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A Progressive Mind: Louis D. Brandeis and the Origins of Free Speech

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A PROGRESSIVE MIND: LOUIS D. BRANDEIS AND THE ORIGINS OF FREE SPEECH

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For a law review audience, I want to stress that the research presented in this article is historical in argument first and foremost. Understanding the historical context of the post-World War I era is crucial to understanding Louis D. Brandeis' emerging First Amendment jurisprudence. He was a prominent intellectual minority of the early 1900s who grasped the importance of protecting the fundamental right of free speech in a political democracy for minorities and the general political culture.

Historical context explains the climate and norms for each time period. For example, the first line of the United States Constitution reads "We the People of the United States."[1] In 1789, who did "We the People" include? It meant white, educated males who owned property, belonged to the church, and were over twenty-one years of age.[2] It did not include the bulk of African Americans, who would not be guaranteed the full protections of the United States Constitution until the states ratified the Fourteenth Amendment in

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[1] U.S. CONST. pmbl.

[2] Ed Crews, *Voting in Early America*, COLONIAL WILLIAMSBURG, http://www.history.org/Foundation/journal/Spring07/elections.cfm (last visited Nov. 18, 2016) (explaining the voting rules in Colonial Williamsburg); *see also* Steven Mintz, *Winning the Vote: A History of Voting Rights*, THE GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights (last visited Nov. 18, 2016) (explaining that the Constitution originally left the issue of voting rights to the states).

1868.[3] It did not include women, who would not be granted suffrage until the states ratified the Nineteenth Amendment in 1920.[4] It also did not include Native Americans, who would not receive United States citizenship until 1924.[5] In 2016, who does "We the People" include? Over time, the concept of "We the People" has evolved expanding the rights of the United States Constitution to a broader set of people.

A second example of the importance of historical context can be seen in the changing meaning of the term, *progressive*. During the time period of United States history that is considered to be the actual *Progressive Era*, from the late 1890s through the 1910s, the progressives pushed for anti-monopoly legislation; child labor laws; voter reform; structural changes, such as the recall and referendum; and municipal improvements.[6] Securing the vote for women and desegregating society did not fit into this particular *progressive* era.[7] Fast-forward 100 years; what is a progressive today? In the 2016 presidential campaign, each candidate would give a separate definition of what being a progressive entails.[8] The point is that the historical context of the 2010s varies greatly from that of the 1910s, where this First Amendment story begins.[9]

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[3] U.S. CONST. amend. XIV § 1; *This Day in History: 14th Amendment Adopted*, HISTORY, http://www.history.com/this-day-in-history/14th-amendment-adopted (last visited Dec. 23, 2016).

[4] U.S. CONST. amend. XIX; *This Day in History: 19th Amendment Adopted*, HISTORY, http://www.history.com/this-day-in-history/19th-amendment-adopted (last visited Dec. 23, 2016).

[5] 8 U.S.C. § 1401(b) (2012); *This Day in History: The Indian Citizenship Act*, HISTORY, http://www.history.com/this-day-in-history/the-indian-citizenship-act (last visited Dec. 23, 2016).

[6] Henry J. Sage, *The Progressive Era: The Great Age of Reform*, SAGE AM. HIST. http://sageamericanhistory.net/progressive/topics/progressive.html (last updated Dec. 13, 2013); *see generally* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (8th ed. 1955); ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-1917 (Henry Steele Commager & Richard B. Morris eds., 1954).

[7] Femi Lewis, *African-Americans in the Progressive Era*, ABOUT EDUCATION, http://afroamhistory.about.com/od/segregation/p/African-Americans-In-The-Progressive-Era.htm (last visited Nov. 1, 2016); *see generally* CHRISTINE LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910-1928 (1986).

[8] Nicole Gaudiano, *Hillary Clinton, Bernie Sanders Battle Over the Meaning of 'Progressive,'* USA TODAY, http://www.usatoday.com/story/news/politics/elections/2016/02/03/new-hampshire-voters-question-clinton-sanders-town-hall/79751570/ (last visited Dec. 23, 2016).

[9] *See generally* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (5th ed. 1941).

When the United States entered World War I in April 1917, Americans had a limited sense of civil liberties, even by their standards.[10] That limited scope can be seen dating back to the beginnings of the United States. In 1798, only seven years after the Bill of Rights were ratified, Congress enacted, and President John Adams signed, the Alien and Sedition Acts to suppress the dissenting opinions of Jeffersonians during the war with France.[11] In response, a group of state legislators created the Kentucky and Virginia Resolutions to strike back at the acts; however, no judicial remedy existed to deem the Alien and Sedition Acts unconstitutional.[12] The absence of protections for free political speech continued through the Civil War and Reconstruction period, during which time the freedom of speech was suppressed both in the Southern states and by the Lincoln administration in the North and Midwest.[13] A "civil liberties consciousness" was limited due to the fact that the Federal Bill of Rights only applied to the federal government.[14] States and localities dealt with *rights*, if they dealt with them at all.[15] No culture of rights consciousness existed.[16] The concept of the federal judiciary applying the Federal Bill of Rights against the states and individuals within the states through the Due Process Clause of the Fourteenth Amendment, a process called incorporation, would not be completed until the "rights revolution" by the Warren Court in the 1960s.[17]

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[10] *Civil Liberties in Wartime*, SHAREAMERICA (Apr. 6, 2015), https://share.america.gov/civil-liberties-wartime/.

[11] *Alien and Sedition Acts: Defining American Freedom*, CONST. RTS. FOUND., https://www.loc.gov/rr/program/bib/ourdocs/Alien.html (last visited Oct. 30, 2016).

[12] *Virginia Resolution – Alien and Sedition Acts*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/virres.asp (last visited Dec. 29, 2016); *Kentucky Resolutions – Alien and Sedition Acts*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/kenres.asp (last visited Dec. 29, 2016); s*ee also* Marbury v. Madison, 5 U.S. 137, 178 (1803) (holding, for the first time, that "[t]he judicial power of the United States is extended to all cases arising under the constitution" and the Supreme Court is bound to decide cases according to the Constitution rather than the conflicting law).

[13] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 955, 971-72 n.144 (1912).

[14] U.S. CONST. amend. XIV § 1.

[15] *See* Slaughter-House Cases, 83 U.S. 36 at 67-68, 70 (1872).

[16] *Id.* at 52, 67-68, 70

[17] Steven J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 WM & MARY BILL OF RTS. J. 121, 128 (1992) ("[C]ase after case comes to the court which finds the individual battling to vindicate a claim under the Bill of Rights against the powers of government, federal and state.").

Therefore, during the total war effort of World War I, the United States government enacted the Espionage Act of 1917 and Sedition Act of 1918, which prohibited Americans from speaking out against the draft, military action, and/or the United States government.[18] In doing so, Congress empowered the Attorney General to arrest radicals who protested any aspect of the war effort.[19] Public opinion overwhelmingly supported these policies because the public viewed the policies as reasonable protective measures during wartime.[20] Following the war, the Supreme Court heard numerous cases arising from these war policies.[21] Louis D. Brandeis played a key role in shaping the eventual jurisprudence for the freedom of speech in the United States through his judicial opinions in the cases *Abrams v. United States*,[22] in which he concurred with the dissenting opinion, *Gilbert v. State of Minnesota*,[23] in which he wrote the dissenting opinions, and *Whitney v. California*,[24] in which he wrote the concurring opinion.

The case that set the stage for free speech jurisprudence post World War I was *Schenck v. United States*.[25] Charles Schenck was arrested and convicted for printing and mailing leaflets that were deemed to incite anti-war action; specifically, he urged men to resist the draft.[26] His lawyers appealed to the Supreme Court of the United States, contending that the First Amendment protected the

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[18] Sedition Act of 1918. Pub. L. No. 65-150, 40 Stat. 553 (1918) (repealed 1921); Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. § 794 (1996)).

[19] *Home Front, War Front: Sewanee and Fort Oglethorpe in World War I: Espionage & Sedition Acts*, SEWANEE U. OF THE SOUTH, http://library.sewanee.edu/c.php?g=118671&p=773219 (last updated Dec. 8, 2015).

[20] Chafee, *supra* note 13, at 960 (explaining that "speech should be unrestricted" during wartime "unless it is clearly liable to cause direct and dangerous interference" with the war).

[21] *See* Steven M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192, 207 (2008).

[22] 250 U.S. 616 (1919).

[23] 254 U.S. 325, 336 (1920) (Brandeis, J., dissenting) (explaining that some rights are guaranteed protection by the federal government and the statute in question was infringing on those rights).

[24] 274 U.S. 357, 373 (1927) (Brandeis J., concurring) ("[T]he due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.").

[25] 249 U.S. 47, 48-49 (1919).

[26] *Id.* at 49.

distribution of the circulars.[27] On March 3, 1919, the Supreme Court upheld Schenck's conviction and affirmed the judgments of the lower courts in a unanimous vote.[28] Associate Justice Oliver Wendell Holmes, Jr. wrote the opinion for the Court.[29] In assessing the claim of the First Amendment right in print materials, Holmes declared that the privilege was limited when there was a "clear and present danger" in the speech or print.[30] Holmes applied the "question of proximity" criminal law standard to the *Schenck* case by doing a thorough analysis of the leaflet.[31] Specific quotes that Holmes referred to in the leaflet included, " 'Assert Your Rights.' . . . 'your right to assert your opposition to the draft,' . . . 'If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.' "[32] In the opinion of the Supreme Court, these statements not only expressed the views of the Socialists, but these statements called on American citizens to act directly.[33] By sending the leaflets to drafted men, the Supreme Court could find no other intention for the flyer than calling on these men to refuse the draft and stay home in violation of the Sedition Act.[34]

However, while Holmes emphasized that such a leaflet would not be ruled unconstitutional in peace times, he insisted:

[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.[35]

Thus, even out of wartime, Holmes deemed any speech that put others in danger was not protected under the First Amendment.[36] Notice that Holmes did not say a *crowded* theatre; indeed, he believed that even if one person was endangered as a result of

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[27] *Id.* at 51.
[28] *Id.* at 48, 53.
[29] *Id.* at 48.
[30] *Schenck*, 249 U.S. at 52.
[31] *Id.*
[32] *Id.* at 51.
[33] *Id.* at 50-51.
[34] *Id.* at 52-53.
[35] *Schenck*, 249 U.S. at 52 (citations omitted).
[36] *Id.*

someone else's speech then the Court would rule it unconstitutional.[37] The fact that his opinion went beyond war times to peacetime examples, such as someone shouting *fire* in a theater, set an important precedent for the Supreme Court in ruling on the freedom of speech in the following years and decades.

The Supreme Court applied the clear and present danger test to several cases following the *Schenck* case, including *Frohwerk v. United States*[38] and *Debs v. United States*.[39] In hindsight, both Associate Justices Holmes and Brandeis vocalized regret in their initial rulings on freedom of speech cases coming out of World War I.[40] In a letter to Harvard Law Professor Felix Frankfurter, Brandeis exclaimed, "I have never been quite happy about my concurrence in the *Debs* and *Schenck* cases. I had not then thought the issues of freedom of speech out. I thought at the subject, not through it."[41] Fortunately the *Abrams* case argued later that year allowed Brandeis and Holmes a fresh opportunity, a second bite at the judicial apple, to reexamine the issue of the freedom of speech and the First Amendment even in wartime.[42]

A major difference between the *Abrams* and *Schenck* cases was that Jacob Abrams, Mollie Steimer, Hyman Lachowsky, Samuel Lipman, and Jacob Schwartz were Russian immigrants in the United States, whereas Charles Schenck was an American citizen.[43] As young Russian and Jewish immigrants, they all found jobs in factories under working class conditions from 1908-1913.[44] Unsatisfied with their position in America, they began to join together with other frustrated workers to create an anarchist organization to fight against government regulations and poor working conditions.[45] Their organization became politicized due to

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[37] *Id.* ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[38] 249 U.S. 204, 207-08 (1919).

[39] 249 U.S. 211, 215 (1919).

[40] *Id.* at 216; *Frohwek*, 249 U.S. at 208-09.

[41] Stephen A Smith, *Schenck v. United States and Abrams v. United States*, *in* FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 20, 26 (Richard A. Parker ed., 2003).

[42] *Abrams*, 250 U.S. at 619.

[43] RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 4 (1987).

[44] *Id.* at 4, 11.

[45] *Id.* at 22, 23.

the Russian Revolution of 1917.[46] These anarchists longed for political change in Russia.[47] In order to publicize their opposition to the American intervention in the Russia Revolution, Abrams and the others wrote and distributed two leaflets.[48] The police arrested the anarchists and took them to federal court where they were found guilty of violating the Espionage Act.[49] When their lawyers appealed their case to the United States Supreme Court, the justices affirmed the lower court ruling in a vote of 7-2.[50] After having decided *Schenck* just a few months before, the Supreme Court went into this case with the judicial doctrine of the clear and present danger test.[51] Associate Justice John H. Clark wrote the majority opinion declaring that sufficient evidence established the defendants' guilt.[52]

However, Holmes dissented in *Abrams* with the support of Brandeis; he dissented from the doctrine he had crafted earlier that same year in *Schenck*.[53] Holmes stated "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[54] In constructing such a rule, Holmes dissented from his previous opinion of *Schenck* by modifying the broad clear and present danger standard rule into the much narrower "imminently threaten" doctrine.[55] Holmes and Brandeis referred to the postscript on the first leaflet that contended that the Russian authors were not trying to support the Germans.[56] The postscript read, "It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants."[57] Holmes and Brandeis pointed out that the postscript constituted clear evidence that the defendants were not trying to interfere with the

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[46] *Id.* at 26.
[47] *Id.*
[48] POLENBERG, *supra* note 43, at 49-52.
[49] *Abrams*, 250 U.S. at 616-17.
[50] *Id.* at 624, 631.
[51] *Abrams*, 250 U.S. at 627; *Schenck*, 249 U.S. at 52.
[52] *Abrams*, 250 U.S. at 616, 624.
[53] *Id.* at 624, 626, 628-31(Holmes, J., dissenting).
[54] *Id.* at 627 (Holmes, J., dissenting).
[55] *Id.* at 627, 630 (Holmes, J., dissenting); *Schenck*, 249 U.S. at 52.
[56] *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).
[57] *Id.* at 625 (Holmes, J., dissenting).

United States' war with Germany.[58] The defendants only sought to raise awareness of the situation in Russia.[59]

Louis Brandeis spent the nine months between the *Schenck* and *Abrams* cases doing what he did best, reviewing the facts and examining the constitutional right of freedom of speech through a progressive lens.[60] In response to Holmes's dissenting opinion, Brandeis stated, "I join you heartily & gratefully."[61] Yet, while the *Abrams* case allowed Brandeis to think through the freedom of speech more methodically, it would not be until 1920 that Brandeis wrote his own judicial opinion on the matter.[62] In 1923, Brandeis sent Felix Frankfurter a letter about the Supreme Court rulings on *Schenck*, *Frohwerk*, and *Debs*, in which he explained, "Of course you must also remember that when Holmes writes, he doesn't give a fellow a chance—he shoots so quickly."[63] Thus, while Brandeis concurred with Holmes in judicial opinions on freedom of speech cases in 1919, he sought to explain himself on the matter.[64] In 1920, he had the chance to do so.

On August 18, 1917, a state jury convicted Joseph Gilbert, manager of the Non-partisan League, of violating a Minnesota statute that prohibited the obstructing or opposing of men enlisting in the United States military.[65] The Minnesota statute was enacted on April 20, 1917, prior to the Federal Selective Service Act and the Federal Espionage Act, both of which were passed later that year.[66] At a public meeting, Gilbert argued:

> We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. . . . If this is such a great democracy, for Heaven's sake why should we not vote on conscription of men. We were stampeded

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58 *Id.* at 628-29 (Holmes, J., dissenting).

59 *Id.* at 619-22 (majority opinion).

60 POLENBERG, *supra* note 43, at 265-66.

61 POLENBERG, *supra* note 43, at 236.

62 *Gilbert*, 254 U.S. at 334, 343 (Brandeis, J., dissenting).

63 POLENBERG, *supra* note 43, at 266.

64 *Abrams*, 250 U.S. at 627-28, 630-31; POLENBERG, *supra* note 43, at 266.

65 *Gilbert*, 254 U.S. at 326-27, 334.

66 POLENBERG, *supra* note 43, at 269.

> into this war by newspaper rot to pull England's chestnuts out of the fire for her.[67]

On December 13, 1920, the United States Supreme Court upheld the Minnesota Supreme Court decision in a vote of 7-2.[68] Associate Justice Joseph McKenna wrote the opinion for the majority.[69] The majority of the Supreme Court held that all states had the authority to enforce "police power to preserve the peace of the State."[70] The Minnesota statute did not hinder the war effort.[71] In fact, it helped to stifle speech that obstructed the United States during the war.[72]

Chief Justice Edward White dissented from the majority opinion because he believed that "the subject-matter is within the exclusive legislative power of Congress, when exerted, and that the action of Congress has occupied the whole field."[73] White contended that the issue of obstructing enlistment fell under the jurisdiction of the Federal United States Congress.[74] He believed that the Espionage Act of 1918 took priority over any state statute, including the Minnesota statute that the jury convicted Gilbert of violating.[75] In contradiction to Holmes, White wrote that national supremacy controlled in this case, not states' rights.[76] White made no reference to the freedom of speech argument in his brief dissent.[77]

While also dissenting, Brandeis did not vote against Gilbert's conviction for the same reasons as White. Brandeis explained that although the Minnesota statute was technically implemented during the war, it was not limited to the war.[78] It was to be maintained after the war as well.[79] To this point, Brandeis contended, "Unlike the

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[67] *Gilbert*, 254 U.S. at 327.

[68] *Id.* at 33-34.

[69] *Id.* at 326.

[70] *Id.* at 331.

[71] *Id.*

[72] *Gilbert*, 245 U.S. at 332-33.

[73] *Id.* at 334 (White, C.J., dissenting); Amanda G. Lewis, *Federal Preemption of State and Local Laws: State and Local Efforts to Impose Sanctions on Employers of Unauthorized Aliens* 7, (May 5, 2008) http://web.law.columbia.edu/sites/default/files/microsites/career-services/Federal%20Preemption%20of%20State%20and%20Local%20Laws.pdf.

[74] *Gilbert*, 245 U.S. at 334 (White, C.J., dissenting).

[75] *Id.* (White, C.J., dissenting).

[76] *Id.* (White, C.J., dissenting).

[77] *Id.* (White, C.J., dissenting).

[78] *Id.* (Brandeis, J., dissenting).

[79] *Gilbert*, 245 U.S. at 334 (Brandeis, J., dissenting).

[F]ederal Espionage Act, [the Minnesota statute] applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances."[80] Brandeis contended that such a statute affected everyone from religious preachers, to school professors, to parents because it prohibited them from speaking their beliefs on the subject or advising young men whether or not to join the military.[81] The statute prohibited those who had moral or religious convictions about pacifism from teaching their beliefs to others.[82]

Upon passage of the Espionage Act in June 1917, two months after Minnesota enacted its statute, Brandeis explained that the two laws conflicted.[83] Brandeis found that the Minnesota statute withheld citizens' rights to discuss their beliefs about enlistment and the war, whereas the Espionage Act only prosecuted those who spoke words that caused actual detriment to the United States war effort.[84] He argued that the degree of difference in these two policies was the difference between maintaining homeland security and depriving citizens of their constitutional rights.[85]

In conclusion, Brandeis made one last argument about how the Minnesota statute violated the Fourteenth Amendment. He stated: "As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment."[86] This final point in Brandeis' minority opinion set the stage for the case of *Gitlow v. New York,*[87] which would apply the freedom of speech to the states.[88] The *Gilbert* case is important to this study because it offered the first opportunity for Brandeis to clarify his understanding of the freedom of speech.[89]

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[80] *Id.* (Brandeis, J., dissenting); Feldman, *supra* note 21, at 208-10.
[81] *Gilbert*, 245 U.S. at 334-35 (Brandeis, J., dissenting).
[82] *Id.* at 335 (Brandeis, J., dissenting).
[83] *Id.* at 336, 338, 340-41 (Brandeis, J., dissenting).
[84] *Id.* at 335-36 (Brandeis, J., dissenting).
[85] *Id.* at 336-37(Brandeis, J., dissenting).
[86] *Gilbert*, 245 U.S. at 343 (Brandeis, J., dissenting); Wermiel, *supra* note 17, at 125-26.
[87] 268 U.S. 652 (1925).
[88] *Id.* at 666.
[89] *Gilbert*, 245 U.S. at 334 (Brandeis, J., dissenting).

On November 28, 1919, California authorities arrested Anita Whitney for crimes under the California Criminal Syndicalism Act, enacted on April 30, 1919.[90] *Whitney* is the final case in this study because it demonstrates the epitome of Brandeis' influence on the jurisprudence of free speech.[91] In his judicial opinion, Brandeis wrote eloquently about the scope of the First Amendment.[92] In *Whitney*, Brandeis solidified his understanding of the crucial role of free speech in a political democracy.[93]

Unlike the previous two decisions, Anita Whitney's arrest and conviction took place in the post-World War I years.[94] Yet, California legislators enacted the California Criminal Syndicalism Act as a direct result of the war.[95] Following World War I, pockets of communist groups formed throughout the United States.[96] Americans identified this phenomenon as the Red Scare.[97] The majority of Americans, including state and federal government officials, feared a revolution similar to Russia's; therefore, individual state governments instituted policies that made it illegal for citizens to join organizations that advocated for revolutionary activity.[98]

In 1919, Whitney joined the Communist Labor Party of California.[99] Born into a well-known political family, the California officials monitored Whitney's political activity.[100] After attending a national conference held by the Communist Labor Party in California, state officials arrested her for participating in an organization that promoted radical revolutionary activity to overthrow the current government.[101] A county court convicted

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[90] *Whitney*, 274 U.S. at 360; H.R.M., *Criminal Law: Criminal Syndicalism Act: Constitutional Law: Validity of the Act under the Free Speech Clause*, 10 CALIF. L. REV. 512, 512 (1922).

[91] *Whitney*, 274 U.S. at 376-79 (Brandeis, J., concurring).

[92] *Id.* at 376-79 (Brandeis, J., concurring).

[93] *Id.* at 373-77 (Brandeis, J., concurring).

[94] *Id.* at 360 (majority opinion); John Graham Royde-Smith & Dennis E. Showalter, *World War I*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/World-War-I (last updated Dec. 9, 2016).

[95] *Whitney v. California – The California Criminal Syndicalism Act*, LAW LIBRARY – AMERICAN LAW AND LEGAL INFORMATION, http://law.jrank.org/pages/22799/Whitney-v-California-California-Criminal-Syndicalism-Act.html (last visited Dec. 23, 2016).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Whitney*, 274 U.S. at 364.

[100] *Id.* at 363-66.

[101] *Id.* at 359.

Whitney of criminal syndicalism.[102] However, Whitney's lawyer appealed the case, arguing that the Criminal Syndicalism Act violated the Fourteenth Amendment of the United States Constitution.[103]

On May 16, 1927, the Supreme Court ruled 9-0 in favor of upholding Whitney's conviction.[104] Seven justices concurred with Associate Justice Sanford's opinion, but only Holmes concurred with Brandeis' opinion.[105] Understanding the differences between the two opinions makes Brandeis' opinion read almost like a dissenting opinion.

Sanford explained the importance of a writ of error.[106] He reinforced the concept that, according to division of powers in a federal system, the United States Supreme Court was not to rule on state cases that did not raise a federal question.[107] Sanford pointed out that Whitney's lawyer had not raised a federal question originally and, therefore, the case did not fall within the Federal Supreme Court's jurisdiction.[108]

While supporting Whitney's conviction, Brandeis did not agree with the full reasoning given in Sanford's opinion.[109] Brandeis upheld Anita Whitney's conviction because he agreed that her case did not fall within the jurisdiction of the Supreme Court.[110] Yet, outside of the question of jurisdiction, Brandeis used his opinion to express his deep thoughts and reflection about the scope of free political speech.[111]

Brandeis found the California statute to be unconstitutional because it went outside the bounds of an "imminent danger."[112] Imminent danger rested at the heart of his opinion.[113] Brandeis argued that the Due Process Clause of the Fourteenth Amendment protected the fundamental right of free speech, but he acknowledged

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[102] *Id.*
[103] *Id.* at 362.
[104] *Whitney*, 274 U.S. at 357, 372.
[105] *Id.* at 359, 372, 380.
[106] *Id.* at 360.
[107] *Id.* at 360.
[108] *Id.* at 362.
[109] *Whitney*, 274 U.S. at 372-80 (Brandeis, J., concurring).
[110] *Id.* at 380 (Brandeis, J., concurring).
[111] *Id.* at 374-78 (Brandeis, J., concurring).
[112] *Id.* at 377-78 (Brandeis, J., concurring).
[113] *Id.* at 377 (Brandeis, J., concurring).

that this right was "not in their nature absolute."[114] He explained that the fundamental right of free speech was subject to restriction if it was "intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent."[115]

Basing this case law on the clear and present danger standard of *Schenck*, Brandeis amended the ruling by changing the word *present* to *imminent*.[116] In doing so, he hoped to clarify the *Schenck* standard.[117] He agreed that free speech needed to be limited when danger loomed in the face of these fundamental rights.[118] The impending threat of violence or injury to other United States citizens overpowered a person's right to speak.[119] However, he contended that when an imminent threat was not present, the First Amendment protected all Americans in their right to speak freely on political issues in a political democracy.[120]

To show his concerns about the jurisprudence of fundamental freedoms, Brandeis harkened back to the American Revolution and the Founding Fathers who created the Constitution in order to demonstrate the historical significance of protecting American freedoms.[121] He wrote:

> [The Founding Fathers] valued liberty both as an end and as a means. They 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 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;

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114 *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

115 *Id.* (Brandeis, J., concurring).

116 *Id.* at 373-74 (Brandeis, J., concurring); *see supra* note 55 and accompanying text.

117 *Id.* at 373-76 (Brandeis, J., concurring).

118 *Id.* at 373 (Brandeis, J., concurring).

119 *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring).

120 *Id.* at 373 (Brandeis, J., concurring).

121 *Id.* at 375 (Brandeis, J., concurring).

> and that this should be a fundamental principle of the American government.[122]

In these powerful statements, Brandeis reminded readers of the fundamental values that underlay the United States.[123] He argued that the Founding Fathers of the United States regarded free speech and assembly as the means by which citizens could make their opinions and concerns known.[124] Without these freedoms, Americans would be deprived of the rights that made the American Revolution possible in the first place.[125] He contended that free speech and assembly were part of active citizenship.[126] Most importantly, he noted that the United States government was responsible for ensuring these liberties.[127]

Brandeis provided support for his philosophy about the Founding Fathers by quoting Thomas Jefferson's first Inaugural Address in which Jefferson declared, "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[128] Brandeis followed this reference by explaining that the Founders acknowledged the possible risks involved in free speech.[129] He continued:

> [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. . . . Recognizing the occasional tyrannies of governing majorities, they amended the

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122 *Id.* (Brandeis, J., concurring).
123 *Id.* (Brandeis, J., concurring).
124 *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).
125 *Id.* at 375-77 (Brandeis, J., concurring).
126 *Id.* at 375, 377 (Brandeis, J., concurring).
127 *Id.* at 374-75, 377-79 (Brandeis, J., concurring).
128 *Id.* at 375 n.3 (Brandeis, J., concurring).
129 *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

> Constitution so that free speech and assembly should be guaranteed.[130]

Brandeis contended that fear of danger or harm that might come of free speech was not enough for state and federal governments to limit the fundamental rights of free speech of American citizens.[131] In his now famous quote, he stated, "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[132] Brandeis made the point that irrational fear, such as with witches in the Middle Ages, resulted in the punishment and death of many innocent women who did not have the ability to defend themselves.[133] Brandeis argued that free speech allows people to confront their fears and gain understanding of other peoples' perspectives.[134] He explained that the only circumstance in which free speech should be limited is when a threat is clear and imminent.[135] He stated, "[t]o justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent."[136] The remedy to counter offensive political speech, Brandeis asserted, was more speech, not repression by public authorities.[137]

According to the power of judicial review decided in *Marbury v. Madison*,[138] Brandeis acknowledged that his role on the Supreme Court was to interpret the Constitution according to how the framers intended it to be understood.[139] Brandeis argued, "if the Founders rallied behind the shift from a British monarchy to a republic, then

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130 *Id.* at 375-76 (Brandeis, J., concurring).

131 *Id.* at 376, 378 (Brandeis, J., concurring).

132 *Id.* at 376 (Brandeis, J., concurring).

133 *Id.* (Brandeis, J., concurring); Austin Cline, *Persecuting Witches and Witchcraft: Executing Witches and Eliminating Witchcraft*, ABOUT RELIGION, http://atheism.about.com/od/christianityviolence/ig/Christian-Persecution-Witches/Witches-Hanging-Burning.htm (last updated Apr. 2, 2016).

134 *Whitney*, 274 U.S. at 377(Brandeis, J., concurring).

135 *Id.* at 376 (Brandeis, J., concurring).

136 *Id.* (Brandeis, J., concurring).

137 *Id.* at 377 (Brandeis, J., concurring).

138 5 U.S. 137, 178-80 (1803).

139 *Whitney*, 274 U.S. at 375-78, 380.

they would oppose the stifling of conflicting political beliefs at any point in time."[140]

Over forty years after Brandeis and Holmes handed down their opinion in *Whitney*, the Supreme Court changed the standard from clear and present danger to the imminently threaten standard in *Brandenburg v. Ohio*.[141] Although neither Holmes nor Brandeis lived to hear the Supreme Court decision in *Brandenburg*, they understood in their lifetime the importance of laying the foundation for free speech jurisprudence. Brandeis' earnest defense of free political speech in the 1920s created the traction for the Supreme Court to start grappling with the Founding Fathers' understanding of the First Amendment.[142] The Supreme Court decisions in *Gitlow* and *Brandenburg* drew upon Brandeis' language and line of reasoning.[143] The legal standards of incorporation and imminent threat demonstrate that Brandeis played the key role in the shaping of the jurisprudence for the freedom of speech.

[140] Elizabeth Diane Todd, A Progressive Mind: Louis D. Brandeis and The Origins of Free Speech 115 (Apr. 9, 2013) (unpublished M.A. thesis, University of Louisville), http://dx.doi.org/10.18297/etd/1446.

[141] 395 U.S. 444, 447-49 (1969).

[142] Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 560-63, 566 (1999).

[143] *Brandenburg*, 395 U.S. at 447-49; *Gitlow*, 268 U.S. at 671.