a book was published in the public interest or by providing evidence of its literary merit.”
- “The first case to question the Hicklin Test’s applicability “to the morality of the present time” was United States v. Kennerley (1913).

Obscenity

- Later Federal court decisions altered the test in various ways:
  - United States v. Dennett (1930) by requiring that a work be judged by its dominant theme;
  - United States v. One Book Named Ulysses (1933) that it undergo independent literary analysis and be judged by its effect on a person of average sexual instincts;
  - United States v. Levine (1936) that its lustful effect on the reader outweigh its literary or scientific merits; and
  - Parmelee v. United States (1940) that it be judged, as in Kennerley, by contemporary community standards."
- In Butler v. Michigan (1957), the Court unanimously held that a Michigan law violated the due process clause of the 14th Amendment. The law made it illegal to sell printed material thought to be obscene because of its potentially harmful influence on youths.
  - Abandons Hicklin's "most susceptible person" requirement.

Obscenity

- Roth v. United States (1953): decided 6-3; overturned.
  - The Court abandoned the Hicklin test, replacing it with “contemporary community standards.”
  - Background: “Samuel Roth, who ran an adult book-selling business in New York City, was convicted under a federal statute criminalizing the sending of "obscene, lewd, lascivious or filthy" materials through the mail for advertising and selling a publication called American Aphrodite ("A Quarterly for the Fancy-Free") containing literary erotica and nude photography. David Alberts, who ran a mail-order business from Los Angeles, was convicted under a California statute for selling lewd and obscene books.[2] The Court granted certiorari and affirmed both convictions.”
  - Majority (Brennan) “The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. ”

Obscenity

- Roth v. United States (1953): decided 6-3; reversed.
  - Concurrence (Warren: “[the] broad language used here may eventually be applied to the arts and sciences and freedom of communication generally…"
  - Dissent (Black and Douglas): The First Amendment means what it says it means.
- Kingsley International Corp. v. Regents of University of New York (1959):
  - Overturns denial of a license to exhibit a film of *Lady Chatterly’s Lover*.
  - No bans for mere “thematic obscenity”: dealing primarily with sexual themes.
- Manual Enterprises, Inc. v. Day (1962):
  - the appeal to prurient interests must be made in a “patently offensive way.”
- Jacobellis v. Ohio (1964):
  - The work must lack “redeeming social importance.”

Obscenity

- A Book Named “John Cleland’s Memoirs of a Woman of Pleasure v. Massachusetts (1966): combines the above three criteria: a work is obscene if:
  - It has a prurient interest that
  - Appeals in a patently in offensive way, and
  - Lacks a redeeming social value
- Stanley v. Georgia (1969):
  - Strikes down a Georgia statute prohibiting possession of obscene materials in one’s own home.
  - Background: “Under authority of a warrant to search appellant's home for evidence of his alleged bookmaking activities, officers found some films in his bedroom. The films were projected and deemed to be obscene. Appellant was arrested for their possession. He was thereafter indicted, tried, and convicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of a Georgia law.”

Obscenity

- Stanley v. Georgia (1969): decided 9-0, reversed.
  - Majority (Marshall): The First Amendment as made applicable to the States by the Fourteenth prohibits making mere private possession of obscene material a crime
    - Freedom of speech extends to what an individual possesses and chooses to read (Winters v. New York).
  - There is a difference between the public and private display of obscene material.
  - The right to receive information and to personal privacy are fundamental to a free society.
  - "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."
  - Concurrence (Stewart): concur in result but search violated Fourth Amendment protections against unreasonable searches and seizures.

- Osborne v. Ohio (1990): Law criminalizing the possession of child pornography upheld).

Obscenity

- Miller v. California (1973): decided 5-4,
- Background: Miller, after conducting a mass mailing campaign to advertise the sale of "adult" material, was convicted of violating a California statute prohibiting the distribution of obscene material. Some unwilling recipients of Miller's brochures complained to the police, initiating the legal proceedings.
- Majority (Burger): The Court modified the test for obscenity established in Roth v. United States and Memoirs v. Massachusetts, holding that "[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.“
  - “Contemporary community standards” means local, not national standards. This allowed prosecutors to engage in “forum shopping” for obscenity cases.
- Rejects the "utterly without redeeming social value" test of the Memoirs decision.

Obscenity

- Miller v. California (1973): decided 5-4,
  - Dissent (Douglas): obscenity cases “have no business in the courts.”
  - Dissent (Brennan): obscenity laws cannot not be “drafted consistently with the First Amendment.”
- The Miller test is still the main test for both state and federal obscenity prosecutions.
- “Criticism continues of the notion of applying “contemporary community standards.” For example, the 9th Circuit in United States v. Kilbride (2009) wrote that “a national community standard must be applied in regulating obscene speech on the Internet.””
- Pinkus v. United States (1978): children aren’t part of the community, they are “sensitive persons.”
- Pope v. Illinois (1987) the judgment about artistic merit should be made by a “reasonable” person (not an “ordinary” person as in Miller).

Obscenity

- City of Erie v. Pap's A.M. (2000): bans on nude dancing are concerned not with expression but with "secondary effects," so can be upheld (O'Connor).
- Reno v. American Civil Liberties Union (1997): decided 9-0; reversed.
  - The 1996 Communications Decency Act violates the First Amendment because its regulations amount to a content-based blanket restriction of free speech.
  - Background: "Several litigants challenged the constitutionality of two provisions in the 1996 Communications Decency Act. Intended to protect minors from unsuitable internet material, the Act criminalized the intentional transmission of "obscene or indecent" messages as well as the transmission of information which depicts or describes "sexual or excretory activities or organs" in a manner deemed "offensive" by **community standards**. After being enjoined by a District Court from enforcing the above provisions, except for the one concerning obscenity and its inherent protection against child pornography, Attorney General Janet Reno appealed directly to the Supreme Court as provided for by the Act's special review provisions."

Obscenity

- Reno v. American Civil Liberties Union (1997): decided 9-0; reversed.
  - Holding (Stevens): The Act failed to clearly define "indecent" communications, limit its restrictions to particular times or individuals (by showing that it would not impact adults), provide supportive statements from an authority on the unique nature of internet communications, or conclusively demonstrate that the transmission of "offensive" material is devoid of any social value.
  - We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. ... It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.
  - Concurrence (O'Connor): we should make parts of the internet "adults only."

Obscenity

- Ashcroft v. Free Speech Coalition (2002): decided 6-3; affirmed.
  - The Child Pornography Prevention Act of 1996 abridges freedom of speech when it proscribes a significant amount of speech that is not obscene.
  - Background: “The Child Pornography Prevention Act of 1996 (CPPA) prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." The Free Speech Coalition, an adult-entertainment trade association, and others filed suit, alleging that the "appears to be" and "conveys the impression" provisions are overbroad and vague and, thus, restrain works otherwise protected by the First Amendment.”
  - Majority (Kennedy): the CPPA to is inconsistent with Miller “insofar as the CPPA cannot be read to prohibit obscenity”, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the obscenity definition.