Brooklyn Law Review

Volume 85
Issue 1 *Symposium: Incitement at 100-and 50-and Today*
Article 2

12-27-2019

The First Amendment and the Imminence of Harm

Floyd Abrams

The First Amendment and the Imminence of Harm

Floyd Abrams[†]

First Amendment law came late to the United States. The Constitution was ratified in 1788 and the Bill of Rights adopted in 1789, but not until 130 years later, in 1919, did the Supreme Court render a decision that began to flesh out just what speech the First Amendment protected and what not.[1] There had been much public debate about the scope of the First Amendment as early as 1798 when the Sedition Act of that year was adopted—Thomas Jefferson staunchly opposed it, saying that living under it was akin to being ruled by a "reign of witches"[2]—but no Supreme Court decision passed upon it until 1964 when Justice William J. Brennan's opinion in *New York Times Co. v. Sullivan* observed that the "court of history" had determined that the law was unconstitutional.[3] There were a few early First Amendment cases, most memorably the 1833 ruling in *Barron v. Baltimore* holding that the Bill of Rights applied only to the federal government, and the 1907 ruling in *Patterson v. Colorado* upholding a contempt of court ruling against a Denver newspaper that seemed to limit the scope of the First Amendment to prior restraints on speech and did not seem to offer much protection for even that speech.[4] Both of those cases dismissed claims that First Amendment rights had been overcome. Both limited the amount and nature of First Amendment claims for years to come.

[†] Floyd Abrams is Senior Counsel at Cahill Gordon & Reindel LLP and a Visiting Lecturer at Yale Law School. He received a B.A. from Cornell University in 1956 and a J.D. from Yale Law School in 1959.

[1] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[2] Letter from Thomas Jefferson to John Taylor (June 4, 1798), https://founders.archives.gov/documents/Jefferson/01-30-02-0280 [https://perma.cc/QKN8-S3WY] ("[A] little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people recovering their true sight, restor[ing] their government to it's [sic] true principles.").

[3] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[4] *See* Barron v. Baltimore, 32 U.S. 243, 250–51 (1833) ("These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."); Patterson v. Colorado, 205 U.S. 454, 462–63 (1907).

With the coming of World War I, however, different questions arose about the scope of the First Amendment in the context of cases arising from federal prosecutions against radical speakers who opposed the war or other governmental policies, who were indicted of extremely serious crimes based on what they said, who were convicted and who appealed to the Supreme Court. In three of them, the Court (in majority opinions or dissents) discussed my topic for this essay: how immediate must a threat to the nation be to allow punishment for the speech?

The first of these cases was *Schenck v. United States.*[5] Charles Schenck was a Socialist party official who printed and distributed anti-war leaflets which argued that conscription was "a monstrous wrong against humanity," that it had been foisted on the public by "cunning politicians and a mercenary capitalist press," and the like.[6] He was convicted under the 1917 Espionage Act for obstructing the recruiting and enlistment services of the United States and conspiracy to cause "insubordination" within the armed forces.[7] It was in *Schenck* that Justice Holmes drafted one of the two best known sentences in American legal history—and certainly U.S. First Amendment history. That was his observation that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[8]

Two lines later, he articulated the other: "[t]he 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."[9]

"[C]lear and present danger"[10]—surely a phrase that has not been forgotten. But just what did Holmes mean by a "present" danger? How immediate? How present? The speech at issue in *Schenck* was, of all things, a quotation from the Thirteenth Amendment of the Constitution that barred slavery and a brief argument to the effect that the draft violated that legal precept. That Holmes concluded that such language from a fringe group with little power of any real sort was really a "present danger" to the war effort may be difficult for us to fathom.[11] But his conclusion that speech can only be punished when it poses a clear and present

---

[5] Schenck v. United States, 249 U.S. 47 (1919).
[6] *Id.* at 49, 51.
[7] *Id.* at 49.
[8] *Id.* at 52.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 52–53.

danger remains one of the most significant protections of First Amendment rights ever articulated by a Supreme Court jurist.

Let's skip ahead now to another post-World War I speech prosecution, the case of *Abrams*—no relative of mine, incidentally—*v. United States*.[12] It was also an Espionage Act prosecution, although this one arose not out of anti-war language but rather the distribution of leaflets by radical Russian émigrés who denounced the United States for sending troops into Russia after the revolution in that nation in 1917.[13] From its title, "WORKERS—WAKE UP" to its impassioned conclusion, "Woe unto those who will be in the way of progress. Let solidarity live!" the leaflet harshly denounced American intervention in Russia in the aftermath of the Revolution in that nation.[14] "Workers," the leaflet cried, "our reply to the barbaric intervention has to be a general strike!"[15] "We must not," it continued, "and will not betray the splendid fighters of Russia. Workers, up to fight."[16] As summarized in Professor Richard Polenberg's definitive study of the *Abrams* case:

> Despite its strong and occasionally provocative language, the leaflet is on the whole cautious and even circumspect . . . . There is a strident denunciation of President Wilson's insincerity, but no attack on the form of government of the United States. Workers are exhorted to "awake" and "rise," but not to take concrete action of any kind.[17]

Like the *Schenck* case, it is not easy for us today to comprehend how the speech at issue led to any prosecution, but so it did, and here Justice Holmes dissented in an opinion which may well be the most sublime defense of the First Amendment ever written. As regards the topic of this essay, this is what he had to say:

> I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they *so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country*.[18]

---

[12] Abrams v. United States, 250 U.S. 616, 617 (1919).

[13] *Id.* at 620–22.

[14] RICHARD POLENBERG, FIGHTING FAITHS: THE *ABRAMS* CASE, THE SUPREME COURT, AND FREE SPEECH 51–52 (1987). The original leaflet was published in both Yiddish and English versions; the Yiddish version—admittedly more militant in word choice and tone—was translated into English after the arrests and formed the basis for the indictments and the Supreme Court's ruling. *Id.* at 51. A later translation of the leaflet more accurately reflects the nuances of the Yiddish leaflet's politics, namely, the conflict between socialists and anarchists. *Id.* at 54–55.

[15] *Id.* at 52.

[16] *Id.*

[17] *Id.* at 51.

[18] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

And he continues: "Only the emergency that makes it *immediately dangerous* to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'"[19]

A third case in the post-World War I era bears on the topic of the level of immediacy that is required before the government may limit or punish speech is *Whitney v. California*, which involved the conviction of Charlotte Anita Whitney for joining an organization—the Communist Labor Party—for violating a California statute which made it criminal to join any organization organized "to advocate, teach, aid and abet criminal syndicalism," a term defined as including the "commission of crime, sabotage . . . , or unlawful acts of force and violence."[20] Justice Brandeis, applying the still newly-minted clear and present danger test in his dissenting opinion which was joined by Justice Holmes, first observed that the Court had yet to articulate any "standard by which to determine when a danger shall be deemed clear[] [or] how remote the danger may be and yet be deemed present."[21] Brandeis then proceeded to write what may well be the most beautiful passage in Supreme Court history. Here it is:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To 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. There must be reasonable ground to believe that the evil to be prevented is a serious one.[22]

In these three cases, the two most celebrated jurists in our history insisted that only the most imminent threats from speech can be punished. There have been many cases addressing that issue thereafter, including a particularly powerful concurring opinion of Justice Brandeis in *Whitney*, in which the Court—or at least some of its members—repeated in one linguistic formulation or another the proposition that speech may only be punished when it would imminently or immediately lead to or actually cause some extremely serious danger.[23]

But two cases in the second half of the twentieth century illustrated the difficulty of applying that principle. The first of

---

[19] *Id.* at 630–31 (emphasis added) (quoting U.S. CONST. amend. I).

[20] Whitney v. California, 274 U.S. 357, 359–60 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[21] *Id.* at 374 (Brandeis, J., concurring).

[22] *Id.* at 376.

[23] *Id.*

them, *Dennis v. United States*, arose out of the convictions of Communist Party leaders under the federal Smith Act for conspiring to advocate the overthrow of the government.[24] There was no evidence offered in the case that any harm from the speech at issue would occur in the near future.[25] As the great First Amendment scholar Harry Kalven, Jr. commented on the *Dennis* case in *A Worthy Tradition*, his masterful study of the First Amendment, "the revolution is set for the indefinite future. The danger, however clear and weighty, is not present."[26]

Chief Justice Vinson's answer, in his opinion for the majority in *Dennis* that affirmed the conviction of the defendants, all but abandoned the requirement that the danger be immediate.[27] Adopting a formulation offered by Judge Learned Hand in his opinion for the Second Circuit affirming the conviction of the Communist leaders, the best was this: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[28] There is no doubt that that test simply jettisons the requirement of the earlier opinions (some of them dissents, to be sure) that I referred to previously. It does so in a fashion in which the first element will almost always be easy to prove—in *Schenck*, for example, leaving the nation without a full army prepared to fight World War I would certainly be a "grave" result—so the critical issue remaining for judicial review would be limited to the "probability" that the harm would actually occur.

But this requirement as well, as one more recent case suggests, may be more illusory than not, as courts defer to the executive branch based on the notion that it, rather than the judiciary, has special expertise in matters of defense and national security.[29] There is nothing foolhardy in the latter proposition. The executive branch of government does have far more experience in that area. But it is the judiciary that must decide how to apply the First Amendment and if it simply defers to the very branch of government that has gone to court in the first place to prevent or punish publications that reveal "secrets"

---

[24] Dennis v. United States, 341 U.S. 494, 497–98 (1951).

[25] *Id.* at 587 (Douglas, J., dissenting) ("This record, however, contains no evidence whatsoever showing that the acts charged . . . the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation.").

[26] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 197 (Jamie Kalven ed., 1988).

[27] *Dennis*, 341 U.S. at 510.

[28] *Id.* (alteration in original) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

[29] *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 33 (2010) ("That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference.").

there would be little likelihood that First Amendment arguments would succeed except in the most extraordinary case.

Consider the most recent case in this area, one that always seemed to me the most difficult of all. When *The Progressive* magazine decided in 1979 to warn the public about the dangers of nuclear war, it did so in an extraordinary way by publishing an article called *The H-Bomb Secret: How We Got it, Why We're Telling It*.[30] The article contained a good deal of what the U.S. government claimed was highly classified restricted data and detail about the make-up of a hydrogen bomb, leading the United States to seek an injunction in federal court against the publication of information about what U.S. District Judge Warren described as "the most destructive weapon in the history of mankind."[31] The parties argued extensively about how much of the article was actually new, the magazine arguing that the "secret" it had trumpeted it was publishing was actually no secret at all and that the technologically detailed parts of the article had already been published before.[32] The United States, bolstered by a detailed affidavit of Dr. Hans A. Bethe, one of the creators of the atomic bomb, maintained that the article contained information that had never before been made public.[33]

Ultimately, the court ruled in a predictable manner. Given the magnitude of the danger involved, the court granted the government a prior restraint on publication of the article.[34] "[O]ne cannot enjoy freedom of speech, freedom to worship or freedom of the press," the court observed, "unless one first enjoys the freedom to live."[35] A prior restraint against publication was entered, the magazine appealed, and, while the appellate process weaved its way through the Seventh Circuit Court of Appeals, an article was prepared by a number of scientists who worked at the Argonne National Laboratory based on unclassified data which contained data similar to that in *The Progressive's* article and which was published in the student newspaper of the University of California at Berkeley.[36] The letter was quickly classified by the Department of Energy, and shortly afterwards the government

---

[30] Howard Morland, *The H-Bomb Secret: How We Got It – Why We're Telling It*, PROGRESSIVE, Nov. 1979, at 3.

[31] United States v. Progressive, Inc., 467 F. Supp. 990, 991, 995 (W.D. Wis. 1979).

[32] *Id.* at 993 ("Defendants contend that the projected article merely contains data already in the public domain and readily available to any diligent seeker.").

[33] *Id.*

[34] *Id.* at 1000.

[35] *Id.* at 995.

[36] Bill Lueders, *The H-Bomb Case Revisited*, PROGRESSIVE (Aug. 1, 2019), https://progressive.org/magazine/the-h-bomb-case-revisited-lueders-190801/ [https://perma.cc/8P5C-MM6J].

moved to dismiss the case as moot.[37] The case was dismissed but not before the district court had applied the *Dennis* test without quite saying so.[38] There was no doubt that the gravity of the evil of other nations learning how to build an H-Bomb was about as high as is imaginable. As for the likelihood of the harm actually occurring, the district court weighed the issue carefully and, predictably enough, ruled for the government.[39]

What has become of the fabled Holmes and Brandeis opinions? The government in the *Progressive* case provided no evidence at all of imminent harm. Indeed, the district court all but acknowledged that in its conclusion that the problem posed by the article was merely that it "could accelerate the membership of a candidate nation in the thermonuclear club."[40] Responding to the argument that it was "only a question of time before other countries will have the hydrogen bomb," Judge Warren observed that while the United States first successfully had exploded a hydrogen bomb twenty-six years before, only five countries had such a bomb by 1979.[41] "This time factor," he observed "becomes critical," as it had been in World War II when Hitler had failed "to get his V-1 and V-2 bombs operational quickly enough to materially affect the outcome of World War II."[42]

The *Progressive* case illustrates the difficulty of articulating a legal standard in this area that provides enough protection for freedom of speech at the same time it permits some limits on speech in truly extraordinary and deeply threatening circumstances. We look back on the Holmes and Brandeis decisions of the past and wonder how anyone could have thought that the speech involved in them, usually by the least persuasive and least threatening speakers, was genuinely dangerous. We look back to the inflamed time of the *Dennis* case and wonder how anyone could have disagreed with Justice William O. Douglas's dissent expressing disbelief that the government could have brought what was essentially a sedition case against people whom he dismissed as "miserable merchants of unwanted ideas."[43]

What we see is that our government, often fully supported by large majorities of the public, not only has brought and won such cases in the past, but invariably cites what may appear to be grave risks to national security when it does so. Consequently, we need

---

[37] *Id.*
[38] *Progressive, Inc.*, 467 F. Supp. at 996.
[39] *Id.*
[40] *Id.* at 994.
[41] *Id.*
[42] *Id.*
[43] Dennis v. United States, 341 U.S. 494, 589 (1951) (Douglas, J., dissenting).

the strongest First Amendment protections so that what amounts to government persecution of political dissent must be successfully resisted. But at the same time, we need some room—constrained, cabined, and deliberately designed to be used in only the most truly dangerous cases—for the government to go to court and seek relief.

No words can easily convey how to strike that balance or to provide assurance that when the level of danger from speech seems to be at its apex that First Amendment protections will—or, in the most dire circumstances, should—carry the day. But the rule and not the most unlikely exception must assure that what is at its core the political persecution of political dissent must be avoided.