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Free Expression Intro

Class 2 – September 12, 2008

SI 519/PubPol 688

Bryce Pilz

Fall 2008

Government Has Struggled With Regulating Obscenity

Jacobellis v. Ohio (1964)

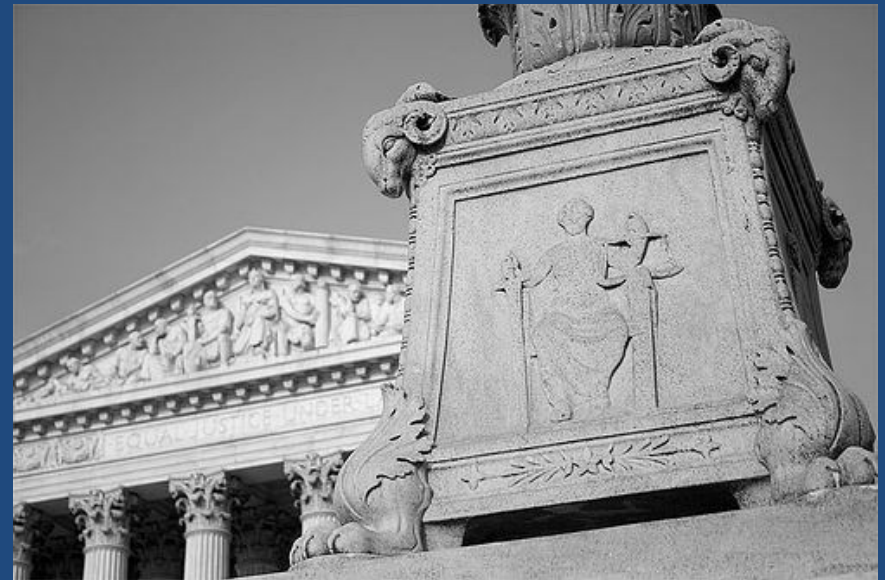
“I know it when I see it.” - Potter Stewart

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But / *know it when I see it, and* the motion picture involved in this case is not that."

Supreme Court Movie Nights?



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Recent DOJ Efforts

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2005-2007

Top Priority:
“Obscenity”

“we must have won
the war on terror...”

COPA/CDA Litigation

Strict scrutiny analysis:

(1) Proving a **compelling government interest**;

(1) Demonstrating that the restrictive practice is **narrowly tailored** to meet the compelling government interest; and

(1) Proving there are **no less restrictive alternatives** that would be just as effective.

CDA / COPA Timeline

June 1997:

S. Ct. rules in *Reno v. ACLU* that CDA violates 1st A: Strict scrutiny applies! "Internet" not as invasive as broadcast media so less need for regulation. "Free exchange of ideas."

June 1996:

3 Judge panel on E.D. Pa. grants preliminary injunction barring Gov. from enforcing CDA.

Feb. '96 – CDA:

Crime to display indecent or patently offensive material on the Internet where a child may find it.

Oct. 1998 – COPA:

Crime to use WWW to communicate for commercial purposes in a way "harmful to minors" unless the person has restricted access by minors by requiring a credit card number.

Feb. 1999:

E.D. Pa. grants preliminary injunction against COPA because filtering is less restrictive.

June 2000:

3d Cir. Upholds injunction because "community standards" language is unconstitutional.

May 2002:

S. Ct. reverses 3d Cir. because "community standards" language by itself did not render COPA unconstitutional.

1996

1997

1998

1999

2000

2001

2002

CDA / COPA Timeline

June 2004:

S. Ct. upholds a injunction preventing enforcement of COPA. "Filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them." Remanded for trial.

Source: Ashcroft v. ACLU (2004)

March 2003:

3rd Cir. upholds injunction because COPA not narrowly tailored to serve Gov.'s interest and less restrictive means exist.

July 2008:

3rd Cir. upholds D. Ct. ruling that COPA violates 1st A.

March 2007:

After bench trial, E.D. Pa. rules that COPA is unconstitutional:
(1) Not narrowly tailored;
(2) filtering less restrictive;
(3) overbroad and vague.

2003

2004

2005

2006

2007

2008

CIPA Timeline

June 2003:

S. Ct. reversed District Court decision finding that libraries do not represent public forums and therefore regulation is generally permissible.

2002:

3 judge panel at E.D.Pa. granted injunction: Less restrictive means included supervision.

Dec. 2000:

CIPA enacted: requires all schools and libraries receiving federal funds for Internet access to install filters.

2000

2001

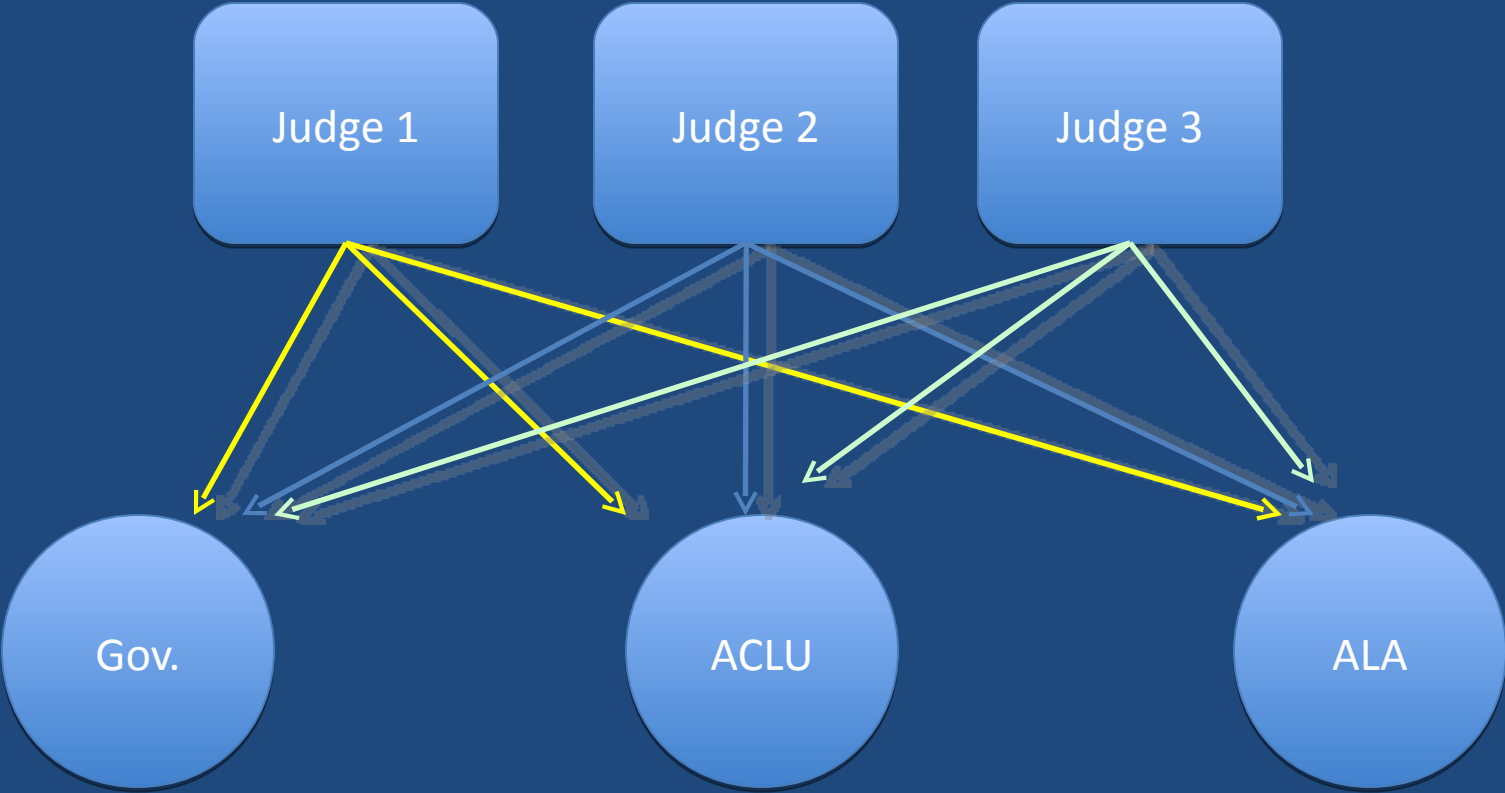
2002

2003

2004

2005

COPA Appellate Argument Drill



Anonymity Issue

There is a First Amendment right to anonymous speech.

- city ordinance banning anonymous pamphlets violated the 1st A (*Talley v. California*)

But, just because something is anonymous, does not mean it's protected.

- the other exceptions apply (e.g., anonymous obscenity)

Question becomes: where do we draw the line and how concerned should we be about chilling anonymous speech?

Example:

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Nicecritic.com

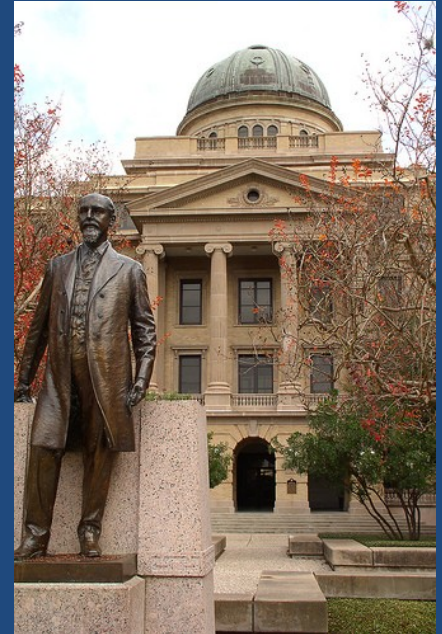


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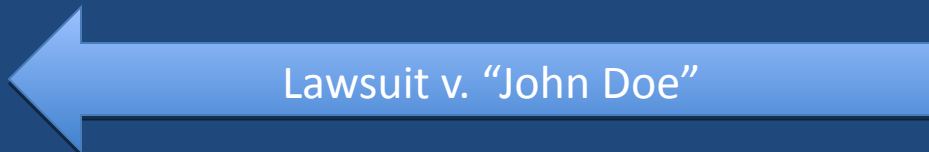
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Example:


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Plaintiff

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Revealing Identity

Delaware Case: Defamation claim against anonymous Internet poster.

“before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”

Source: John Doe v. Cahill, No. 266, 2005

Bloggers

Press get heightened protection:

-Gov. has very limited power to impose prior restraint

-state “shield laws” provide post-publication protection

Bloggers

Similar to Press?

Unlike Press?

Bloggers

The question should be what they do, not what they are called.

-“reporting” deserves equal protection regardless of the medium

History News Network, “Should Bloggers Be Covered By The First Amendment,” by Chris Daly (professor of journalism at Boston U.)

<http://hnn.us/articles/11233.html>

Final Thoughts

Why is unfettered access to Internet so important?

- difficult to get unbiased and complete info elsewhere

Different levels of protection:

- strict/heightened scrutiny (Internet, press, prior restraints, content-based, regulation in a public forum)

- intermediate scrutiny (content-neutral, software?)

Interests allowing regulation of speech?

- obscenity, clear and present danger, national security, defamation

Analysis?: Speech?, Level of protection? Interest protected? Breadth? Alternatives?

Copyright

Next week –

\) Copyright basics

ʎ) *Kelly v. Ariba* (July 7, 2003 Opinion) (fair use on the Internet – use of thumbnails by search engine)

Ʒ) Fair Use Guidelines (attempt to provide some certainty to fair use in academic setting)

ξ) *Grokster* (indirect liability for file-sharing technology)

Copyright

How does copyright work with First Amendment?

Often, work together to ensure greater artistic, technological, creative, and scientific advancement.

Internet, makes it easier for First Amendment and copyright to conflict.

- copyright allows creators to control flow of information and expression

- is copyright a form of censorship, like filtering?

- in what ways does copyright attempt to stay consistent with First Amendment principles?