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John T. McBroom
College of Saint Benedict/Saint John's University

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JUSTICE HARRY BLACKMUN AND THE REGULATION OF SEXUALLY EXPLICIT EXPRESSION

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John McBroom

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JUSTICE HARRY BLACKMUN AND THE REGULATION OF SEXUALLY EXPLICIT EXPRESSION

Associate Professor of Political Science

Professor of History

Associate Professor of Canon and Civil Law

Chair, Department of Political Science

Director, Honors Thesis Program

Director, Honors Program
**Harry Blackmun and the Regulation of Sexually Explicit Expression**

Supreme Court Justice Harry A. Blackmun came onto the Court in 1970 in the midst of national conflict over the Vietnam War and widespread changes in the fabric of American society like the sexual revolution. The heated division in the United States about the growing "liberalism" in the country instigated a collision between those in society who wanted to engage in controversial speech and those who wanted to limit this expression. Blackmun is inseparable from his abortion decision *Roe v. Wade* and his dramatic change to a more moderate or even liberal ideology during his time on the Court. In the realm of law regarding the regulation of sexually explicit expression, however, he underwent no such metamorphosis. His only pro-individual decisions in this area dealt with statutes proscribing material or expression that was merely explicit and not formally obscene. Blackmun remained consistent in espousing a moderately conservative approach to the regulation of sexually explicit expression and the Constitution throughout his twenty-four years on the Court.
Blackmun's Liberal Move

Harry Blackmun is known as one of the most moderate or liberal members of the Rehnquist Court. In his article on Blackmun in a book on the Burger Court, Stephen L. Wasby says, "Justice Harry Blackmun has not been an ideologue but a centrist with a balanced, thoughtful approach" to the bench (Wasby 95). Blackmun was nominated by Republican President Richard Nixon in 1970. At the time of his appointment, Blackmun was considered by most people to be a conservative Republican (Storm Center 72). In addition, he was a lifelong friend of newly appointed Chief Justice Warren Burger (Wasby 63). David Savage, in his book Turning Right: The Making of the Rehnquist Supreme Court, states that, "Blackmun was supposed to be a clone of conservative Warren Burger."(175). In his first years on the Court, "Hip Pocket Harry" Blackmun was nearly just that. Blackmun voted with the Chief in 69 of the 72 cases in his first year. That trend continued throughout his first decade on the Court. Blackmun and Burger voted similarly in 83.9% of the cases in 1971 (Wasby 68). In 1972, with the addition of Justices William Rehnquist (1971) and Lewis Franklin Powell (1972), Blackmun continued to vote with Burger in over 80% of the cases (Lamp and Halpern 31-2).

Blackmun was in the conservative voting bloc throughout the 1970's. In 1976, Burger, Rehnquist, Blackmun, White, Powell and Stewart voted
together in non-unanimous cases 73% of the time. In 1980, Blackmun still voted with the conservative voting bloc of Burger, White, Rehnquist, Powell, Stewart, and Stevens in 64% of the Court's non-unanimous cases (Lamp and Halpern 31).

In addition to his alignment with the Court's conservatives, Blackmun also voted conservatively in a overwhelming proportion of cases. In his first three years on the Court, the highest percentage of liberal\(^1\) votes Blackmun made in any single year in civil liberty (pro-defendant), criminal procedure (pro-defendant) and in First Amendment cases (pro-individual against government) were 39%, 26% and 35% respectively (Epstein and others 457).

In the years after his 1973 *Roe v. Wade* majority opinion, Blackmun began to move away from Burger and the conservatives (Savage 232). After that point, Blackmun's interagreement with Burger slowly decreased year after year. While Blackmun voted with Chief Justice Burger in 90% of the nonunanimous civil liberties cases his first five years, by the time

\(^1\)"The term *liberal* represents the voting direction of justices across the various issue area. It is most appropriate in the areas of civil liberties, criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys, where it signifies pro-defendant votes in criminal procedure cases, pro-women or -minorities in civil rights cases, pro-individual against the government in First Amendment, due process, and privacy cases, and pro-attorney in attorneys' fees and bar membership cases. In takings clause cases, however, a pro-government/anti-owner vote is considered liberal. The use of the term is perhaps less appropriate in union cases, where it represents pro-union votes against both individuals and the government, and in economic cases, where it represents pro-government votes against challenges to its regulatory authority and pro-competition, anti-business pro-liability, pro-injured person, and pro-bankruptcy votes. In federalism and federal taxation, liberal indication pro-national government positions; in judicial power cases, the term represents pro-judiciary positions"(Epstein and others 485).
Burger left the Court in 1985, Burger and Blackmun voted together in merely 40% of the Court's civil liberty cases (Goldman 147). That trend was exacerbated by the addition of conservative Reagan appointee Justice Sandra Day O'Connor in 1981. In that year, Blackmun voted with the Chief Justice in just 41% of the cases (Wasby 69). Some Supreme Court scholars believe that Blackmun made an intentional move left to counter the additions of conservative appointees in an effort to make a more moderate Court (Wasby 72). From this point on, Blackmun was more likely to vote with William Brennan and Thurgood Marshall than Burger (Wasby 69). By the time Burger left the Court in 1985, Blackmun was clearly no longer a Burger clone; he was completely "his own man" (Schwartz 317).

In his book, Constitutional Law: Cases and Essays, Sheldon Goldman first puts Blackmun in the "liberal" voting bloc (with Brennan, Marshall and Stevens) and not in a moderate or conservative bloc in 1982. That year, those four individuals agreed in 70% of the cases (Goldman 148). During their time on the Burger Court (1972-85), Rehnquist and Blackmun voted together in 65% of the First Amendment cases and 80% in cases involving due process disputes. Conversely, during the Rehnquist Court (1986-94), Blackmun and Rehnquist agreed in merely 47.5% of the time in First Amendment decisions and voted together in just 52.2% of the due process cases before the Court (Epstein and others 518,533).

While Blackmun consistently voted liberally under 50% of the time in his first decade on the Court, the late 1970's and 1980's would be the last
time Blackmun voted liberally in under half of the cases in areas like civil liberties (1983), criminal procedure (1984), civil rights (1977) and the First Amendment (1980) (Epstein and others 458). By the time Burger left the Court, Blackmun's opinions were "as liberal as any that Justices Brennan and Marshall might have written" (Schwartz 316). In particular, it is clear that Blackmun's support of civil liberties increased greatly from the time he joined the Court to 1986 when Rehnquist became Chief Justice (Goldman 151). Blackmun had moved drastically from the conservative faction on the Court to a more centrist or liberal group. The change was precipitated by both a more intensely conservative Supreme Court and a change in ideology in Blackmun. Bradley C. Cannon, in his work, *Justice John Paul Stevens: The Lone Ranger in the Black Robe*, describes Blackmun as a justice who underwent a great change in his time on the Court. Cannon says that Stevens experienced some "growths and development" and a few "shifts in doctrinal stance" but was "not an Earl Warren or Harry Blackmun" (372). While there is debate as to the reason for this shift, it is undeniable that Blackmun realigned himself in terms of his position on the Court and his general judicial ideology in his over two decades on the high bench.

While Blackmun moved significantly in terms of his Court identity and ideology in his years on the Court, no such momentous change occurred in the realm of the regulation of sexually explicit expression. In this area, Blackmun maintained a moderately conservative approach to the
First Amendment despite an increase in "liberal" votes in other areas of civil liberties. Blackmun entered the Court in a national environment in which the regulation of sexually explicit expression was an important issue to the country and its government. As a result, it is necessary to look at the country and the circumstances of his appointment to the Supreme Court.

*Permissive Liberalism, Nixon and Law & Order*

The late 1960's saw a barrage of protests against the Vietnam War and the establishment. As a result of this turmoil, President Nixon was looking for a replacement for Justice Abe Fortas on the Supreme Court who would help stem the radical tide which he believed threatened American culture. Nixon looked for a justice who would have "negative views about the permissive nature of society" (Wasby 64). The President believed that the Warren Court had hampered the government from controlling the "criminal element" in our society (*CQ Almanac* 130). Because of Nixon's desire to regain "law and order" in the United States, he sought a judge who would remain deferential to the government in controlling and molding society.

Law and order formed a cornerstone of Nixon's 1968 campaign. This emphasis appealed to voters who wanted dissension to end. Tom Wicker,
in his book, *One of Us - Richard Nixon and the American Dream*, says that for Nixon, law and order was "a veritable obsession that included a far-fetched and self-serving view of 'national security...'(This) led him to fatal excesses" (615). By 1968, the United States was coming apart as a result of anti-war protests and riots (Aitken 348). In campaigning for the 1968 presidency, Nixon vehemently attacked the "liberal jurisprudence" which surfaced during the Warren Court (*Constitutional Law and Politics* 78). As a result, Nixon wanted to appoint justices who would stem the liberal and permissive tide of rulings that the Warren Court had made in the last fifteen years which, in his mind, had contributed to the disintegration of American society and culture (Ambrose 159).

**Blackmun's Supreme Court Appointment**

The President's first nominee to fill Justice Abe Fortas' vacant seat was Clement Haynsworth, a Federal Circuit Court of Appeals judge. The Democrats in Congress, still upset over the Republican attack which led to Fortas' exit from the Court (Frank 4-16), assailed Haynsworth's anti-integration stance and his decision to rule on a case that impacted a business in which he held stock. Some moderate Republicans joined the attack and Haynsworth was rejected November 21, 1969 by the Senate on
a 55-45 vote (Woodward and Armstrong 56). Nixon's next nominee was Florida Court of Appeals judge, G. Harrold Carswell. Evidence that Carswell had assisted white supremacy groups and that he was unimpressive intellectually as a jurist arose during the hearing. On April 8, 1970, the Senate rejected Carswell by the vote of 51-45 (Aitken 393).

Months had now passed since the Fortas resignation, and Nixon was still without a "law and order" justice to replace him. On April 12, 1970, the New York Times ran a front page story stating that Nixon's list of potential nominees had been cut to three. The Times reported that the President was willing to relax the necessity of a Southerner on this appointment. One of the trio was Harry Blackmun. The story also reported that in addition to being "a close personal friend of Chief Justice Warren E. Burger... the striking feature about Mr. Blackmun, according to lawyers who have studied his decisions, is his similarity to Mr. Burger as judge." Nixon had appointed Burger just two years ago to the position of Chief Justice and hoped he would lead the Court and successive appointees in creating a more conservative judicial body. The similarity between Blackmun and Burger made Blackmun an ideal choice to help start that coalition.

On April 14, 1970, Nixon nominated Harry Blackmun to fill Fortas' vacant seat on the Supreme Court. The New York Times reported the next day that "Judge Blackmun, a member of the United States Court of Appeals for the Eighth Circuit, is regarded in the legal profession as a scholarly and
mildly conservative judge." Blackmun was ideal for Nixon because he was moderate on civil rights issues and he leaned right on issues of civil liberties and criminal rights. A civil rights moderate was needed to please the Northern Democrats in this time of intense racial problems. "From an ideological standpoint, he (Blackmun) seemed to be exactly what Nixon was looking for; a judge who believed in judicial restraint, was strong on law and order, and weak on civil liberties" (Shaman 39).

The Senate convened a hearing on the Blackmun nomination before the Committee on the Judiciary of the United States Senate on April 29, 1970. During the hearing, Massachusetts Democratic Senator Ted Kennedy brought up a section of a speech he recently gave at a ceremony honoring former Supreme Court Chief Justice Earl Warren which dealt with the Court's First Amendment jurisprudence.

I fear that we are entering another era of inaction and retrogression and repression easily matching that which faced Chief Justice Warren when he arrived in Washington, an era which will demand frequent profiles in courage if we are to survive as a free people. Many of the signs are small, but they are ominous.... They are gnawing at the precious foundations of our freedom, chipping away piece by piece the barriers against tyranny and oppression which the framers of the Constitution erected. Even to recite calmly a list of the symptoms is to give the impression that 1984 may be less than 14 years away, and that "Z" could happen here. (U.S. Congress, Senate 1970, 36-7)
Kennedy is obviously concerned at the trend of a lack of regard for civil liberties like the freedom of expression. Blackmun's response to the senator was evasive: "I like to feel... that my record and the opinions I have written and which are spread upon the law books will show, particularly in the civil rights area and in the labor area and in the treatment of little people, what I hope is a sensitivity to their problems" (U.S. Congress, Senate 1970, 37). This desire to help "little people" will greatly impact his decisionmaking on the Court, including decisions dealing with child pornography.

Another committee member, Democrat Birch Bayh from Indiana, asked Blackmun another question about the Bill of Rights. "One of the news media conducted a poll on the Bill of Rights and between two-thirds and three-fourths of the people who were polled responded that they would not look with disfavor on repealing portions of the Bill of Rights. Would you care to comment on the role of those amendments?" Blackmun responded by saying, "I doubt if it is appropriate for a Federal judge to comment on this. These are the tools with which we work. There they are and they are precious to me" (U.S. Congress, Senate 1970, 44). The approval of limits on civil liberties by large amounts of citizens threatened First Amendment freedoms like speech. The questions by Kennedy and Bayh reflect the anxiety about the problems that arise with an excess of law and order and its effect on the relationship between governmental power and individual rights at the heart of the First Amendment.
Unlike Nixon's previous two nominations, Blackmun's hearing was not controversial. Blackmun had no trouble gaining the approval of the Republican and Democratic members of the committee. The Senate unanimously approved the nominee May 14, by a count of 94-0 (Epstein and others 327).

Blackmun was the second of Nixon's appointments to the Court. Nixon appointed Warren Burger Chief Justice in 1969. With this development, it began to look as if the Court would turn more conservative as a result of Nixon's influence in the appointment of the two new justices. Blackmun himself declined to put himself into a liberal or conservative group during his hearings (U.S News & World Report 22), but most regarded him as a moderate conservative. In 1970, the Court was split four to four in regards to those justices who are primarily liberal and voted pro-individual in over half of the First Amendment cases on the Court (William O. Douglas, William J. Brennan, Jr., Thurgood Marshall, Hugo Black) and those who are usually considered conservative (Warren Burger, John M. Harlan, Byron R. White, and Potter Stewart) who most often voted pro-government in First Amendment challenges (Epstein and others 457-485). The pro-government (conservative) and pro-individual (liberal) factions were the same in cases dealing with the regulation of sexually explicit expression as the usual blocs in First Amendment jurisprudence as a whole. Blackmun's arrival on the Court seemed to tip the balance toward the pro-government side of the regulation of sexually explicit expression
debate. Americans were wondering if this would create a conservative majority on the Court which would retreat from some pro-individual First Amendment precedent set by the Warren Court.

*Time* reported on October 5, 1970 that Blackmun "could emerge as the Court's pivotal figure" and that "he may have the deciding vote in many important cases." More specifically, the article said that "Blackmun may also cast the tie-breaking vote in a series of cases... While the Warren Court largely avoided the chore of setting new First Amendment rules... events may now force the Court to face such issues" (*Time* 68). Blackmun entered the Court as a justice whose philosophy would consolidate a conservative majority that would make the United States a less "permissive and lenient" society by ruling on controversial and important cases dealing with freedoms and rights.

*The Regulation of Sexually Explicit Expression and the Supreme Court in 1970*

The First Amendment's freedom of speech was a important issue in the United States in 1970. One of the main prongs of this freedom in First Amendment jurisprudence was questions about the regulation of sexually explicit expression, which was an important issue in Nixon's law and order
society.

Until the twentieth century, the federal judiciary allowed legislatures to prohibit pornography using an 1868 English common-law standard elucidated in Regina v. Hicklin, L.R. 2 Q.B. 360 (Constitutional Law and Politics 419). This standard was "whether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall." This Hicklin test made restricting obscene materials in state and federal legislatures easy because it allowed books to be banned because of their possible influence on children and not their probable reader (Blanchard 17).

The Hicklin standard remained widely used until the Court set a new precedent regarding obscenity and pornography in 1957. In Roth v. United States, 77 S.Ct. 1304 (1957) the Supreme Court revisited the issue of obscenity and sexually explicit expression. Samuel Roth was a bookseller who was convicted under a federal statute that prohibited the mailing and advertisement of obscene materials. Justice William Brennan wrote the opinion of the Court that held the statute constitutional. Brennan delineated a three part obscenity test in Roth. This test would outline the difference between sexually explicit expression which is protected by the First Amendment and sexually explicit expression which is not (obscenity). The first prong which must be met is "whether to the average person, applying contemporary community standards, the
dominant theme of the material taken as a whole appeals to prurient interest." The jury or judge must also find that "the material is patently offensive." The third part of the test is that the "material is utterly without redeeming social value" (Roth 1311-2). Brennan took great pains to separate obscenity and sex. He thought that unreserved and honest discussion of sex was something that the country needed (de Grazia 322).

In the years after Roth, liberal judges used the ruling to diminish the power of censorship. "Despite Roth's seeming sanctions of crackdowns on obscenity, the decade following witnessed an unprecedented increase in the availability of pornographic materials and concomitant Supreme Court liberalization of obscenity standards" (Downs 14). Edward de Grazia, in his book Girls Lean Back Everywhere communicates how this phenomenon occurred:

In the United States, as indicated earlier, the legal situation with respect to freedom of expression became more propitious after the Court's decision in Roth v. United States in 1957. Gradually, lawyers defending literary and artistic works against acts of government suppression began to find lower court judges more responsive to the liberal dictum contained in Justice Brennan's landmark opinion--that books having literary, artistic, or other social importance ought to be protected by the Constitution against charges of being obscene--than to the opinions seemingly repressive concrete holding-- that 'obscenity' was whatever applied to the average person's prurient interest in sex and as such was expression outside the protection of the First Amendment's guarantees. Brennan's liberating dictum would in time overshadow Roth's actual holding. (de Grazia 263-4)
The *Roth* decision's emphasis on protection of important and useful expressive materials provided much greater protection for materials than did *Hicklin* which allowed legislatures to ban works easily. *Roth* thus resulted in a greater protection of materials from legislative attack than the *Hicklin* test.

*Memoirs v. Massachusetts*, 86 S.Ct. 975 (1966) was an important case in expanding this liberal use of the *Roth* standard. In *Memoirs*, Brennan announced the Court's opinion which deemed unconstitutional an obscenity conviction of John Cleland's *Memoirs of a Woman of Pleasure*. The Court stated that the lower court should not have allowed the conviction because they did not explicitly find the work to satisfy the "utterly without redeeming social value" part of the *Roth* standard (*Memoirs* 978). Brennan says, "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness" (*Memoirs* 978). *Memoirs* is a concrete example of the Warren Court's use of the *Roth* standard to disallow government censorship. It sent a clear message to lower courts to accept any and all possible scientific or artistic uses of sexually explicit
material as part of the third prong of the Roth standard (Richards 59).

In 1969, the Warren Court returned to the issue of pornography and obscenity. In *Stanley v. Georgia*, 89 S. Ct. 1243 (1969) the Court continued an expansive reading of the First Amendment in striking down a Georgia law prohibiting obscenity. While the home of Robert Eli Stanley was searched with a warrant to look for evidence of a gambling business, the police found obscene films (*Constitutional Law and Politics* 431). Writing for the majority, Justice Thurgood Marshall, a recent Johnson appointee, said that "the mere private possession of obscene matter cannot constitutionally be made a crime." He continued, saying that in regards to "the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home" (*Stanley* 1247). Marshall stated that the Roth test was not being overturned, however, and that the states have the ability to legislate obscenity. The Court qualifies that "that power simply does not extend to mere possession by the individual in the privacy of his own home" (*Stanley* 1246). *Stanley* sets limits on the states' and federal government's power to regulate obscenity and pornography.

Offensive speech and pornography were areas of law which had become more liberal during the Warren Court (de Grazia 340,342,398-399). The combination of Roth, Memoirs, and Stanley would prove to be the high point of the Warren Court's attempt to limit censorship restrictions on the First Amendment (de Grazia 450). In the 1970's, the effects of these Warren obscenity decisions were evident in American
society. As a result of the greater independence of businesses and artists from censorship, a "new, multi-billion pornography industry, whose XXX-rated movie house, peep shows and live-sex stage acts flashed their neon lights in Times Square and other neighborhoods" was greatly invigorated (Clark 978). In motion pictures, the trend included a large increase in American made high budget pornography which was more explicit than its low-budget and foreign predecessors (Clark 978).

Trying to deal with the problem, Congress created the Commission on Obscenity and Pornography in 1967. Its report in 1970 stated that our society's use of pornography was a result of the closed and protected manner in which sex was discussed in our county. The group said that "there is no warrant for continued governmental interference with the full freedom of adults to read, obtain, or view whatever material they wish" (The Report of The Commission... 52). Moreover, the commission stated, "In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual material plays a significant role in the causation of delinquent or criminal behavior among youth or adults" (The Report of The Commission... 53). The report angered Nixon, who sought to make the judiciary, legislature and executive branches all more conservative when dealing with obscenity and pornography. He quickly assigned his single nominee to the Committee, Charles Keating, to challenge the findings in court (Blanchard 386-7). Nixon himself asked Congress in 1969 to free our country from "the
barrages of the filth peddlers" who he believed were ruining American society (Irons 171).

It is easy to see the charged political environment surrounding issues of pornography and obscenity that Blackmun entered into on the Court. Pornography was at the forefront of the important issues of the day. Congress and city and state legislatures made obscenity regulation a priority and President Nixon and the executive branch had done so as well. In order for those efforts to remain fruitful, Blackmun and the Court had to uphold those regulations inspite of the First Amendment.

By the time Blackmun entered the Court in 1970, there was a backlash by state and federal legislators to the invigoration of the pornography industry. As a result, Blackmun and the High Court faced several cases dealing with pornographic obscenity legislation in the early 1970's. Prior to the Roth ruling, there were few obscenity cases that found their way to the High Court. Between 1933-1952, the Supreme Court heard just one case dealing with obscenity. In order to free more material from censorship, the Warren Court between 1953-1967 increased the amount of obscenity cases granted a petition of certiorari to 15 (Pacelle 52).

The Burger Court made an effort to counter the liberal precedent in this area by opening the Court to hear obscenity cases. Within the years 1968-1977, the Court heard 54 obscenity cases, which overwhelms the number and rate of obscenity cases decided in the High Court in the
previous decades (Pacelle 52). With Chief Justice Warren being replaced by Warren Burger and Blackmun replacing Abe Fortas, the Court seemed to have swung in Nixon's favor.

**Blackmun's Pro-Government Approach to the Regulation of Sexually Explicit Expression**

Blackmun would most often vote for the government interest against the individual interests in cases dealing with the regulation of sexually explicit expression. It did not take long to find out how Blackmun thought about the issue. In his first year on the Court, Blackmun, joined by Chief Justice Burger and Justice Harlan, dissented in *Hoyt v. Minnesota*, 90 S.Ct. 2241 (1970), a holdover from the 1969 October term. In *Hoyt*, a man was arrested for selling obscene books. The Minnesota Supreme Court stated the books were obscene according to the *Roth* test and because "obscenity is not within the area of constitutionally protected speech," it allowed the convictions (*Minnesota v. Hoyt* 700-1).

The Court decided *Hoyt* per curium by merely citing *Redrup v. New York*, 87 S.Ct. 1414. In *Redrup*, the Court overturned a conviction of obscene paperbacks. The short *Redrup* per curium decision outlined the three different approaches to obscenity which are embraced by different
members of the Court: the First Amendment absolutist position, the "opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material" and those justices which embrace the Roth standard (1415). The Court then says, "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand" (Redrup 1416).

In dissenting, Blackmun displays deference to a Minnesota trial court who, in his mind, applied the correct standards delineated by Supreme Court precedent (Roth) in deciding that the materials were in fact obscene. "I cannot agree that the Minnesota trial court and those six justices (which upheld the law on appeal) are so obviously misguided in their holding that they are to be summarily reversed" (Hoyt 2241). Both Blackmun and the majority use the Roth standard, but unlike the majority, Blackmun is less strict in applying it to governmental legislation. This deference to the government and its ability to proscribe obscene expression would continue throughout his time on the Court.

Blackmun shows clear disapproval with the notion of some kind of national standard for obscenity. He adds that he chiefly agrees with Justice Harlan's concurrence in Roth, (Hoyt 2241) which holds that state governments have greater power to control obscenity than does the federal government (Roth 1318-20). Blackmun's notion of community standards instead of a national standard in the Hoyt dissent is an early indication of how he will vote in Miller v. California, the important case in
which the Court sets a new test for obscenity.

The geographic nature of the community norm used in an obscenity test influences that test enormously. The use of a national standard would be a moderate standard. In contrast, the use of community standards would vary greatly depending on where the statute is made or where the explicit material is owned, sold or created. One would expect that what is patently offensive in a small rural town would not offend the community norm of what is patently offensive in Los Angeles or New York City. Therefore, according to the local standards criteria Blackmun is advocating, material which could be banned in Minnesota could be protected by the First Amendment from censorship in New York.

In *United States v. 37 Photographs*, 91 S.Ct. 1400 (1971), the Court reversed a District Court ruling and upheld a federal law that prohibits the importation of obscene materials into the United States. Claimant Milton Luros was arrested under a federal anti-obscenity law when U.S. customs officials found allegedly obscene photographs in his belongings after returning to the country. Justice Blackmun joined the opinion of the Court, written by Justice White, that the District Court wrongly interpreted the Court's finding in *Stanley v. Georgia*. Blackmun agreed that the trial court erred in believing because *Stanley* protected the right to have obscene material in the home it also protected an individual's right to import obscene materials for private reading (*U.S. v. 37 Photos* 1407-8). White stated, "That the private user under *Stanley* may not be prosecuted for
possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home" (37 Photos 1408). Here, Blackmun agreed to restrict the finding in *Stanley* into merely the possession of materials in one's home instead of using it to give greater protection of obscene materials in all spheres. Blackmun placed obscenity under governmental power.

Also decided in 1971 was *United States v. Reidel*, 91 S.Ct. 1410 (1971). Norman Reidel was indicted for violating a federal statute outlawing the mailing of obscene material through the United States Post Office System. Blackmun joined the majority which overturned the lower court decision by upholding the law as constitutional.

Blackmun and the Court hearken back to *Roth* and reiterate that the "'obscenity is not within the area of constitutionally protected speech or press' and that 'applied accordingly to the proper standard for judging obscenity, *(Roth)* do(es) not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited" (*U.S. v. Reidel* 1411-2). The Court also points out that *Roth* has not been overruled as of yet. Blackmun and the majority see cases like *Roth* and *Reidel* as being unaffected by *Stanley*. "Clearly the Court had no thought of questioning the validity of (the statute in *Reidel*) as applied to those who, like Reidel, are routinely disseminating
obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home." (Reidel 1412).

Moreover, Blackmun and the Court add a postscript to their opinion which discusses how studies like The Report of The Commission on Obscenity and Pornography affect the Court's obscenity doctrine:

It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the Court that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. Roth and like cases pose no obstacle to such developments. (Reidel 1413)

Blackmun continues his deference to government in these two 1971 decisions. In contrast, in just two years, Blackmun will write the Court's opinion in Roe v. Wade, 93 S.Ct. 705 (1973) in which the Court will dictate to legislatures about abortion. While Roe will negate many abortion laws, Blackmun has upheld the first three challenged obscenity laws he has
faced on the Supreme Court.

Only Black, Douglas and Marshall dissented from the majority in this case. Their conceptions of obscenity law are much different than Blackmun's. Black and Douglas in their dissent in both cases maintain that the "First Amendment denies Congress the power to act as censor and determine what books our citizens may read and what pictures they may watch" (Reidel 1416). In his dissent in Thirty Seven Photographs and concurrence in Reidel, Marshall interprets Stanley in a much different way than Blackmun. "Only two years ago in Stanley v. Georgia, the Court fully canvassed the range of state interests that might possibly justify regulation of obscenity. That decision refused to legitimize the argument that obscene materials could be outlawed because the materials might somehow encourage anti-social conduct, and unequivocally rejected the outlandish notion that the State may police the thoughts of its citizenry. The need for such protection of course arises when obscenity is distributed or displayed publicly... Thus, Stanley turned on an assessment of which state interests may legitimately underpin governmental action, and it is disingenuous to contend that Stanley's conviction was reversed because his home, rather than his person or luggage, was the locus of a search" (Reidel 1415).

This statement is in direct contrast to Blackmun's position on obscenity. Blackmun was a key part of the virtual destruction of Stanley. The Court and Blackmun reiterate in these cases that "obscenity is not
within the scope of First Amendment protection," and therefore may be proscribed by the government. To Blackmun Stanley only means that the government cannot prosecute obscenity found in one's home. This opinion differs greatly from Marshall's, the writer of the Court's decision in Stanley. If obscenity is "not within the scope of First Amendment protection," Blackmun believes the government should be able to prosecute obscenity statutes violated in private homes as long as proper search and seizure procedures are followed. Blackmun and the Court circumvent Stanley by allowing obscenity statutes which will restrict the "right" delineated in Stanley. It is difficult to view or own obscenity in one's home if it is illegal to sell, send, buy or create it. Blackmun's refusal to affirm the decision in Stanley shows how his view of obscenity differs from the Warren Court's conception. If Blackmun would have been on the Court at the time of Stanley, he would most likely have voted to uphold the constitutionality of the law and conviction in Stanley. Now that Blackmun and Nixon's appointees are in control of the Court, they are limiting Stanley to the point of nonexistence through these two cases. Without the advent of Blackmun and Nixon's other justices on the Court, this development would not have occurred.

Blackmun agreed with the conservative majority and his friend the Chief Justice. In 37 Photographs and Reidel, Blackmun voted as President Nixon would have wanted him to by deferring to the legislative interests in limiting pornography.
Three crucial 1973 obscenity cases give great insight into Blackmun's approach to the First Amendment and obscenity. The Court handed down these opinions on the same day, a day which would further change the course of obscenity jurisprudence in the United States. *Miller v. California*, 93 S.Ct. 2607 (1973) was the most important of the trio because it altered the test standard for obscenity in the United States. Marvin Miller was convicted of breaking a California statute that made the mailing of unsolicited obscenity illegal (*Miller* 2610). The Supreme Court modified the *Roth* three prong test of obscenity and remanded the case back to the trial court.

In joining the majority opinion, written by Chief Justice Burger, Blackmun embraced the revamped *Roth* test as the new standard for obscenity in the United States. The Court announces that, "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment" (*Miller* 2614). Blackmun and the Court also said that "The 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" (*Miller* 2615).

This new test is significant because the Court allows for community...
standards instead of a national standard. The majority explains this in saying, "Fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or what is 'patently offensive.' These are essentially questions of fact, and our Nation is too big and diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, even assuming the prerequisite exists" (Miller 2618). Blackmun and the majority dismiss the "utterly without redeeming social value test" (Miller 2615) created in Memoirs v. Massachusetts, 86 S.Ct. 977 by the Warren Court. The effect of the new Miller test, the application of community standards and the abandonment of the "utterly without redeeming social value test" allowed more material to be labeled obscene and thus opened more material up to restrictions by legislation. The difficulty in finding that material is "utterly without redeeming social value" gave way to a less stringent "serious literary, artistic, political, or scientific value" test. No longer did the state have to overcome the difficulty of proving that material was "utterly without redeeming social value" to designate material as being obscene.

Douglas, Brennan, Stewart and Marshall dissented from the majority, which, in addition to Blackmun, was Burger, White, Rehnquist and Powell. Brennan had decided to use the trio of cases to make all sexually explicit expression, regardless of its obscenity, protected by the First Amendment
(Richards 61-2). For Brennan, it was a change from his earlier decisions in *Roth, 37 Photographs* and *Reidel* where he created and voted for state censorship of obscenity. In his early drafts of *Miller*, Brennan cited *The Report of The Commission on Obscenity and Pornography* to show that censorship was needless in this area (de Grazia 561). The difficulty of subjective standards used in obscenity cases necessitated throwing them out in favor of free expression (Greenawalt 304). Justice Stewart agreed with Brennan and the two along with Marshall and Douglas were looking for the decisive fifth vote. Douglas initially felt that Blackmun could go with him (Woodward and Armstrong 196-9).

Burger and Brennan were both jockeying for votes on the Court in these three important obscenity decisions. It was Blackmun who would be the deciding vote in the three cases. The Burger faction had attained four votes for moving to the community standards and Brennan had picked up four in retaining an expansive reading of protection for speech. For Blackmun, the evidence that Brennan in the past had wanted at least some kind of definition of obscenity, however small, meant that one was needed. If a definition was necessary, then Blackmun saw no reason to go with the Chief Justice on his definition (Woodward and Armstrong 252).

After coming to that conclusion, the only thing that kept Blackmun from allowing the Court to continue to accept government censorship was a phrase of the third part of the *Miller* obscenity test. Burger had included "taken in context" into the "whether the work lacks serious literary,
artistic, political, or scientific value" test, which Blackmun thought was used by Burger in a way which was really the opposite of the "taken as a whole" addition to the test that Blackmun endorsed. Blackmun was worried that with "taken in context" in the test, "any pornographic section, no matter how small, could get the most worthwhile book banned" (Woodward and Armstrong 252). Even though Blackmun was willing to ban "real" obscenity, his sense of need to protect valuable works was sufficient enough to demand the change. Burger was unwilling to take the phrase out of his draft initially, but with intense prodding by one of his clerks, he changed the wording to win over Blackmun and allow himself to set the Court's precedent in obscenity (Woodward and Armstrong 252).

Again, by embracing the new standard Blackmun shows great deference to the legislative and executive branches in regard to pornography and obscenity. Although by the time he leaves the Court Blackmun will vote with Brennan and Marshall more often than any other justice, Blackmun will hold onto the Miller obscenity standard his entire tenure on the Court while Brennan and Marshall have already decided to junk the standard in favor of a position similar to the Douglas/Black absolute approach. Had Blackmun decided to go the path of Brennan and Marshall, the Roth test would have been dismantled instead of revamped. Several cases related to the Miller standard will make their way to the High Court in the next decade.

The second of the 1973 obscenity cases was Paris Adult Theatre v.
Slaton, 93 S.Ct. 2628. In Paris, two movie theater owners were arrested for showing obscene motion pictures in violation of a Georgia anti-obscenity statute. Blackmun upheld as constitutional the banning of obscene pornographic movies. Chief Justice Burger delivered the opinion of the Court that the First Amendment does not protect obscene material (Paris 2633). Blackmun and the Court also found that the state has an interest "in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly the public safety itself" (Paris 2635). The Court says that the lack of scientific proof that pornography negatively affects a city environment does not mean that a legislature or Court cannot assume it is enough of an interest to uphold the law. "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist" (Paris 2637). This is in direct contrast to the conclusions made by The Report of the Commission on Obscenity and Pornography and Justice Marshall in his 37 Photographs/Reidel opinions that sexually explicit expression was harmless to society.

Moreover, Blackmun and the majority "have declined to equate the privacy of the home relied on in Stanley with a 'zone' of 'privacy that follows a distributor or a consumer of obscene materials wherever he goes" (Paris 2640). This is exactly the opposite conclusion of Marshall, who wrote the opinion of the Court in Stanley. Blackmun's decision in this case
helped to continue to expand the power of legislatures to regulate sexually explicit expression, this time even in a public accommodation which was closed to minors and entered by willing and consenting adults.

In *United States v. 12 200 ft. Reels of Super 8mm. Film*, 93 S.Ct. 2665 (1973), the Court reaffirmed its ruling in *37 Photographs*. On April 2, 1970, claimant Paladini tried to carry obscene material into the United States from Mexico and was arrested under a federal statute which prohibited the importation of obscene and immoral materials (books, papers, drawings etc.) into the United States. The materials were then confiscated by U.S. Customs Officials. Chief Justice Burger wrote the Court's opinion which reversed a U.S. District Court ruling that the statute was unconstitutional.

Like in *37 Photographs* and *Reidel*, in *12 200 ft. Reels* Blackmun voted to narrow the holding in *Stanley*. In *12 200-ft. Reels* the Court found that *Stanley* does not prohibit the proscription of the importation of obscene materials, even if they are claimed to be only read in a private home. "We are not disposed to extend the precise, carefully limited holding of *Stanley* to permit importation of admittedly obscene materials simply because it is imported for private use only" (*12 200 ft. Reels* 2669). In *12 200 ft. Reels*, Blackmun helped the Court deliver a fatal blow to *Stanley* and resisted extending any real protection to obscene materials through that case. Here Blackmun and the Court make clear that even if obscene materials are to be used explicitly in the privacy of one's home,
they can still be proscribed by government officials anywhere outside the home. Douglas, Brennan, Marshall and Stewart all dissented from the majority's opinion.

Even though it was just four years after the resignation of Chief Justice Warren, Blackmun contributed to the Burger Court's remodeling of the High Court's stance on obscenity. Nixon's wish to make the country less of a permissive society was granted in these cases by his appointees. Without them, a much different precedent, authored by Justice Brennan, would have existed. Blackmun served to moderate the Burger *Miller* test and may have allowed some worthwhile material to escape the reach of legislative statute by demanding the phrase change, but he was the deciding vote to allow the conservatives the opportunity to rewrite the standing precedent on obscenity and the First Amendment. In all three of the cases, Blackmun allowed the government to take these steps it thought were needed to stem the porn explosion. Justice Marshall was frustrated and disheartened with the conservative's rewriting of obscenity precedent and the destruction of his *Stanley* majority opinion. His said candidly to one of his clerks, "What difference does it make? Why fight when you can just dissent?" (Woodward and Armstrong 197).

Another obscenity case, *Hamling v. United States*, 94 S.Ct. 2887 was decided in 1974. Two people who had mailed an advertisement of their illustrated version of *The Report of the Commission on Obscenity and Pornography* in violation of a federal statute which outlawed the mailing of
obscenity challenged their conviction on the grounds of the First Amendment.

Blackmun joined the majority opinion, written by Rehnquist, which affirmed the District Court's ruling that the statute and convictions were constitutional. Blackmun and the majority point out that *Miller* does not necessitate a Court from specifying a certain geographical area when describing the community standards (Hamling 2893). Blackmun also found that the federal law in *Hamling* was not evidence of a uniform national standard, which would contradict *Miller*’s community based standards. In joining the majority, Blackmun also decided that "it was not necessary to prove that defendants knew that the materials mailed were obscene" (Hamling 2887).

In light of the *Miller* decision, it was necessary to discuss the question of whether the material in *Hamling* had "serious literary, artistic, political or scientific value." The problem with this material was that it was a project of the President and Congress, *The Report of The Commission on Obscenity and Pornography*. Nothing was altered in the material with the exception of adding illustrations depicting what the report was discussing. Blackmun decided that the material did not have "serious literary, artistic, political or scientific value" despite its original source. This interpretation is very deferential to the government. The conservative bloc of Burger, White, Rehnquist, Powell and Blackmun narrowly edged Brennan, Stewart, Marshall and Douglas for the chance to
decide the case.

Blackmun wrote the majority opinion in *Smith v. United States*, 97 S.Ct. 1756 (1977). In *Smith*, Jerry Lee Smith was convicted of mailing obscene materials in violation of a federal statute (the same as in *Hamling*). The Court affirmed the Court of Appeals and upheld the conviction.

Smith challenged his conviction on the grounds that Iowa did not have an obscenity statute regulating possession by adults and thus according to "community standards" in the *Miller* test, his mailings were not obscene. Blackmun and the Court say that state law does not conclusively delineate the "community standards" discussed in *Miller*. Therefore, the lack of an adult obscenity statute does not necessarily define what is patently offensive, it remains the jury's conception of what the community standard is. In this case, Blackmun states that the absence of an Iowa obscenity statute does not determine that nothing in Iowa could be deemed "patently offensive" according to a community standard. Thus Smith can be found guilty for mailing obscenity. Accordingly, Blackmun also emphasized that the federal statute on obscenity is in effect regardless of reigning state law (*Smith* 1766).

*Smith* was narrowly decided, 5-4, with Blackmun's opinion of the Court joined by Burger, Rehnquist and White. Blackmun is in direct opposition to Brennan, Stewart and Marshall who dissent, saying that the statute is "clearly overbroad and unconstitutional on its face" from past cases which have come to the Court (*Smith* 1769). In his dissent, Stewart
assails the community standards which Blackmun continues to use in 
upholding legislation against obscenity (*Smith* 1769). Stevens also wrote a 
dissenting opinion. In his dissent, Stevens asks for a serious rethinking 
and reworking of the *Miller* standard (Cannon 354).

In *Smith*, Blackmun again shows his willingness to work with the 
*Miller* standard. While Brennan, Marshall, Stewart and Stevens are wary 
of the *Miller* test and seem to quickly overturn all obscenity convictions in 
the midst of any kind of controversial circumstance, Blackmun is very 
derential to the government's interests in the realm of obscenity. In 
*Smith*, Blackmun felt that the government went through all the 
appropriate channels and procedures in order to convict the defendant 
under the *Miller* precedent. Therefore, the conviction should stand.

A question about the community standards in the *Miller* test arose in 
*Pinkus v. United States*, 98 S.Ct. 1808 (1978). William Pinkus was 
convicted of sending obscene materials through the post office system in 
violation of a federal statute. By the margin of 8-1, the Court reversed the 
Court of Appeals decision and remanded the case for a new trial. 
Blackmun joined Burger, Rehnquist and White in the majority opinion.

Chief Justice Burger delivered the opinion of the Court which held 
that the judge's instruction in the original trial, which asked the jury to 
take into account children when determining a community standard, was 
unconstitutional. Blackmun and the Court find that the inclusion of 
children into the community standard would impermissibly alter the
standard as set in *Miller*. The Court states that "we elect to take this occasion to make clear that children are not to be included for these purposes as part of the 'community' as that term relates to the 'obscene materials' proscribed by (the federal statute)" (*Pinkus* 1812).

The majority also discussed the challenge of the instructions by the judge to the jury to take into account "sensitive persons" when deeming what is obscene. Blackmun and the Court find this instruction to be allowable because it was made clear that the standard was not to be based on "sensitive persons" but on a community standard of which sensitive persons may be a part (*Pinkus* 1813).

The Court also upheld the judge's instructions to the jury asking if they believed the works are "an appeal to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of mailing" (*Pinkus* 1814). The Court says that this is a permissible instruction because, "nothing prevents a court from giving an instruction on prurient appeal to deviant sexual groups as part of an instruction pertaining to appeal to the average person when the evidence, as here, would support such a charge" (*Pinkus* 1814).

The issue in *Pinkus* is the *Miller* obscenity test. While no one on the Court is willing to allow children to be a "part" of the community standards to be used in the *Miller* test, Blackmun votes to allow judges to specify sensitive persons as part of the community and to reaffirm "the right to
give a jury instruction on appeal to 'deviant' groups when the evidence supports such a charge" (Osanka and Johann 318). Blackmun again gives legislatures (and in this case judges as well) strength in banning obscenity.

Stevens' concurrence, along with Brennan's concurrence (which was joined by Stewart and Marshall), agreed with the majority that the conviction should be reversed, but would have dismissed the case instead of remanding. Brennan is again adamant in stating that this federal statute (at issue in Smith as well) is overbroad and unconstitutional (Pinkus 1816).

While the Court is in virtual total agreement that the "children" instruction is wrong, the Court splits on whether the case should be retried or dismissed. Blackmun sides with the conservatives in granting a retrial instead of a dismissal. Again, Blackmun is in the pro-government camp on the issue of government regulation of sexually explicit expression. As in most obscenity cases, Blackmun sides with the government interest instead of the individual.

The Court was approached with a zoning ordinance which affected the location of "adult" movie theaters in Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986) (see pg.66). In Renton, two theaters were purchased by Playtime Inc. and were to be made into adult theaters but were prohibited from doing so by a Renton zoning ordinance. This law forbid "adult" theaters from establishing within 1,000 feet of a residential home, park, church or school. Playtime went to court to challenge the law. The Court reversed the Court of Appeals decision and declared that the Renton
ordinance was constitutional.

The Court was split 8-2, with Brennan's dissent joined by Marshall. Justice Blackmun decided not to join the majority's opinion or write his own concurrence; he only concurred in result. Even though he did not join the opinion of the Court, Blackmun voted to allow the government to zone theaters showing sexually explicit expression into specific areas. This gives the government great power in regulating sexually explicit activities.

Another clarification of the terms of the Miller test arose in Pope v. Illinois, 107 S.Ct. 1918 (1987). Pope is the consolidation of two cases in which two bookstore attendants were convicted of selling obscene materials in violation of a state obscenity law. After their conviction, the defendants appealed, challenging the judge's instructions dealing with the "literary, artistic, political or scientific value" prong of the Miller obscenity test. Justice White, speaking for the Court, decided that the judges' instruction that the alleged obscene material must have some "value" to a "ordinary member of any given community" was incorrect and therefore in violation of the First Amendment. Blackmun and the Court found that only the first two prongs of the Miller test--appeal to prurient interest and patent offensiveness--are to be analyzed in relation to "contemporary community standards" (Pope 1920-1). Unlike the other two tests, the "value" test is to be done independently of society's majority opinion. The Court, however, found that this improper instruction was incidental to the obscenity convictions in the case and therefore, the convictions should
stand (Pope 1922-3).

Justice Blackmun concurred in part and dissented in part in the decision. Blackmun joined the majority's finding that the judge's instructions violated the Miller test. He states his disagreement with Stevens, Marshall and Brennan assertion that a "juror asked to create a 'reasonable' person in order to apply the standard that the Court announces today might well believe that the majority of the population who find no value in such a book are more reasonable than the minority who do find value" (Pope 1924). Blackmun states that the standards created by the majority satisfies the dissent's worries about the majority impinging on First Amendment rights. He also says that this standard is in accordance with Stevens' concern that, "just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won" (Pope 1923-4).

Blackmun filed his own opinion concurring in part and dissenting in part and joined Stevens' dissent (which was joined by Marshall and Brennan) because he disagreed with the Court's "harmless error" classification of the faulty instructions. Stevens states, "Because of these erroneous instructions, the juries that found petitioners guilty of obscenity did not find one of the essential elements of that crime. This type of omission can never constitute harmless error" (Pope 1925).
In dissent in *Pope*, Brennan cites his own dissent in *Paris Adult Theatre*, in which he says "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms" (*Pope* 1924). Blackmun had set forth a similar argument in *Young v. American Mini Theatres*, 96 S.Ct. 2440 (1976)(see pg.60) by questioning the ability of a theater owner to know if he or she is an "adult" theater owner and thus subject to penalties. However, Blackmun declines to embrace that position and Brennan's dissent in this case.

While other liberal members of the Court lament the intensely problematic nature of the *Miller* standard and its precedent, Blackmun holds onto *Miller* and often supports state regulation of materials that the liberals, mainly Brennan, Stevens and Marshall at this point, abhor. Edward de Grazia, in his book, *Girls Lean Back Everywhere*, discusses how the supposed reasonable person is rarely found in the juror box, which is a serious threat to free expression as long as the *Miller* test is in use. "The 'reasonable person' does not exist; he must be fabricated by the judge's or juror's mind. Expert witnesses do exist and can help the judge or jury carry out its constitutional task of saving literary expression from the toils of vague and overbroad obscenity law. Jurors, like judges, ought to be required to reach outside and above their individual consciousneses, if
necessary to experts, for an understanding of what is of value in the world" (686). Brennan and liberals like Douglas and Black have attacked *Miller* and Blackmun's position because it makes it virtually impossible to be fair in making obscenity law.

Moreover, Justice John Paul Stevens dissents, saying that in addition to the disagreement with the majority about the reasonable person addition to the third prong of the *Miller* test, "There is an even more basic reason why I believe these convictions must be reversed. The difficulties inherent in the Court's 'reasonable person' standard reaffirm my conviction that government may not constitutionally criminalize mere possession of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults. During the recent years in which the Court has struggled with the proper definition of obscenity, six Members of the Court have expressed the opinion that the First Amendment, at the very least, precludes criminal prosecutions for sales such as those involved in this case... When petitioners Pope and Morrison accepted part-time employment as clerks in the bookstores, they could have hardly expected to examine the stores' entire inventories, and even if they had, they would have had no way of knowing which, if any, of the magazines being sold were legally 'obscene"' (Pope 1929). Even though Blackmun had clearly joined Brennan, Stevens and Marshall in the moderate/liberal voting bloc on the Court by 1987, he remained at odds with them in regards to obscenity doctrine. While Blackmun continues to use and embrace the
Miller standard, Brennan, Stevens and Marshall vehemently attack Miller in hopes of ending the Blackmun and the Court's problematic approach to sexually explicit material and expression.

In *Fort Wayne Books v. Indiana* and *Sappenfield v. Indiana*, 109 S.Ct. 916 (1989) the Court heard cases in which adult bookstore owners challenged an Indiana Racketeer Influenced and Corrupt Organizations (RICO) law which penalizes businesses who are repeat offenders of obscenity statutes. Justice White delivered the opinion of the Court which affirmed the constitutionally of the RICO law and declared that the pretrial confiscation of the owners' bookstore was unconstitutional.

Blackmun joined the majority of the Court (White, Rehnquist, Scalia, Kennedy) who declared the use of the RICO law constitutional. The Indiana RICO law states that businesses that repeatedly violate the state's obscenity statutes may be penalized with the "forfeiture of all... property, real and personal, that 'was used in the course of, intended for use in the course of, derived from, or realized through' petitioner's 'racketeering activity'" (*Fort Wayne* 921). The attack by the petitioners on the RICO statute stems from the ambiguous nature of the *Miller* standard (*Fort Wayne* 924). Blackmun and the majority again refuse to review the *Miller* test. Blackmun and the Court uphold the statute's penalties because it is only convictions of material that has been deemed obscene that the RICO statute prohibits. "We find no merit in petitioner's claim that the Indiana RICO law is unconstitutionally vague as applied to obscenity predicate
offenses. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either" *(Fort Wayne 925).*

Blackmun also agreed that the severe punishment for a conviction was constitutional. The Court found that the RICO law was simply similar to an "enhanced sentencing scheme for multiple obscenity violations *(Fort Wayne 925).* Moreover, Blackmun finds that just because some bookstore owners may pull constitutionally protected material from their stores in order to make sure they do not suffer repeat violations which will lead to a enforcement of the RICO law, "the mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents" *(Fort Wayne 926).* The petitioners also questioned the RICO statute because their obscenity convictions which led to the violation were not affirmed in appellate courts. Blackmun and the majority firmly discarded that notion, commenting that the Court does not necessitate review in any other convictions, and nothing respecting obscenity cases requires any such special treatment *(Fort Wayne 926).* Because Blackmun agrees to again use the *Miller* obscenity test, he too agrees that the government can censor some sexually explicit expression.

The liberal faction of the Court, Stevens, Brennan and Marshall dissented from the Court's decision, stating that the RICO statute was overbroad. Because Stevens, Brennan and Marshall refuse to accept that
the government should be able to proscribe obscenity with the exceptions for children and unwanted exposure, they find RICO's law unconstitutional because it penalizes those who sell sexually explicit material.

Despite upholding the RICO law, the Court also heard the petitioners' challenge of the pretrial confiscation of their business' materials. On this cause, the Court by a vote of 7-2, found that the property seizure was improper. Blackmun again joined the majority (White, Rehnquist, Brennan, O'Connor, Scalia, Kennedy) on this cause. The Court points out that in order to obtain a conviction of obscene materials, "rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene'" (Fort Wayne 927). The Court cites Heller v. New York 93 S.Ct. 2789, which says that all copies of the expressive material in question in excess of a copy that can be used to determine if it is obscene is unconstitutional until the material has been deemed obscene by the court (Fort Wayne 927).

Fort Wayne marks another obscenity case where Blackmun agreed with the conservative majority in allowing the state to make laws to restrict and regulate obscenity. Blackmun is not nearly as protective of First Amendment freedoms when pornography or explicit materials are concerned as are the liberal members of the Court. In this case, Blackmun even concedes the loss of some protected expression. When the Miller test is used to deem material obscene, Blackmun is willing to allow the government continued convictions of sexually explicit material.
In the 1980's telephone dial-a-porn services became a lucrative and thriving business. In 1986 over 800,000 calls a day were made to dial-a-porn companies in New York alone (Osanka and Johann 16). In response to this phenomenon, Congress took steps to make sure the Federal Communications Commission would alleviate the problem. In 1989, 
*Sable Communications v. Federal Communications Commission*, 109 S.Ct. 2829, was brought before the Court as a result of that action. In *Sable*, a California communications company involved in dial-a-porn services challenged a FCC law which banned indecent and obscene phone messages. The Court, by a 6-3 (White, Rehnquist, Blackmun, Scalia, O'Connor, and Kennedy) margin approved the FCC ban on obscene phone messages as constitutional. Justice White wrote the majority opinion which was joined by Blackmun. Blackmun and the majority state that the Court has a firm precedent that obscene speech is not protected by the First Amendment and may therefore be regulated without offending the freedom of expression (*Sable* 2835).

The Court disagreed with the petitioners contention that the law establishes a national standard of obscenity which would invalidate *Miller*. White pointed out in his opinion that federal laws outlawing the mailing of obscene materials have already been declared constitutional by the High Court in *U.S. v. 12 200 ft. Reels of Film* (*Sable* 2836). Blackmun and the majority also stated that if the company wants to maintain its dial-a-porn service to a large geographic area, it may have to tailor its messages to
avoid obscenity violations in areas with different "community standards" (Sable 2836).

The Court unanimously found that the FCC ban on indecent but not obscene transmissions was unconstitutional. The FCC put forth the ban on indecent messages to prevent minors from gaining access to such calls, but the Court found that the statute "was not sufficiently drawn to serve that purpose" and was thus unconstitutional because of the First Amendment (Sable 2936). While the Court points out that protected speech may be regulated if the government shows a compelling interest like the psychological health of children in this case, the law must be tailored to protect that interest. In this case, the law outright bans the indecent communications instead of finding a way to screen calls made by minors (Sable 2838). White sums up the Court's position in saying, "Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny" (Sable 2839).

Stevens and Marshall join Brennan's dissent from the majority opinion. Brennan reiterates his statement from Paris Adult Theater and Pope v. Illinois that the freedom of speech is chilled because of obscenity convictions where the subjective nature of the Miller standard makes it impossible for creators of sexually explicit materials to know what is and isn't protected by the First Amendment. He says "I have long been
convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable" (Sable 2840).

Blackmun and the majority again go back to Miller to allow regulation of speech that has been found obscene. For Blackmun, the key factor is whether or not the expression has been found obscene via the Miller obscenity test. In Sable, some of the communications had and therefore Blackmun is willing to uphold the law despite the difficulty of enforcing local standards on a company that is based in one area. Blackmun will not allow the FCC to ban communication which has not been found to be obscene, however. In doing so, Blackmun ascribes to a problematic philosophy which shows continued deference to government interests. With technological developments like dial-a-porn, Blackmun's embracement of Miller and the notion that the government can regulate sexually explicit expression makes the entire area of censorship more complicated for citizens, legislators, judges and the Supreme Court.

The Court faced another challenge of a anti-child pornography statute in Osborne v. Ohio, 110 S.Ct. 1691 (1990). In Osborne, an individual convicted of violating a state statute prohibiting the ownership of child pornography challenged the constitutionality of the law. The claimant asked the Court to nullify the law because of the law's overbreadth and an instruction error made by the judge to the jury.

The Court, by a margin of 6-3, deemed the statute constitutional but
declared that Osborne was to be given a new trial as a result of the erroneous instruction of the judge in his conviction. Justice White delivered the opinion of the majority (White, Rehnquist, Blackmun, Kennedy, O'Connor and Scalia). Blackmun and the Court dismiss the petitioner's claim that under *Stanley v. Georgia*, a person has a constitutional right to have obscene material in one's own home. The Court restates that *Stanley* should not be "read too broadly" (*Osborne* 1695). Because of the interest in protecting children's mental and physical health that Ohio asserts which is absent in *Stanley*, the Ohio law does not offend the First Amendment (*Osborne* 1695-6).

An overbreadth challenge to the statute is also discussed by the Court. Blackmun and the majority say that the aim of the law is to end child pornography and not just materials depicting child nudity. As a result, the Ohio court's reading of the law as only criminalizing the ownership of materials picturing naked minors which explicitly centers on the child's genitals or is made in a distasteful manner (*Osborne* 1698). Blackmun finds that the Ohio court's narrow interpretation of the statute is sufficient to render it not overbroad and therefore constitutional.

The majority believes, however, that because the trial judge did not alert the jury about that interpretation, Osborne should be given a new trial (*Osborne* 1698). The failure of the jury to find this key aspect of the materials demands a retrial because Osborne was denied due process.

Brennan dissented and was joined by Justices Stevens and Marshall.
The trio claimed that the statue was still too broad in light of the Court's precedent set in Stanley v. Georgia. Therefore, Ohio should not be able to retry Osborne (Osborne 1706-7). The dissenters also point out that the nexus between proscribing the possession of child pornography and the state goal of reducing the production of the child pornography is very frail. Brennan stated that because of the weakness between the statute and the state's objective, the statute is unable to usurp the First Amendment (Osborne 1714-5).

Osborne is another victory for the conservatives who continue to allow the government to ban materials based on state interests related to the regulation of sexually explicit expression. Blackmun votes in another case to further chip away at any significance left in the Warren Court's Stanley decision. Robert F. McKeever, in his work Raw Judicial Power? The Supreme Court and American Society characterizes Blackmun's position in Osborne as "further evidence of the end of liberalism in obscenity cases" (237). Osborne exhibits how deferential Blackmun is to the government in First Amendment areas concerning obscenity. In Osborne, Blackmun allows a lower court to interpret the law in such a way so it will not be overbroad, thus upholding the government sponsored ban.

Blackmun would leave the Court having deferred to the government in allowing legislatures to regulate obscenity in most cases. He voted to uphold Miller throughout his entire tenure on the Court. From upholding the convictions in Hoyt to defending the zoning ordinance in Renton,
Blackmun was a frequent member of the pro-government faction in cases dealing with the regulation of sexually explicit expression.

**Blackmun's Moderating Influence in the Regulation of Explicit Expression**

Blackmun showed great deference to the government in regulating obscenity and sexually explicit expression, but at times he also acted as a moderating force on the Court in this area of jurisprudence. While his moderating efforts in the regulation of sexually explicit expression pale in comparison to his centrist decisions in other areas of law, Blackmun sometimes voted against the government when proper procedures and safeguards were lacking in cases dealing with the regulation of explicit material. He often voted against upholding statutes which outlawed explicit but not obscene material. Blackmun weighed the right of the government to regulate obscenity against possible gross overcensorship of valuable material and expression primarily by differentiating between statutes affecting obscene material and those which affect expression which was explicit but not obscene under the *Miller* standard.

In Blackmun's first years on the Court, the Nixon appointees began to carve out state power to ban obscenity and merely sexually explicit
material. Brennan and the "liberals" were deeply troubled by the development of *Miller v. California*. As a result, they declined to use the "rule of four" to grant another obscenity case a *cert petition* after *Miller* because of their lack of numbers. This faction believed that the regulation of obscenity was impermissibly problematic because of its subjectivity. Brennan scoured the country to find a case where a film or book had been censored which was clearly not obscene and thus protected by the First Amendment (Woodward and Armstrong 280). He believed such a case would show Blackmun and the conservatives the folly of allowing juries to use their own "community standards" instead of Brennan's complete protection of obscene and explicit materials. Brennan hoped he could find another obscenity conviction to go along with this kind of obscenity case which would be less clear-cut and therefore show the conservative's weak and subjective position in the area of obscenity (Woodward and Armstrong 281). Brennan was mounting an attack on the community standard test Blackmun first put forth in *Hoyt*. Brennan was hoping that he would be able to move Blackmun to the same conversion he himself had made since his *Roth* opinion.

Brennan found his case to challenge Blackmun and the conservatives in *Jenkins v. Georgia* 94 S.Ct. 2750 (1974). *Jenkins* was decided the same day as *Hamling v. United States*. *Jenkins* arose when a movie theater owner was arrested and fined under a Georgia statute for distributing obscene materials. The obscene material was the movie *Carnal Knowledge*,
(which starred Jack Nicholson, Candice Bergen, Ann Margaret and Art Garfunkel) which Jenkins played at his theater. The Court unanimously reversed the Georgia Supreme Court's decision and overturned Jenkins conviction.

The Court's opinion was written by Rehnquist. First of all, Blackmun and the Court stated that juries do not have to be told to apply a statewide community or that judges do not have to specify what "community" the standards are from (Jenkins 2753). Most importantly, however, Blackmun found that just because a jury made a conviction based on their designation that the material was obscene, it does not preclude another court reviewing the material. "Even though questions of appeal to the 'prurient interest' or of 'patent offensiveness' are 'essentially questions of fact,' it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is 'patently offensive'" (Jenkins 2755). This aspect of the opinion would elucidate an important issue in the regulation of sexually explicit expression debate for Blackmun. This case would in one respect reinforce Miller while at the same time giving judges a chance to check the power of juries. The Jenkins decision would allow the judicial branch to reverse any outlandish obscenity convictions. Jenkins protects Blackmun from the possible unwanted consequences of Miller.

The Court then moves to the issue of whether they find the film is obscene and not afforded First Amendment protection. Blackmun and the
Court state that although there is nudity and "ultimate" sexual acts taking place in the film, the graphic sex is not the main focus of the film. "Nothing in the movie falls within either of the two examples given in Miller of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is their anything sufficiently similar to such material to justify similar treatment" (Jenkins 2755). The Court found that the movie was not "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which was labeled obscene in Miller (Jenkins 2755). The majority even cited the placement of Carnal Knowledge on the "Ten Best" lists of 1971 and a review of the film's theme in The Saturday Review to make that point clear. Blackmun and the majority dealt with the juxtaposition of Hamling and Jenkins by delineating the difference between the "hard core" nature of the illustrated report in Hamling and the simulated sex in Carnal Knowledge.

Jenkins was an important case because it reaffirmed Blackmun's intention to make the Miller obscenity standard a community one and to also extend power to courts to check overzealous and oversensitive juries from banning too much material as being obscene. It is also interesting to note that Blackmun was willing to impart his own "collective" obscenity standard in communities which are too overzealous in their censorship efforts (de Grazia 571). Blackmun again joined the majority, and this case vindicates his trepidation about giving too much power to juries to label
things as obscene. *Jenkins* is important in that it creates the kind of safeguard in obscenity precedent that Blackmun needs to make the *Miller* test suitable for use. This is one of the few cases where Blackmun votes against the government in a case which deals with obscenity. Although the case was unanimous Brennan, Stewart, Marshall and Douglas declined to join the majority's opinion. They used this opportunity to make their case against the *Miller* standard.

Brennan continued to play to Blackmun's trepidation that a decision may have unwanted and unintended consequences for himself or the Court in hopes of winning him over to the anti-*Miller* faction of the Court (Woodward and Armstrong 362). Blackmun also followed Brennan in *Erznozniak v. Jacksonville*, 95 S.Ct. 2268 (1975). In this case, Richard Erznozniak, a drive-in theater manager, was arrested for violating a statute that prohibited showing a movie which showed naked human body parts. The Court, by a count of 6-3, overturned the lower courts ruling and found the law to be unconstitutional. Blackmun joined the majority opinion (Powell, Blackmun, Douglas, Brennan, Marshall, White) which was written by Justice Powell.

Blackmun and the majority were quick to point out that the city acknowledges that the film's banishment exceeds the restraints on the government under the *Miller* test (*Erznozniak* 2272). Instead, the city asserted that the nudity on the screen of the theater is a public nuisance and thus justifies the statute. Powell says that a "municipality may protect
individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power" (Erznoznik 2272). The Court dismisses the need to protect the viewer, because unlike the entering of unwanted mail into one's home in Rowan v. Post Office, anyone may avert their eyes of any portion of the movie theater's screen (Erznoznik 2273).

Blackmun and the Court also attack the statute as being overbroad, because it does not specify that it proscribes only "explicit" or "lewd" nudity (Erznoznik 2274). Powell sums up the Court's position when he says, "we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content" (Erznoznik 2274). Thus, in Erznoznik Blackmun takes a step to moderate any extreme empowerment of the government in censoring sexually explicit expression.

Erznoznik was one of the first cases dealing with the regulation of sexually explicit expression since Blackmun arrived on the Court that the conservatives lost. In this case, Brennan was able to win over Blackmun who dissented in all three of the 1973 obscenity decisions. Blackmun gave an early indication how he would vote in the case when he stated in oral arguments that the law was so vague that it even prohibited the showing
of a baby's buttocks on the screen (Woodward and Armstrong 364). Blackmun's willingness to move away from Burger's thoughts in order to avoid the misuse of the Court's findings in *Miller* is evident in *Erznoznik.*

*Erznoznik* also exhibited the emphasis Blackmun puts on procedure when dealing with the regulation of sexually explicit expression. Brennan was able to win over Blackmun, because the statute in question in *Erznoznik* dealt with explicit, but not obscene material. If the material had not found to be obscene, he was unwilling to allow it to be banned. This case is an example of the line Blackmun draws between obscene material and expression which is merely explicit. As in *Sable,* Blackmun was as protective of speech that had not been deemed obscene through the proper procedure as he was confident that the of banning obscenity was constitutional.

*Southeastern Promotions, LTD.* v. *Conrad,* 95 S.Ct. 1249, was decided in 1975. *Southeastern* dealt with a public city board who was responsible for administrating a city-leased theater. When the board refused to allow a promoter to present the musical *Hair* at the theater, the promoter brought the case to court. The board did not conduct any investigation before deeming the work not "in the best interest of the community." There decision was based merely on hearsay reports from outside the board.

Blackmun, backed by Brennan, Powell, Stewart, White and Marshall, overturned the District Court and stated that the board's refusal to allow
the work to be presented on its face without a hearing as to its content was unconstitutional. Blackmun points out that the board's decision is a case of prior restraint of the freedom of expression. In his *Smith* opinion, Blackmun discusses how pernicious censorship prior to the act of free expression (prior restraint) can be.

Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority (prior restraint) was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship--reflecting the natural distaste of a free people--is deep written in our law. (1244)

Because the prior restraint in this case did not include procedural safeguards against a tyrannical use of the board's power against expression freedom, Blackmun felt the board's decision was unconstitutional. These safeguards include "the burden of instituting judicial proceedings, and of proving that the material is unprotected (i.e. obscene), must rest on the censor," as well as requirements that a trial begin quickly and be accompanied by a "prompt final judicial determination" (*Southeastern* 1247). Blackmun concludes by saying that it is not the lower or Supreme Court's time to consider the obscenity of the work in question. That
determination must be made by a lower court with original jurisdiction before a appellate court can concern itself with the possibility of the obscenity of the work. Therefore, the only issue in *Southeastern* is whether the appropriate concerns for First Amendment freedoms accompanied the board's decision. "The procedural shortcomings that form the basis for our conclusion are unrelated to the standard that the board applied. Whatever the reasons may have been for the board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safeguards" (*Southeastern* 1248).

While *Southeastern Promotions* may not be a valuable case in terms of First Amendment jurisprudence, it is a window into Blackmun's' thoughts and theory of the relationship between obscenity regulations and the First Amendment. For Blackmun, truly obscene expression may be banned by the government, but he is more demanding than most conservative justices that the government must be cautious in this area. Hence, Blackmun voted for the *Miller* standard yet quickly points out that the state may not restrict material without formally finding the material obscene under that definition. The procedural safeguards in *Southeastern* and other obscenity cases show Blackmun's attempt to balance justifiable censorship of pure obscenity and the trepidation and fear that acceptable expression will be unconstitutionally banned without carefully defined rules, procedures, standards and checks. The material or expression in *Southeastern* has not been found obscene, therefore the board cannot ban
it. Blackmun believes sexually explicit expression which has not been found obscene is protected by the First Amendment. Therefore, prior to banning it, the censor must prove its obscenity through the correct procedures, which it has failed to do. Blackmun hopes that with safeguards the government will not take obscenity regulations to the point of egregious overregulation.

*Young v. American Mini Theatres, Inc.*, 96 S.Ct. 2440 (1976), marked the third time in as many years that Blackmun decided in favor of the individual against the government in case dealing with the regulation of sexually explicit material. In *Young*, a movie theater manager was challenged a city law that prohibited any adult theater from doing business within 1,000 feet of another similar operation or within 500 feet of a residential neighborhood. The majority (Burger, Powell, White, Rehnquist, Stevens) found the law to be constitutional and thus reversed the judgment of the Court of Appeals (*Young* 2440). Justice Stevens, who offered little protection to sexually explicit materials states in a famous line in the majority opinion that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice" (*Young* 2446-2448).

Blackmun, along with Brennan and Marshall joined Stewart's dissent. Blackmun and the dissenters point out that the ordinance has nothing to with regulating obscene speech. "What this case does involve is the constitutional permissibility of selective interference with protected
speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference. By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience" (Young 2460). Though legislators can regulate obscene speech, Blackmun and the dissenters are adamant in pointing out that the First Amendment does not allow the regulation of speech that has not been deemed obscene. This again is similar to Blackmun's position in Sable as well as Southeastern.

Justice Blackmun also writes his own dissent, which is joined by Stewart, Brennan and Marshall. Blackmun attacks the "vagueness" of the ordinance by exhibiting the daunting task that awaits movie theater owners in complying with the law. The hassle that the owner must undertake to find out whether the shows he or she is showing are considered "adult" in addition to finding out if there are any other businesses in the area that also show "adult" films is great (Young 2461). Blackmun reiterates his agreement with Stewart's dissent when he says, "however distasteful we may suspect the films to be, we cannot approve their suppression without any judicial finding that they are obscene under this Court's carefully delineated and considered standards" (Young 2465).

In Young, Blackmun exhibits his willingness to join the liberals of the
Court in making sure that legislatures are not given unbridled power in banning work that does not fall under the Court's tests for obscenity. Sexually explicit expression that has not been found obscene cannot be easily regulated in the eyes of Blackmun. Although Blackmun allows the government to ban speech as obscene, he hesitates to give them carte blanche power in doing so (Wasby 82). The need for safeguards he alluded to in *Southeastern* is again applicable here. A narrowly defined ordinance is needed to secure First Amendment protected expression from unconstitutional regulation. Moreover, Blackmun recognizes the difficulty of the regulation in this case. While Brennan, Marshall and Stevens make that claim throughout the 1970's, 80's and 90's, this is one of the few cases about the regulation of sexually explicit expression in his career in which Blackmun agrees.

The next decade would be the main years of Blackmun's transformation to a more liberal stance on the Court. Despite this fact, after *Smith* it would be nine years after *Young* before Blackmun voted again for the individual against the government in a case dealing with the regulation of sexually explicit expression.

The area of child pornography became an important issue in the 1970's as a result of the large increase in magazines and films which portray children engaged in sexual acts in the late 1960's. The Child pornography business had become a "highly organized, multimillion dollar industry" by the mid 1970's (Moretti 53). Child pornography was thrust
into the public spotlight when a national child-pornography ring was exposed when police found 6 1/4 tons of pornography at a man's home in Texas (Osanka and Johann 451). American society and government attempted to deal with the problem by enacting several federal and state statutes aimed at protecting children involved in this industry. In 1978, Congress passed a new federal pornography law. That law was accompanied by several state statutes as well (Osanka and Johann 448).

The first significant case surrounding the regulation of sexually explicit material that came before the Court during Blackmun's tenure that dealt with child pornography was *New York v. Ferber*, 102 S.Ct. 3348 (1982). *Ferber* dealt with the conviction of a bookstore owner for violating a New York law forbidding the production and dissemination of material depicting a child under the age of 16 performing in sexual acts. The Supreme Court unanimously reversed the New York Court of Appeals by finding that the statute was not underinclusive or broad and thus constitutionally permissible.

Justice White delivered the Court's opinion. The Court found that the state interest in child pornography allows the state to be given greater latitude in the creation of anti-child pornography statutes in comparison to other activities that have also not been found technically "obscene." The state's interest in preventing the "physiological, emotional, and mental health" damage that children involved in the production of pornographic material allows for this easing of First Amendment protections (*Ferber*
Because child pornography impacts greatly "the welfare of children," that interest overbalances the Constitution's First Amendment (*Ferber* 3349).

Justices O'Connor, Brennan (joined by Marshall), and Stevens each wrote concurring opinions. Blackmun, however, neither joined the majority or concurring opinions or wrote his own. Instead, he simply concurred in result. Blackmun's belief in making sure regulations are narrowly drawn (*Erznoznik*) and that there are procedures formally finding the material obscene (*Smith* and *Southeastern*) to prohibit wanton uses of censorship makes *Ferber* a difficult case for him to delineate his reasoning behind his decision. It is important to remember his Senate confirmation hearing where he pledged to protect "the little people."

Blackmun's moral beliefs against child pornography led him to uphold the law while his fear of the decision being taken too far in other cases kept him from joining the majority decision. In this case, Blackmun evades the difficult explanation of his vote by simply voting to help out children by validating the law. As a result, Blackmun is advocating a kind of case by case approach to obscenity and sexually explicit expression censorship. With enough safeguards, both the state and constitutional interests can be preserved.

Another fact facing Blackmun is that the Court did not delineate a test to be used in dealing with child pornography. Daniel S. Moretti, in his work, *Obscenity and Pornography: The Law Under the First Amendment,*
says, "Although the Court retained the Miller standard for cases not involving children, it failed to adopt a specific test for child pornography" (61). Moretti continues discussing the vagueness of the Court's ruling.

(Ferber) really tells the states nothing on how to formulate their child pornography laws. As a result, Ferber gives the states great latitude in formulating their own tests for child pornography. The Court's statement that material need not be evaluated 'as a whole' allows the material to be judged on the basis of 'isolated passages.' Since there is no requirement that the material be without 'serious value,' it would seem this part of the Miller test need not be satisfied to show child pornography may be banned. The Ferber test gives states the power to prohibit any material containing even the slightest amount of child sex. This test may be construed to include both scientific and artistic material as well. (61)

These insights show more conclusively why Blackmun would not want to add his name to the opinion. The Ferber majority's willingness to allow the the expression to be analyzed without looking at it "as a whole" is contrary to Blackmun's point back in Miller in which he necessitated the word change so material would not be judged in this manner. For Blackmun, the expression must be taken in context in order to render a appropriate designation of obscenity. Also in Ferber, the opinion of the Court declines to use Miller. Blackmun's continued approval of the Miller standard comes in conflict in Ferber. Blackmun's vote for the opinion of the Court would
have given White's opinion a five justice majority. Blackmun did not want to stray from the *Miller* test and allow other courts to use this case to take out of context sexually explicit parts of materials. Yet because he upheld the law, he indicated that he believed that the government could regulate child porn.

Similarly, Blackmun concurs in result without joining an opinion of any kind in the aforementioned adult theater zoning ordinance case, *Renton v. Playtime Theatres* (1986). The Court's opinion in *Renton* was delivered by Rehnquist, who found the ordinance to be an allowable method to deal with the negative effect of adult theaters on the city's environment and thus unconnected to the First Amendment (*Renton* 926). Rehnquist also cited that the law does not prohibit the existence of such theaters, but is a "content neutral" time, place and manner regulation which is constitutional because of the "substantial" government interest in avoiding the negative effects of adult theaters (*Renton* 926).

The justices in *Renton* decided the same way when a similar issue was brought before the Court a decade earlier in *Young v. American Mini Theaters* with the exception of Blackmun. Blackmun, who dissented in *Young* with Brennan and Marshall in attacking an ordinance which also banned adult theaters, decided to join the conservative majority in upholding the ordinance. Blackmun did not join Rehnquist's majority opinion and did not write his own or join a concurrence. He merely concurred in result.
Blackmun's decision in Renton is odd when looked at in the context of his decision in the similar case in Young. In Young, Blackmun cited the vagueness of the statute and the difficulty facing theater owners in determining whether or not they own "adult" theaters (Young 2461-2465). He says in his defiant Young dissent, "We should not be swayed in this case by the characterization of the challenged ordinance as merely a 'zoning' regulation, or by the 'adult' nature of the affected material. By whatever name, this ordinance prohibits the showing of certain films in certain places, imposing criminal sanctions for the violation of a ban. And however distasteful we may suspect the films to be, we cannot approve their suppression without any judicial finding that they are obscene under this Court's carefully delineated and considered standards" (Young 2464). With this kind of rhetoric, it seems unlikely Blackmun would have decided to uphold the Renton ordinance as he did.

Moreover, it is more stunning that he votes to uphold the Renton ordinance despite the fact that it is more restrictive than the law at issue in Young. In fact, the restrictions on the location of adult theaters in Renton left possible owners with just 5% of the city's area with which to place their businesses and of this small portion virtually none was up for sale or lease (Irons 175).

In Renton, Blackmun may have been in the same position as he was in Ferber. At the time, ordinances were an attempt by city governments to cleanse their neighborhoods of pornography. In the election of 1980,
future President Ronald Reagan campaigned on a "morality" platform. Reagan and the New Right "invigorated the conservative anti-pornography movement and contributed to building a more formidable national movement in the 1980's" (Downs 27). This movement decided to use zoning ordinances to buoy their cause. Reagan created his own commission on pornography just one year prior to Renton in 1985 in hopes of "determin(ing) the nature, extent and impact on society of pornography in the United States," with the hope of finding "more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees" (de Grazia 583-4). Reagan was trying what Nixon had tried over a decade earlier in dealing with pornography. This environment made the decision to overturn the ordinance more difficult for Blackmun.

Despite not wanting to abolish the ordinance, Blackmun was uneasy about adding his name to an opinion which could be used in future cases to ban works he believes are protected by the First Amendment. It is important to remember how much Blackmun fears the misuse of his decisions. Rehnquist's acceptance of the state's advanced interest preventing the negative "secondary" effects of adult theaters despite the lack of tangible evidence was something that could evade safeguards and allow gross over-censorship is something Blackmun would have wanted to avoid. Moreover, the government did not find the films shown by the theater to be obscene, which made Blackmun's decision difficult. Brennan
had the same abhorrence of future consequences of this flimsy "secondary" effects argument. But unlike Blackmun, Brennan decided to again attempt to stop these alleged "zoning ordinances" from slipping further down the slippery slope of obscenity censorship (Davis 168). As a result, Blackmun and the Court allowed the city of Renton to virtually ban adult theaters from doing business in their town.

Another challenge to a city ordinance was made in *Arcarda v. Cloud Books, Inc.*, 106 S.Ct. 3172 (1986). In *Arcarda*, the owner of an adult bookstore challenged a New York law which closes down for one year, a building which has been deemed to be a "public health nuisance" as a result of prostitution and public indecency violations on or near the premises (*Arcarda* 3172). Chief Justice Burger delivered the opinion of the Court that the statute was constitutional. Burger said the statute was lawful because it is aimed at illegal activity that is unconnected to any First Amendment rights (*Arcarda* 3173). The Court found that the fact that the building was a bookstore is not a factor in making the statute unconstitutional.

Blackmun dissented from the six justice majority. He personally wrote a dissent that was joined by both Brennan and Marshall. First of all, Blackmun points out that the bookstore in question sells "sexually explicit, but not allegedly obscene materials" (*Arcarda* 3178). Therefore, the materials sold at the store are constitutionally above the law in regard to content. This reiterates Blackmun's position in *Sable*. Blackmun mainly
attacks the statute as not being narrowly tailored enough to the state's goal of prosecuting prostitution and public lewdness (*Arcada* 3178-80). He also points out that a legislature cannot get around the First Amendment's protection of expression through regulation of unexpressive conduct (*Arcada* 3178). Blackmun says that it can prosecute prostitution and public lewdness, not by penalizing the individual who owns the property it is done on, but the individual who is the actual perpetrator (*Arcada* 3179). In sum, Blackmun believes that the statute is unconstitutional because the state has chosen a means of enforcement which is expression based, when it could be solved without treading on the First Amendment.

Blackmun is somewhat inconsistent his ideology in this case. In *Arcada*, Blackmun says that the state should not prosecute the bookstore owner but the individuals engaged in the actual illegal conduct. It is clear that the owner of the theater in question in *Renton* is not the actual perpetrator, but the secondary effects of that theater are what allows the state to regulate them through the ordinance. If one applies this standard to *Renton*, the state should regulate those engaged in the negative conduct which results and find ways to combat the secondary effects without impeding on the First Amendment. As evidenced by his decisions (or lack thereof) in *Ferber* and *Renton*, Blackmun is torn and divided on obscenity and for him there is a fine line between obscenity and First Amendment protected speech.

Conversely, *Arcada* is in accordance with his principles about
procedural accuracy in obscenity convictions. While the government has unquestionable power to censor obscene expression, it cannot inhibit the sale of material that is not obscene. If the government had decided to just ban the books which had been found to be obscene, Blackmun would have upheld the convictions as he had done in *Hamling, Sable, Reidel, Ft. Wayne* and *Smith*. Instead, he votes against the constitutionality of the proscription of sexually explicit expression which has not been found obscene in this case as he had done in *Sable, Southeastern* and *Arcarda*.

Two individuals who owned businesses who employ nude dancers challenged the constitutionality of an Indiana law that necessitated that nude dancers wear pasties and g-strings in *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991). The Court majority's opinion was written by Chief Justice Rehnquist and was joined by O'Connor, and Kennedy. Rehnquist found that the law is constitutional because nude dancing is not related to the expression protected by the First Amendment. Moreover, Rehnquist believes the state's interest in "protecting societal order and morality" is served by the proscription of the nude dancing. Because this interest is not connected to expression freedom, the state can ban nudity even though it is done in conjunction with the expressive nature of dance (*Barnes* 2457).

Blackmun joined White, Marshall and Stevens in dissenting. They attack the Court's finding that nudity is unrelated to the "expressive component of the dance" (*Barnes* 1474). White, writing for Blackmun and
the dissenters, finds that the nudity of the dance affects the "expressive component" of the dance by producing feelings and emotions. As a result, the First Amendment protects non-obscene nude dancing and therefore the law must be scrutinized heavily in regards to the state interest asserted. The dissenters find that the state statute fails in this respect because the legislature could have made other laws which would have served their interest without impinging on the freedom of non-obscene expression (Barnes 2475). White sums up the dissenter's position by saying, "As I see it, our cases require us to affirm absent a compelling statute interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard" (Barnes 2475).

_Barnes_ is another example of Blackmun as a moderate influence on the Court. In cases like _Young, Erznoznik, Arcarda_ and _Barnes_, Blackmun disallowed government convictions because they were not narrowly drawn to the state interest while in the bulk of cases about the regulation of obscenity, he gives the government great latitude in such areas. In _Barnes_, Blackmun reiterates his _Young_ dissent from 1976 in demanding the government tailor its interests closely to any statute which regulates sexually explicit expression. In this case, the government has not found the material to be obscene, therefore Blackmun limits the scope of governmental power to censor such expression.

Another RICO statute challenge was brought before the Court in
Alexander v. U.S., 113 S.Ct. 2766 (1993). In Alexander, an adult bookstore owner challenged a RICO law which penalized obscenity violations with the forfeiture of all of his adult bookstore assets. Rehnquist delivered the majority opinion which was joined by White, O'Connor, Scalia and Thomas that found that the RICO seizure of the petitioner's assets was constitutional and did not offend the freedom of expression. Rehnquist states that the penalty stops Alexander from funding "expressive activity" with finances gained through illegal sale of obscenity but does not prohibit Alexander from participating in "expressive activity" (Alexander 2768). RICO is indifferent to the expressive or non-expressive nature of the violator's assets. Moreover, the Court adds that this seizure penalty will not result in a greater "chilling effect on free expression" than the stiff penalties that were upheld in Fort Wayne Books (Alexander 2768).

Justice Kennedy wrote a dissenting opinion which Blackmun and Stevens joined. Blackmun and the dissenters found the forfeiture of the petitioner's assets served as the extermination of his adult book and film business based on a single obscenity violation. This eradication thus divests the public of the availability of protected expression which is sold in the stores (Alexander 2779). The forfeiture of assets is different from normal criminal penalties because its aim is the destruction of a business (Alexander 2783). Blackmun believes this kind of penalty is unconstitutional because it allows the government to "chill" protected speech through censorship. The seizure of assets in this case will greatly
restrict citizens' access to protected non-obscene sexually explicit material (Alexander 2783).

Alexander is another example of the skipping back and forth between the factions in the Court by Blackmun depending on the nature of the case. Unlike Fort Wayne Books v. Indiana and Sappenfield v. Indiana Blackmun decided not to uphold the RICO statute in the Alexander case. The key factor making Alexander different from the other two RICO cases for Blackmun is the total forfeiture and seizure of Alexander's entire business to the government. Blackmun's reasoning in Alexander is similar to Arcarda. Like Arcarda, the government in Alexander is using the finding of obscenity of some material to effect something other than just that material. Blackmun is unwilling to allow that kind of extension go on. Alexander is the last sexually explicit expression regulation case that Blackmun would rule upon.

Despite his pro-government tendency in cases dealing with the regulation of sexually explicit expression, Blackmun would occasionally attempt to pull the Court back from an overzealous censorship position. This most often occurred in statutes which dealt with expression that is sexually explicit but not technically obscene under the Miller obscenity test. However, this attempt at moderating the Court's regulation of sexually explicit expression doctrine is not as constant or is evident as in other areas of law.
Blackmun's Voting Patterns in the Regulation of Sexually Explicit Expression

In cases dealing with obscenity and the regulation of sexually explicit expression, Blackmun would not undergo the kind of liberal move he made in most other areas of law. The 22 important cases dealing with the regulation of sexually explicit expression which Blackmun heard during his 24 years on the Court evince his consistently moderately conservative approach to this area of law which endured for his entire career. Blackmun voted liberally (in favor of the individual right to the expression "against the government('s)" right to censor sexually explicit material) in just seven of the 22 cases during his tenure. Moreover, these cases were spread out during his career. While he used his vote to moderate the increasingly conservative Court in the 1980's, liberal moderating votes were rare for Blackmun in cases dealing with the regulation of sexually explicit expression and obscenity. He voted liberally in a unanimous case in 1974 (Jenkins), two in 1975 (Erznoznik and Southeastern Promotions), one in 1976 (Young v. American Mini-Theatres), 1986 (Arcarda v. Cloud Books), 1991 (Barnes v. Glen Theater) and 1993 (Alexander). In the thirteen cases about the regulation of sexually explicit expression or obscenity decided in the 1970's, Blackmun voted liberally in four, or 30.8%
of them. During the 1980's and 1990's, in which the Court faced nine of these disputes; Blackmun voted liberally in three, or 33.3% of them.

The constancy of Blackmun's voting pattern can also be illuminated through his interagreement with other justices. Blackmun agreed with Justice Brennan, the liberal leader of the Court in obscenity and the regulation of sexually explicit expression, in only 4 of the 11 (36.4%) non-unanimous cases which were decided in the 1970's. During the 1980's and 1990, Blackmun and Brennan voted similarly just once in the six (16.7%) non-unanimous obscenity and sexually explicit expression cases during that time.

The interagreement between Blackmun and the conservative duo of Burger and Rehnquist (which voted identically in all of the cases they heard while on the Court at the same time) shows the consistency of Blackmun's conservative leanings in the realm of obscenity and the regulation of sexually explicit expression. Blackmun voted similarly with Burger and/or Rehnquist in 8 of 11 (72.7%) non-unanimous sexually explicit expression and obscenity cases between 1970 and 1980. In comparison, Blackmun agreed with Burger/Rehnquist in 5 of 8 (62.5%) non-unanimous obscenity and sexually explicit expression cases decided between 1980 and 1994. This analysis shows that Blackmun made no dramatic shifts in his approach to his ideology regarding the regulation of sexually explicit expression before retiring from the Court in 1994.

Blackmun's would leave the Court with a moderately conservative
doctrinal stance which was consistent in his time on the High Court. Although it was just three years into his tenure on the Court, his decisive vote in Miller v. California set the precedent which allowed an increase in the banishment of more and more sexually explicit material. This was the largest impact he had on this area of law. Blackmun's support of that case and its test for obscenity held steadfast throughout his twenty-four years on the Court. In Hoyt v. Minnesota, in his first year on the Court, Blackmun advocates the use of community standards for obscenity legislation. And after Miller, Blackmun writing for the Court in Smith v. United States in 1977 reaffirms the Court's belief in community rather than national standards. In 1989, he again voted with the conservative majority in upholding Miller in Fort Wayne Books v. Indiana. In his concurrence in that case, he states, "Because I agree that what may be punished under Miller v. California may form the basis of a racketeering conviction, I join Justice White's opinion" (930) which refused to overturn Miller. In that same year in Sable Communications v. F.C.C., Blackmun votes with the conservatives to yet again reinforce Miller and the ability to ban obscene speech.

This adherence to Miller is in great contrast to Brennan, with whom Blackmun evolved with in most other areas of law. Brennan would leave the Court never being able to win over Blackmun to the liberal side of the issue. While Brennan wished to dismantle the Miller standard and its ambiguity, Blackmun stayed in the Burger/Rehnquist camp, upholding
Miller as the working test in obscenity cases. Brennan authored the Roth decision in 1957 which was used in part to create the Miller standard which he fought the last two decades of his time on the Court. Robert D. Richards, in his work, Uninhibited, Robust, and Wide Open: Mr. Justice Brennan's Legacy to the First Amendment cites Brennan's change in his theory about obscenity and the First Amendment to a much more liberal and freedom protected position. "His (Brennan's) turnaround on the issue (of obscenity) illustrates the way in which law, even from a single jurist can evolve. Here a Supreme Court justice recognized that his own earlier opinion was causing so much confusion that the real victim was the First Amendment" (68). Unlike his most common ally on the Court, Blackmun never came to such a conclusion. Throughout his 24 years on the Court, Blackmun believed in the governments ability to criminalize obscenity through community standards.

In addition to his key vote in Miller, Blackmun gave Burger and the conservatives the decisive vote in five cases between 1973-1978. Beginning with the aforementioned loss of staunch First Amendment protectors Douglas (1975) and Stewart by 1981, the Court was so overwhelmingly pro-censorship there was not another 5-4 decision on a case dealing with the regulation of sexually explicit material until Barnes v. Glen Theater in 1991. That made questions about the regulation of sexually explicit expression answered by the High Court to become largely systematic, where Blackmun's occasional wander over to the liberal side
was inconsequential.

As long as safeguards and procedures were in accordance with the obscenity standard set in *Miller*, Blackmun usually allowed the government to censor explicit expression. In cases like *Jenkins* and *Erznoznik*, Blackmun voted against the government because either the law at question or the lower court went too far in regulation. In *Arcada* and *Alexander*, Blackmun voted against the law because it went too far in punishing the regulation of sexually explicit expression. Similarly, in *Young* and *Arcada*, Blackmun voted against the government because it did not tailor the statute close enough to its interest. Blackmun's main reason for voting liberally in these cases was the fact that the government did not formally find the sexually explicit expression to be obscene in court under the *Miller* test. This was the case in *Erznoznik, Southeastern, Young, Arcada, Barnes* and *Alexander*. If expression had not been deemed obscene, the state must show a "compelling interest" (*Barnes* 2475) to regulate the sexually explicit expression, as was the case in *Osborne*. While Blackmun allows the proscription of obscene materials, he will not extend a penalty for that obscenity into areas and activities which have not been deemed obscene.

**Conclusion**
While some people have questioned Nixon's satisfaction with the way Blackmun ruled on the Court, the President got what he wanted from Blackmun in decisions dealing with some the key issues of the time he was put on the Court. His concern was law and order and stemming the permissive tide in the country. Obscenity and pornography were important parts of that desire. In terms of obscenity, Blackmun not only upheld Miller early on in his term, but he did not experience a significant move or change in doctrinal stance in his twenty four years on the Court.

While Blackmun underwent a drastic change in his identity on the Court and his ideology during his time as a Supreme Court Justice in most areas of law, he remained moderately conservative in obscenity cases during that time. While he espoused a liberal position in cases in his last decade on the Court in order to make the Court more "moderate," his centrist influence in sexually explicit expression regulation cases was evident only in cases where procedures and safeguards to find the expression formally obscene were either not present or followed. It is important to remember that the regulation of sexually explicit expression was an important national issue during his entrance onto Court in 1970. That interest spilled out into the Burger Court as a need to remedy the Warren Court's permissive stance on pornography. Blackmun's deference to the government was a key part of that new pro-censorship direction within the Court.


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<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alexander v. United States</td>
<td>113 S.Ct. 2766</td>
</tr>
<tr>
<td>Arcada v. Cloud Books</td>
<td>106 S.Ct. 3172</td>
</tr>
<tr>
<td>Barnes v. Glen Theatre</td>
<td>111 S.Ct. 2456</td>
</tr>
<tr>
<td>Erznoznik v. Jacksonville</td>
<td>95 S.Ct. 2268</td>
</tr>
<tr>
<td>Fort Wayne Books v. Indiana</td>
<td>109 S.Ct. 916</td>
</tr>
<tr>
<td>Hamling v. United States</td>
<td>94 S.Ct. 2887</td>
</tr>
<tr>
<td>Heller v. New York</td>
<td>93 S.Ct. 2789</td>
</tr>
<tr>
<td>Hoyt v. Minnesota</td>
<td>90 S.Ct. 2241</td>
</tr>
<tr>
<td>Jenkins v. Georgia</td>
<td>94 S.Ct. 2750</td>
</tr>
<tr>
<td>Memoirs v. Massachusetts</td>
<td>86 S.Ct. 975</td>
</tr>
<tr>
<td>Miller v. California</td>
<td>93 S.Ct. 2607</td>
</tr>
<tr>
<td>Minnesota v. Hoyt</td>
<td>174 N.W.2d 700</td>
</tr>
<tr>
<td>New York v. Ferber</td>
<td>102 S.Ct. 3348</td>
</tr>
<tr>
<td>Osborne v. Ohio</td>
<td>110 S.Ct. 1691</td>
</tr>
<tr>
<td>Paris Adult Theatre v. Slaton</td>
<td>93 S.Ct. 2628</td>
</tr>
<tr>
<td>Pinkus v. United States</td>
<td>98 S.Ct. 1808</td>
</tr>
<tr>
<td>Pope v. Illinois</td>
<td>107 S.Ct. 1918</td>
</tr>
<tr>
<td>Redrup v. New York</td>
<td>87 S.Ct. 1414</td>
</tr>
<tr>
<td>Regina v. Hicklin</td>
<td>L.R. 2 Q.B. 360</td>
</tr>
</tbody>
</table>


Roth v. United States, 77 S.Ct. 1304 (1957)


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