



# The Courts and Political Controversy

POLI 104I

# Texts

- ▶ *O'Brien and Silverstein - Constitutional Law and Politics Volume One* [[UCSD Bookstore \(Links to an external site.\)](#)] [[Amazon \(Links to an external site.\)](#)]
- ▶ *O'Brien and Silverstein - Constitutional Law and Politics Volume Two* [[UCSD Bookstore \(Links to an external site.\)](#)] [[Amazon \(Links to an external site.\)](#)]

# 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
- ▶ 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.

Here's how your final grade will be calculated:

- [Response Memo #1](#) - 25%
- [Response Memo #2](#) - 35%
- [Response Memo #3](#) - 40%

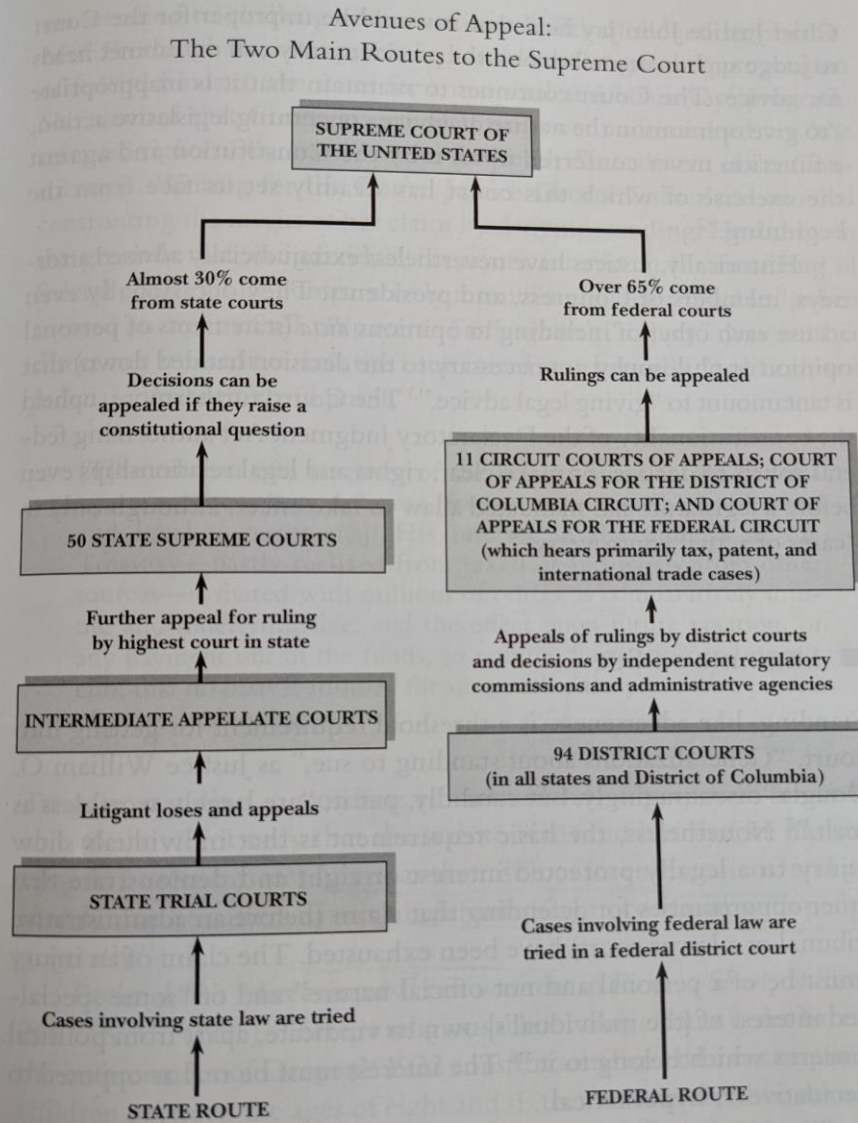
# How to Succeed

- ▶ 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.

# Preliminaries

▶ **Jurisdiction:** The Supreme Court's jurisdiction derives from two main sources:

- ▶ Original Jurisdiction: Article III of the Constitution: "all Federal questions" [1%].
- ▶ Appellate Jurisdiction: Congressional legislation providing a basis for hearing appeals of lower courts' decisions. Direct appeals gradually replaced by petitions for certiorari [99%].



Note: In addition, some cases come directly to the Supreme Court from trial courts when they involve reapportionment or civil rights disputes. Appeals from the Court of Military Appeals also go directly to the Supreme Court. A few cases come on "original jurisdiction" and involve disputes between state governments.

# Preliminaries

- ▶ Even where the Supreme Court has jurisdiction, the case must be “**justiciable.**”
  - ▶ Justiciable: “capable of judicial resolution.”
- ▶ Justices may deny a petition for certiorari if the case lacks 1) **adverseness**, 2) is brought by parties who lack **standing** to sue, 3) poses issues that are not **ripe**, or 4) have become **moot**, or 5) involve a **political question**.
- ▶ ***Stare Decisis***: the policy of letting prior decisions stand.
- ▶ Two kinds of *stare decisis*:
  - ▶ Statutory interpretation: the Court tends to be deferential because Congress can redraft.
  - ▶ Constitutional interpretation: the Court is the final arbiter of constitutional meaning.
- ▶ Competing considerations: stability in the law vs. “getting it right.”

# Preliminaries

- ▶ O'Brien: "...of the thousands of decisions handed down, only a small number of precedents are reversed...But of those overruled...half did not survive more than twenty years" (OB1:138).
- ▶ Justice Alito: "*Stare decisis* is like wine. If it's really new, you don't want to drink it...if it's really old it is very valuable or it has possibly turned to vinegar. There's this magical period in between. It [is] not difficult for a judge to make the *stare decisis* inquiry come out however the judge wants it [to] come out" (Speech to the Federalist Society, 2015).

■ CONSTITUTIONAL HISTORY  
*The Supreme Court's Reversal of Precedent (continued)*

The following table places the Court's explicit reversals of precedents in historical perspective.

COURT	NUMBER OF PRECEDENTS OVERTURNED
Marshall Court (1801–1836)	3
Taney Court (1836–1864)	4
Chase Court (1864–1873)	7
Waite Court (1874–1888)	11
Fuller Court (1888–1910)	4
White Court (1910–1921)	5
Taft Court (1921–1930)	5
Hughes Court (1930–1941)	14
Stone Court (1941–1946)	12
Vinson Court (1946–1953)	12
Warren Court (1953–1969)	56
Burger Court (1969–1986)	55
Rehnquist Court (1986–2005)	42
Roberts Court (2005– )	16
Total	246

Based on Leon Friedman and Fred Israel, eds., *Justices of the United States Supreme Court*, vol. 4, 4th ed. (New York: Facts on File, 2013), 573–600, and as updated by the authors through the 2018 term, as of July, 1, 2019.



# 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).*
- ▶ 1<sup>st</sup>: 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.
- ▶ 2<sup>nd</sup>: 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.**
- ▶ 3<sup>rd</sup>: 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

- ▶ 4<sup>th</sup>: 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.
- ▶ 5<sup>th</sup>: 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

- ▶ 6<sup>th</sup>: In all criminal prosecutions, the accused shall enjoy the right to a **speedy and public trial**, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be **informed of the nature and cause of the accusation**; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
- ▶ 7<sup>th</sup>: In Suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved**, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
- ▶ 8<sup>th</sup>: **Excessive bail** shall not be required, nor **excessive fines** imposed, nor **cruel and unusual punishments** inflicted.

# Constitutional Amendments

- ▶ 13<sup>th</sup>:
- ▶ Section 1.  
Neither **slavery** nor **involuntary servitude**, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
- ▶ Section 2.  
Congress shall have power to **enforce** this article by appropriate legislation.

# Constitutional Amendments

- ▶ 14<sup>th</sup>: [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**.

# Constitutional Amendments

- ▶ 15<sup>th</sup>: [1870]

- ▶ Section 1.

The right of citizens of the United States to vote **shall not be denied** or abridged by the United States or by any State on account of race, color, or previous condition of servitude--

- ▶ Section 2.

The Congress shall have the power to enforce this article by appropriate legislation.

# Reading for 7/4

- ▶ incitement (OB2 – 5a)
  - ▶ Schenck v. United States
  - ▶ Gitlow v. People of the State of New York
  - ▶ Dennis v. United States
  - ▶ Brandenburg v. Ohio
- ▶ ***“incite”*** (<https://www.merriam-webster.com/dictionary/incite>)
  - ▶ transitive verb
  - ▶ : to move to action : stir up : spur on : urge on
- ▶ History and Etymology for *incite*
  - ▶ Middle French *inciter*, from Latin *incitare*, from *in-* + *citare* to put in motion — more at [cite](#)



# Incitement

- ▶ The common law of incitement (Blackstone):
  - ▶ **Absence of prior restraint**, but liability for:
  - ▶ Speech or print deemed “**mischevievous or illegal**”
    - ▶ Defined by majority opinion: abolitionism, obscenity, socialism
- ▶ Alien and Sedition Acts (1798)
- ▶ State acts prohibiting abolitionist literature (1830s)
- ▶ Comstock Act (obscenity) (1873)
  - ▶ obscenity
- ▶ Espionage Act (1917)
  - ▶ subversion

# Incitement

- ▶ Schenck v. United States (1919): decided 9-0; affirmed.
  - ▶ “Charles Schenck and Elizabeth Baer were members of the Executive Committee of the Socialist Party in Philadelphia, of which Schenck was General Secretary. The executive committee authorized, and Schenck oversaw, printing and mailing more than 15,000 fliers to men slated for conscription during World War I.”
  - ▶ “The fliers **urged men not to submit to the draft**, saying "**Do not submit to intimidation**", "**Assert your rights**", "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain," and urged men not to comply with the draft on the grounds that military conscription constituted involuntary servitude, which is prohibited by the Thirteenth Amendment.”

# Incitement

- ▶ Schenck v. United States (1919): decided 9-0; affirmed.
  - ▶ Majority (Holmes): If words are used in 1) such circumstances and are of 2) such a nature as to create a **clear and present danger** of some situation that Congress is constitutionally empowered to address.
  - ▶ “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to 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.”
  - ▶ “the character of every act depends upon the circumstances in which it is done.”
  - ▶ Note: the common law of attempt applies to speech.

# Incitement

- ▶ After Schenck (1919):
  - ▶ Abrams v. United States (1919): decided just a few months after Schenck. Applies the “clear and present danger standard” to convict defendants who threw leaflets out of an NYC building of sabotaging war production (under the 1917 Espionage Act).
    - ▶ Holmes dissents! (did he change his mind?): No clear and present danger, prosecution is for “...not for what the indictment alleges but for the creed that they avow.”
  - ▶ Debs v. United States (1919): socialist party candidate for President prosecuted under the 1917 Espionage Act for attempting to “arouse mutiny and treason.”
    - ▶ Holmes affirms the conviction (9-0): this *does* count as clear and present danger.

# Incitement

- ▶ Gitlow v. People of the State of New York (1925): decide 7-2; affirmed.
  - ▶ Major incitement case **and** major incorporation case.
  - ▶ “New York's Criminal Anarchy Law was passed in 1902 following the assassination of President William McKinley by an anarchist in Buffalo, New York, in September 1901. Under the Criminal Anarchy Law, people seen as activists supporting the destruction of American government through revolutionary means could be arrested...Benjamin Gitlow, a member of the Socialist Party of America, who had served in the New York State Assembly, was charged with criminal anarchy under New York's Criminal Anarchy Law of 1902 for publishing in July 1919 a document called "Left Wing Manifesto" in The Revolutionary Age, a newspaper for which he served as business manager.”

# Incitement

- ▶ **Gitlow v. People of the State of New York (1925):** decide 7-2; affirmed.
  - ▶ Majority (Sanford): conviction upheld because the speech has a “bad tendency.”
  - ▶ “For present purposes we may and do assume that the rights of freedom of speech and freedom of the press were among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states”.
  - ▶ Dissent (Holmes): “clear and present danger” was the proper standard.
    - ▶ “Every idea is an incitement.”
  - ▶ Dissent (Brandeis): even "indefinite" advocacy of overthrowing government should be protected speech.
- ▶ **Whitney v. California (1927):** California defendant tried to establish a local Communist party teaching “the violent overthrow of government”.
  - ▶ Conviction under California’s Criminal Syndicalism Act affirmed (7-2).
  - ▶ Clear and present danger **plus** “bad tendency” (not necessarily imminent).

# Incitement

- ▶ Dennis v. United States (1951): decided 6-2; affirmed.
  - ▶ Background: “In 1948, eleven Communist Party leaders were convicted of advocating the violent overthrow of the US government and for the violation of several points of the Smith Act. The party members who had been petitioning for socialist reforms claimed that the act violated their First Amendment rights to freedom of speech...”
    - ▶ Smith Act (1940): “criminal penalties for advocating the overthrow of the U.S. government by force or violence; required all non-citizen adult residents to register with the federal government.”
  - ▶ Majority (Vinson): Adopts the Second Circuit’s formulation (Judge Learned Hand)
    - ▶ The rule we deduce from [Schenck] is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, e. g., interference with enlistment.
    - ▶ “In each case [courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger.”

# Incitement

- ▶ **Dennis v. United States (1951):** decided 6-2; affirmed.
  - ▶ Concurrence (Frankfurter): “Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances: “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.. The defendants have been convicted of conspiring to organize a party of persons who advocate the overthrow of the Government by force and violence... On any scale of values which we have hitherto recognized, speech of this sort ranks low.”
  - ▶ “Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas.”



# Incitement

- ▶ **Dennis v. United States (1951):** decided 6-2; affirmed.
  - ▶ Concurrence (Jackson): “either by accident or design, the Communist stratagem outwits the anti-anarchist pattern of statute aimed against "overthrow by force and violence" if qualified by the doctrine that only "clear and present danger" of accomplishing that result will sustain the prosecution.”
  - ▶ Dissent (Black): We should be using Brandeis’ standard in *Whitney*.
    - ▶ “These petitioners were not charged with an attempt to overthrow the Government...They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date...No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids.”
  - ▶ Dissent (Douglas): Let them publish, because the content of their publications reveals the deficiencies of their doctrine. No prior restraints.

# Incitement

- ▶ **Brandenburg v. Ohio (1969):** decided 8-0; reversed.
  - ▶ Background: Brandenburg was charged with advocating violence under Ohio's criminal syndicalism statute for his participation in the Ku Klux Klan rally and for the speech he made, which made reference to the possibility of "revengeance" against various minority groups, and announced plans for a march on Congress to take place on the Fourth of July.
  - ▶ "In relevant part, the statute – enacted in 1919 during the First Red Scare – proscribed "advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism"."
  - ▶ Majority (per curiam): Ohio criminal syndicalism statute is a violation of defendant's first amendment freedoms, unconstitutional on its face.

# Incitement

- ▶ Brandenburg v. Ohio (1969): decided 8-0; reversed.
  - ▶ The **imminent lawless action** test (three elements):
    - ▶ intent to speak
    - ▶ imminence of lawlessness
    - ▶ likelihood of lawlessness
  - ▶ “*Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States* (1951). These later decisions have fashioned the principle that 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 action.”
  - ▶ A statute can ban incitement, but not “mere advocacy.”

# Incitement

- ▶ Brandenburg v. Ohio (1969): decided 8-0; reversed.
  - ▶ Dissent (Douglas joined by Black): the First Amendment means what it says (Congress shall make no law abridging freedom of speech). The “clear and present danger” doctrine is therefore unnecessary.
  - ▶ “When one reads the opinions closely and sees when and how the “clear and present danger” test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges...wedded to the status quo ...Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.”
  - ▶ “The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.”

# Incitement

- ▶ O'Brien: "In sum, the justices and the country remain locked in a dialogue over how free "free speech" should be and how it should be **balanced** with such **competing governmental interests** as promoting moral decency, national security, equality, and the social order. In other words, the Court and the country continue to debate why we value and should value free speech over other competing values."
  - ▶ Instrumental?
    - ▶ Marketplace of ideas?
    - ▶ Threat of censorship/slippery slope?
  - ▶ Intrinsic?
    - ▶ Speaking freely is good?
    - ▶ Living in a society with free speech is good?