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"Brandeis: Free Speech Critical to Preservation of Democracy"

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In response to previous columns about the appointment, importance, and influence of Justice Louis Brandeis, an enthusiastic reader has asked a most welcome question about the jurist's contributions to the Supreme Court's development of the law governing freedom of speech.

In Whitney v. California (1927), Justice Brandeis penned what most scholars agree was one of the most eloquent and powerful defenses of freedom of expression in Anglo-American legal history. His opinion draws upon the aims of those who declared America's independence, drafted the Constitution and the Bill of Rights, and fought to preserve and protect independent thought from arbitrary governmental action. As a philosophical matter, Brandeis, like other great champions of freedom of speech, believed freedom of expression critical to democracy and integral to human self-fulfillment.

As the Court was poised to consider the Whitney case, the law governing free speech hinged on the meaning and application of the "clear and present danger test," conceived by Justice Oliver Wendell Holmes in his 9-0 opinion for the Court in 1919, in Schenck v. United States. Holmes began with the presumption that the freedom of speech is not an absolute right, but rather subject to congressional

regulations in the name of providing for the common defense.

Congressional authority is sweeping, of course, but the question of the limits of its authority arises, Holmes noted, when it conflicts with speech. The matter of resolving governmental authority v. freedom of speech, in Schenck's case, involved speech that criticized the government's conduct of World War I. The case turned on whether the speech posed a "clear and present danger" to the United States.

The parameters of the clear and present danger were not spelled out in Justice Holmes's opinion for the Court, leaving Justices to contemplate questions about the severity of the danger—minimal or great—and the immediacy—imminent or remote—of the danger. Brandeis spent the years between Schenck and Whitney contemplating these questions and searching for a reasonable rule.

In 1927, Anita Whitney had helped to create the Communist Labor Party of California. She was convicted of membership in an organization advocating "criminal syndicalism," a term that was applied to radical groups, and she was sentenced to one to 14 years in the San Quentin penitentiary. Some members of the organization, but not Whitney, had engaged in violent acts, which drew the attention of state officials, who moved to prosecute its members. When the case arrived at the Supreme Court, Justice Brandeis lamented the fact that Whitney's attorney had not challenged the statute under a mere membership v. violent action distinction, but he could not help Whitney.

Brandeis's magnificent concurring opinion read in part: "Those who won our independence . . . believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means

indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

In his opinion, Justice Brandeis reversed the presumption of governmental authority to regulate speech and, instead, emphasized the necessary freedom to speak, that is, the importance of protecting the free flow of discussion, subjecting it to carefully proscribed limits. He believed that speech should be protected unless the incitement to violence was likely and the violence apprehended was so imminent, that there was no time for "speech to counteract speech." He wrote: "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. Such, in my opinion, is the command of the Constitution."

In sum, Brandeis's stout defense of speech was bottomed on a belief that every democratic government must be subjected to constant examination by the electorate. As part of the cause of making ideas available to the citizenry, even speech that might tend to lead to disruption but was unlikely to result in "serious injury to the State" must be permitted. Most important, while harmful acts should be punished, speech itself should not.

Justice Brandeis's opinion in Whitney may well be the most memorable and forceful of all the opinions he wrote during his long tenure on the Court. His test for

suppression of speech—serious, unlawful, and immediate harm—became the law of the land in 1969, in Brandenburg v. Ohio. In the years between Whitney and Brandenburg—punctuated by the fears of radicalism instilled by the Great Depression, the ravages and complexities of World War II, and McCarthyism and repression of Communism in the 1950s—the Court struggled with the question of the scope of free speech. By the end of the tumultuous 1960s, the Court recognized the wisdom in Justice Brandeis's test for freedom of speech.

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