



Brandenberg v. Ohio: Notes for Teachers and Facilitator

Key Points:

- The Supreme Court in *Brandenberg* reversed previous cases which upheld the validity of state anti-syndicalism laws. This means that much of the case law in the arguments support Ohio. Students representing *Brandenberg* will have to argue that the precedents in that regard should be overturned or that the current case can be distinguished in some important way from those precedents. Because of this, their general brainstorming on the meaning of the First Amendment's protection of freedom of speech is particularly important.
- Students representing Ohio have a case that directly supports their position and they must aggressively argue that the Court's previous precedent must control. Even so, their brainstorming on the importance of state sovereignty will be important.
- Trivia: The case was issued *per curiam* which means the decision is of the Court, rather than that of an individual judge.

Additional Resources:

[Oyez: Brandenberg v. Ohio](#)



Brandenberg v. Ohio

This moot court concerns the case of *Brandenberg v. Ohio* in which the Supreme Court set forth guidelines for evaluating speech under the First Amendment.

Facts

Overall Facts:

Brandenberg, a leader in the Klu Klux Klan, called a local television reporter and invited him to a KKK rally to be held on the farm of one of the Klan members. The reporter attended with a cameraman and subsequently aired several stories, many of which included video recordings from the event. Brandenberg was then arrested and charged with violating Ohio's anti-syndicalism statute. He was convicted, fined \$1000 and sentenced to 1 to 10 years in prison.

The Rally:

The rally was attended only by KKK members and two members of the press and held on private property. One of the films showed several hooded Klan members gathered around a large wooden cross which they burned. Although some of the members held firearms, Brandenberg did not. The film was unable to successfully capture most of the words spoken except a few phrases which were derogatory about Blacks. Another video from the event showed Brandenberg making the following speech:

"This is an organizers' meeting. We have had quite a few members here today which are - - we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, *Dispatch*, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. 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 revengeance¹ taken.

We are marching on Congress July the Fourth, four hundred thousand strong. From there, we are dividing into two groups, one group to march on St. Augustine, Florida, the other

¹ "Revengeance" is a word most commonly used by the KKK and it means revenge.

group to march into Mississippi. Thank you." *Brandenberg v. Ohio*, 395 U. S. 444, 446 (1969)

In another section of the same film *Brandenberg* was shown stating, "Personally, I believe that the [n-word] should be returned to Africa and the Jews returned to Israel."

In that section of the film *Brandenberg* was again shown without weapons, although other members carried them.

Syndicalism Statutes

Brandenberg was convicted under Ohio's syndicalism statute, especially the following sections:

"advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. . ."

". . . voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

Ohio Rev.Code Ann. § 2923.13

A Note about Syndicalism Statutes:

In the first two decades of the twentieth century, twenty states enacted similar anti-syndicalism statutes. These statutes were promulgated in response to threats seen from the growth of trade unions, increased immigration and the rise of fascism and communism in the world. During this era, the United States Supreme Court upheld arrests under syndicalism statutes for views which ran contrary to those of the general public.

Procedure:

Brandenberg appealed his conviction through the Ohio state court system, contending that Ohio's syndicalism statute violated the First and Fourteenth Amendments of the Constitution. The first level of appeal confirmed his conviction without opinion and the Ohio Supreme Court dismissed the appeal stating that there were no substantial constitutional issues present. *Brandenberg* then filed a petition for writ of *certiorari* to the Supreme Court of the United States which was granted.

A Procedural Note: Petition for Writ of Certiorari

Because *Brandenberg* claimed that the state of Ohio denied his constitutional rights, (the right of free speech) procedurally, after obtaining the judgement of the state Supreme Court, he could then file with the United States Supreme Court. The document used to file with the Supreme Court is called a petition for writ of *certiorari*. That document is designed to convince the Supreme Court that the case is a significant one and worth hearing. The Supreme Court is a court of discretionary appeal which means that it is not obligated to hear every case submitted to it and, in fact, the Supreme Court agrees to hear less than 3 percent of the cases requested. The issuance of the writ requires a vote of a minimum of four of the justices.

The First Amendment v. the Tenth Amendment or Free Speech v. State Sovereignty

This case sets the First Amendment guarantee of free speech without government interference against the right of each state to govern itself and define its own laws including its criminal laws. To understand the essence of this battle we must briefly consider the meaning of the amendments involved.

The Tenth Amendment and a question of Federalism

The concept of federalism is basic to our system of government. In a nutshell, it means that there are two government structures--state and federal. The federal government is said to have delegated powers; the states exercise reserved or police powers. The United States Constitution embraced this system and the rights of states is expressly preserved in the Tenth Amendment to the Constitution which states:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."

Recall that the Constitution as originally drafted did not include what we now call the "Bill of Rights." The failure to do so provided the Constitution's opponents, the so-called Anti-Federalists, with one of their better arguments. James Madison, having argued in the Federalist papers that a Bill of Rights was unnecessary in a government of limited powers, took up the task of drafting proposed amendments that would be sent to the states. Ten of the twelve proposed amendments were ratified December 15, 1791 and form what we refer to as the Bill of Rights. The protection of state's rights was **so significant** that the Tenth Amendment was the most important amendment to many people in the creation of the Bill of the Rights.

The sovereignty of each state continues in importance today. Much of the law and regulation that govern our everyday life comprises state, not federal law. For example, if a couple wishes to get married, they will have to obtain a license and follow whatever procedure, such as blood tests and waiting periods, the state in which they wish to wed requires. Likewise, if they wish to end their marriage years later, the laws on divorce which vary from state to state will govern. In some states, they may assert a fault basis for divorce while others recognize only no-fault divorce.

Police power presents perhaps the broadest area of state power which enables a state to ensure the safety and security of its people. What is a crime, what are the defenses to crimes and what are the punishments for crime vary from state to state and are within the state's police powers. For example, a person charged with murder may raise an insanity defense in Connecticut, but not in Montana. A person convicted of murder may be sentenced to death in Texas, but not in New York which has abolished the death penalty. Not only criminal law but court procedure is largely up to each state. The very structure of the court system varies from state to state as does the precise process that the criminal defendant experiences.

Key Issue: In this case, Ohio is arguing that it has a right to define and enforce its own criminal law including its criminal syndicalism statute which, at the time the case went to the Supreme Court, had been in force for almost fifty years. This authority to create and administer its own

criminal law is a crucial part of the rights reserved to each state under the Tenth Amendment and Ohio argues that those rights are superior to the rights of Brandenburg to communicate as he did here. In *Whitney v. California*, 274 U.S. 357 (1927), the Supreme Court upheld an almost identical syndicalism statute in a case involving the conviction of a Communist holding that her words presented a “clear and present danger” and held that free speech is not absolute and can be curtailed by the state in a valid exercise of its authority to make criminal law. Those representing Ohio must argue that *Whitney* should be upheld.

First Amendment: Freedom of Speech and Press

The First Amendment to the Constitution states in pertinent part:

Congress shall make no law . . . abridging the freedom of speech. . . .

Beginning with its decision in *Gitlow v. New York*, 268 U.S. 652 (1925), the Supreme Court has held that the First Amendment’s guarantee of freedom of speech is applied to the states by the Fourteenth Amendment’s guarantee that “No States shall . . . deprive any person of life, liberty, or property, without due process of law. . . .” Therefore, Ohio is obligated to “make no law which abridges the freedom of speech. . . .”

Key Issue: In this case, Brandenburg is arguing that his right to speak freely outweighs Ohio’s right to enact criminal law. In other words, Brandenburg contends that his personal rights under the First Amendment encompasses the words he spoke and should prevail over the state of Ohio’s constitutional right to create criminal laws. Those representing Brandenburg must argue that the Supreme Court’s decision in *Whitney v. California* must be overturned.

Are we ready to form arguments?

Before you do make sure that you understand:

- State rights under the Tenth Amendment
- Individual free speech rights under the First Amendment



Our Mission in this Moot Court

Our moot court begins at the point that the United States Supreme Court has agreed to resolve the issue of whether the First Amendment right to free speech, as exercised in this case, supersedes the right of a state to determine its own criminal law.

Brainstorming

Break into three groups:

Group 1: Attorneys representing Brandenburg

Group 2: Attorneys representing Ohio

Group 3: Justices who will ask probing questions and decide the case.

Each side will have 15 minutes to present its arguments. Those representing Brandenburg will go first and may reserve 5 minutes for rebuttal. Justices who will hear the case will have engaged in brainstorming and will interrupt the arguments with questions.

Hints for attorneys representing Brandenburg: You must directly argue that the *Whitney* case be overturned. Think about why speech matters. What are the risks and concerns when the government attempts to punish the content of speech? Think of ways to use or distinguish the cases included in the arguments. As the side bringing the case, remember that you can reserve five minutes for rebuttal. That means you can have the last word to counter what the other side says.

Hints for attorneys representing Ohio: You must argue that the *Whitney* case should control. Think about the guarantees of the Tenth Amendment and what that means to state sovereignty. Consider the harm that the state of Ohio is trying to prevent by the enactment of the statute. Think of ways to use or distinguish the cases included in the arguments.

Hints for Justices: Your job is to think about both sides of the case and develop questions for each side. Good questions will dig deeper into the arguments made and help clarify both sides.

Summary of tasks:

1. Engage in general brainstorming of arguments for your side or if you are a justice of questions to ask.
2. As part of that brainstorming, review and consider the arguments on the Argument Sheet.
3. Attorneys: Write out a bullet point list of the arguments you want to make and begin with the most persuasive. Use the attorney worksheet.
4. Attorneys: Think of counters to those arguments and develop answers.
5. Justices: Fill out the Justice worksheet
6. Attorneys: Designate the person to make the argument (All attorneys can answer questions posed by the Justices)

Attorneys making argument: Introduce yourself by saying, “May It Please the Court, I’m _____ and I represent _____ in this matter.”



Arguments

Look over these arguments. Decide whether they help Brandenburg or Ohio. Or does the argument help both sides or neither side? Or can our case be distinguished or aligned in some other way?

_____ In *Whitney v. California*, 274 U.S. 357, 371, the Supreme Court, stated, “the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom, and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.”

_____ In *Noto v. United States* 367 U.S. 290 (1961) the Supreme Court reversed the conviction of an official of the United States Communist Party for violating the Smith Act which made it a crime to be a member of an organization which advocated the overthrow of the government of the United States. In overturning the conviction, the Court held, “the mere abstract teaching of Communist theory, including the 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. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.”

_____ In *Schenck v. United States*, 249 U.S. 248, 252 (1919) the Supreme Court upheld the conviction of two individuals who, during World War I urged the public to resist the draft and engage in peaceful resistance. The Schencks were convicted under the Espionage Act. In upholding the conviction, the Court stated, “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.”

_____ In *Frohwerk v. United States*, 249 U.S. 205 (1919) the Supreme Court considered the conviction of Frohwerk under the Espionage Act. Frohwerk had circulated a German-language newspaper criticizing the involvement of the United States in the First World War. The Supreme Court upheld his conviction noting that the government, especially during wartime had a valid interest in protecting its recruitment of personnel to serve in the armed forces.

_____ In *Abrams v. the United States*, 250 U.S. 616 (1919), the Supreme Court upheld the conviction of Russian immigrants to the United States who called for a general strike in ammunition plants to undermine the American war effort. In a dissent preeminent jurist Oliver Wendell Holmes stated, “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.” 250 U.S. 616, 630. [Note that dissenting opinions are persuasive, but it is not mandatory for a court to follow such opinions.]

_____ *Stare decisis* is a principle which holds that a court, including the U.S. Supreme Court should respect the precedent established by prior decisions.

_____ *Stare decisis*, while requiring a court to give great deference to prior decisions allows a court to overturn one of its own precedents only where a strong reason for doing so exists.

_____ In *Herndon v. Lowry*, 301 U.S. 242 (1937) the United States Supreme Court struck down a state decision affirming the conviction of Herndon for violating Georgia’s syndicalism statute. The Court found that although Herndon was a Communist, the pamphlets he possessed did not advocate the overthrow of the government. The Court stated, “The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government.”

_____ In *Bridges v. California*, 314 U.S. 252 (1941) the Supreme Court overturned the contempt conviction of Bridges and others for publishing their opinions on pending court cases stating, “... the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial.' ” 314 U.S. 252, 262.

_____ In *Yates v. United States*, 354 U.S. 298 (1956) the Supreme Court reversed the convictions of fourteen leaders of the Communist Party who were convicted under the Smith Act, a federal statute which criminalized willfully and knowingly conspiring to teach and advocate the overthrow of the government by force. The Supreme Court held that penalizing the advocacy of overthrowing the government in the abstract without advocating for action to do so was protected under the First Amendment.



Justice Brainstorming Worksheet

You are a Supreme Court Justice hearing *Brandenberg v. Ohio*. Please answer the following questions. Be sure to reference the facts and the relevant cases on the argument sheet.

1. Pretend that you are listening to the oral arguments of the attorneys representing Brandenburg. What two questions would you ask?
 - A.
 - B.
2. Pretend that you are listening to the oral arguments of the attorneys representing Ohio. What two questions would you ask?
 - A.
 - B.
3. At the conclusion of hearing the case, you have to write a court opinion ruling either in favor of Brandenburg or Ohio. Remember that you need to weigh the needs of the state to prevent violence against the needs of the individual to express his or her views.

_____ Brandenburg _____ Ohio.

4. Prepare a bullet point list of your reasons. Include why you rejected the losing side's arguments.