BRANDENBURG v. OHIO

SUPREME COURT OF THE UNITED STATES
395 U.S. 444
June 9, 1969
[9 - 0]

OPINION: PER CURIAM...The appellant, a leader of a Ku Klux Klan group, was convicted under the **Ohio Criminal Syndicalism statute** for "advocating...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."...[The] appellate court of Ohio affirmed his conviction...[and] [t]he Supreme Court of Ohio dismissed his appeal...[W]e reverse.

The record shows that...the appellant telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a **Ku Klux Klan "rally"** to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network...

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film...[S]cattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech...was as follows:

> "This is an organizers' meeting...**We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken...**"

The significant portions that could be understood were:

> "How far is the nigger going to -- yeah."
> "This is what we are going to do to the niggers."
> "A dirty nigger."
> "Send the Jews back to Israel."
> "Let's give them back to the dark garden."
> "Save America."
> "Let's go back to constitutional betterment."
> "Bury the niggers."
> "We intend to do our part."
> "Give us our state rights."
> "Freedom for the whites."
> "Nigger will have to fight for every inch he gets from now on."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919...In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*[1]. The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But ***Whitney*** **has been thoroughly discredited by later decisions.** These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation **except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action**. As we said in *Noto v. United States (1961),* "the mere abstract teaching...of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation

[1]Case 1A-S-4 on this website.

speech which our Constitution has immunized from governmental control. *Stromberg v. California*[2].

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "**advocate or teach** the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of **mere advocacy not distinguished from incitement to imminent lawless action**.

Accordingly, we are here confronted with a statute which, by its own words and as applied, **purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action**. Such a statute falls within the condemnation of the First and Fourteenth Amendments. **The contrary teaching of *Whitney v. California* cannot be supported, and that decision is therefore overruled.** *Reversed...*

So as to be clear, the Court is specifically overruling the "mere advocacy" holding in *Whitney v. California*.

CONCURRENCE: Justice Douglas...The "clear and present danger" test was adumbrated by Justice Holmes in a case arising during World War I -- **a war "declared" by the Congress, not by the Chief Executive**. The case was *Schenck v. United States*[3], where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Frohwerk v. United States, also authored by Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. *Schenck* was referred to as a conviction for obstructing security "by words of persuasion." And the conviction in *Frohwerk* was sustained because "the circulation of the paper was in quarters where a little breath would be enough

[2]Case 1A-S-5 on this website.

[3]Case 1A-S-2 on this website.

to kindle a flame."

Debs v. United States was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting."

...In the 1919 Term, the Court applied the *Schenck* doctrine to affirm the convictions of other dissidents in World War I. *Abrams v. United States* was one instance. Justice Holmes, with whom Justice Brandeis concurred, dissented. While adhering to *Schenck*, he did not think that on the facts a case for overriding the First Amendment had been made out:

> "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."

...Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power -- the greatest leveler of them all -- is adequate to sustain that doctrine is debatable...[The concept of] "clear and present danger" is [easily] manipulated to crush what Brandeis called "the fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse even in time of war. **Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.**

When we come to our study of "war powers," does this statement lend credibility to an argument that a correct interpretation of the Constitution depends upon whether the Country is at peace vs. war?

The Court quite properly overrules *Whitney v. California* which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous...

One's beliefs have long been thought to be sanctuaries which government could not invade... The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that <u>all</u> matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas...and advocacy of political action...The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.

The Court is beginning to take a much broader view of the 1st Amendment freedoms.