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Brandenburg v. Ohio: How One Case Changed a Nation

Since the formation of the United States Constitution and its implementation of the First Amendment, centuries of state and federal court cases have drastically changed the law's meaning and application in our courts today. During World War I, Charles T. Schenck distributed leaflets that protested and discouraged enlistment in the military (Wilson, 2022, *Schenck v. United States*). Schenck was cited as violating the Espionage Act of 1917 which aimed to "suppress any speech or act alleged to be disloyal to the United States or disparaging of the national war effort" (Sterling, 2022, Espionage Act of 1917). The determining factor for his conviction came to be the Supreme Court's use of the "clear and present danger test" which gave courts the right to convict if it was decided that "speech posed such a direct and imminent threat to society" (Rohde, 2022, Clear and Present Danger Test). In 1969, *Brandenburg v. Ohio* changed this narrative as it challenged the court's ability to convict based on the "potential" for lawless action rather than the actual "incitement to imminent lawless action" (*Brandenburg v. Ohio*, 1969, 395 U.S. at 448–49). Unbeknownst at the time, this specific court case would eventually go on to change the interpretation of the First Amendment and impact the nation.

Clarence Brandenburg, a leader of a Klu Klux Klan group based in Ohio, gave a "speech at a rally promising 'revengeance' against the Black and Jewish communities should the federal government continue pursuing desegregation" (*Brandenburg v. Ohio*, 1969, 395 U.S. 444, 445–46). The speech encouraged listeners to participate in future lawless action against these groups as a form of protesting the United States' continuous efforts of integrating these minority

groups into society. In the Ohio Court System, Brandenburg was prosecuted cited under the “Ohio Criminal Syndicalism statute, which prohibited advocating for violence or unlawfulness” (*Brandenburg v. Ohio*, 1969, 395 U.S. 444, 445–46).

In a revision which ultimately helped Brandenburg’s case, “the U.S. Supreme Court evaluated the text of the Ohio statute and determined that it violated the First Amendment by failing to make a distinction between ‘mere advocacy’ and ‘incitement to imminent lawless action’” (*Brandenburg v. Ohio*, 1969, 395 U.S. at 448–49). It was after this where the infamous Brandenburg Test was introduced. The test was aimed to determine when speech loses its protection from the First Amendment by focusing on three elements: “intent of the speaker, the imminence of the result, and its likelihood” (*Brandenburg v. Ohio*, 1969, 395 U.S. at 447). The ruling ultimately came to fruition through the Supreme Court’s belief in the protection of political speech through the First Amendment (*Holder v. Humanitarian Law Project*, 2010, 561 U.S. at 42, Breyer, J., dissenting). Brandenburg’s case changed the narrative on speech protection and redesigned what was previously decided in *Schenck v. United States* – the case heightened the standard of review for speech protection and placed “a substantial burden on the government to justify its efforts to prohibit certain speech” (*Holder v. Humanitarian Law Project*, 2010, 561 U.S. 1, 21–22, 26).

The overturning of *Brandenburg v. Ohio* has paved the way for more advocacy of freedom of speech protections. In the years post-*Brandenburg*, this First Amendment influence has been carried through the court system and applied to numerous cases. In the instance of *R.A.V. v. City of St. Paul*, a teenager was charged under a St. Paul City ordinance that banned cross-burning after doing so in the yard of an African-American family along with several of their peers (Ho, 1994, p. 713). St. Paul’s ordinance was placed into effect in order to ensure “the

basic human rights of the members of groups historically subjected to discrimination, including the right of such members to live in peace where they wish,”—this ordinance was cited as being breached by the defendant, R.A.V. (Ho, 1994, p. 713). In a ruling after being challenged by R.A.V. The Supreme Court came to the decision that the cross-burning was actually protected by the First Amendment—by their reasoning, “such a content and view-point-based regulation of hate expression was facially unconstitutional” (Ho, 1994, p. 713). The argument proved that these ordinances were too broad and influenced a change in similar ordinances placed in other legislatures, as they too may breach First Amendment rights.

Corry v. Stanford University was a lawsuit filed by nine Stanford University students on May 2, 1994. This lawsuit challenged Stanford’s “Free Expression and Discriminatory Harassment” Standard which had been in place since 1896 at the university (Corry, 2014). The issue that these students had was that this standard protected all forms of speech—except for “fighting words.” This challenge reached a verdict in 1995, after review by the Santa Clara County Superior Court—Stanford’s “Fundamental Standard was unconstitutionally overbroad” (Corry, 2014). The plaintiffs and judge of this case strongly relied on the Supreme Court’s decision in the case of R.A.V. v. City of St. Paul due to the fact that it paved the way for the challenging of what does or doesn’t breach Constitutional First Amendment Rights.

In the instances of R.A.V. v. City of St. Paul and Corry. v. Stanford University, the inability of each entity —such as the City of St. Paul and Stanford University—to write anti-hate-speech laws without them being unconstitutional is proven. The main issue that is typically demonstrated in both of these court cases—and others that have been tried—is the fact that they are too broad to the point where they infringe on the plaintiff’s right to free speech or freedom of expression. In congruence with this, it also causes difficulty in establishing these

laws, ordinances, and student codes across the country because they are constantly challenged in court. So while anti-hate-speech laws can be introduced, there may come a circumstance where they will eventually be challenged and ultimately amended or rewritten if deemed unconstitutional.

In the modern digital world, the lines between what is constitutionally protected online and what is not are blurred. A recent issue that has come to light is terrorists' use of social media platforms to garner “recruits” (Wells, 2019). “Terrorists, both domestic and abroad, have adopted social media as the go-to platform to recruit and spread its message” (Park, 2016, p 410). This is because “social media channels ‘are by far the most popular with the intended audience, which allows terrorist organizations to be a part of the mainstream’” (Wu, as cited in Park, 2016, p. 410). What many fear is the lack of regulation surrounding these terrorist groups and what they are able to post.

Post-Brandenburg, regulating speech has been increasingly difficult because in many cases results from “hate speech” are not imminent and therefore cannot be considered as being a danger. Some scholars who are working against terrorism advocacy have suggested three things to be reviewed: “Brandenburg’s imminence requirement does not, or should not, apply to terrorist advocacy (Sunstein, 2015, as cited in Wells, 2019); the United States should enact laws prohibiting people from accessing terrorist indoctrination websites (Posner, 2015, as cited in Wells, 2019); or the government can use laws punishing material support of terrorism to punish terrorist advocacy” (Tsesis, 2019, as cited in Wells, 2019). While Brandenburg’s influence has created a more lenient free speech system, it has also caused questions on where the court system draws the line.

The United States Supreme Court's current consensus on hate speech is that it is protected under the First Amendment. Chief Justice John Roberts sent a message in a 2011 ruling stating that while some speech may cause pain, "we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate" (Foundation for Individual Rights and Expression, 2024). Alongside this statement, the same message rings true from the 1969 court case—speech cannot be restricted unless inciting imminent lawless action. The historic case of *Brandenburg v. Ohio* has laid the framework for generations to come and has been incessantly influential in similar cases that have been tried decades later. Despite the United States' constantly evolving nature and technological advancements, the courts have maintained their commitment to the First Amendment and its foundational principles—continuing to shape how speech is regulated to this day.

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