

## **The Right of Group Affiliation**

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“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” - 1<sup>st</sup> Amendment, the Constitution of the United States

In these days of the Patriot Act and fear from terrorist attacks, it becomes easy to forget the principles of the rights that were made protected early in the history of the United States Government.

Any federal law that made it a crime to be a “member of a terrorist organization” should not be constitutional now that the Supreme Court has returned to the fundamental concept of the necessity for the interaction of ideas. Simple affiliation with an unpopular group should never be enough for a conviction. “Those that won our independence... valued liberty both as an end and as a means.” (Whitney v. California) The rights protected by the 1<sup>st</sup> Amendment, freedom of religion, freedom of speech, freedom of the press, and the right to assemble, are specifically given to protect the interaction of ideas, regardless of their popularity. These rights being the first of the Bill of Rights amendments shows how much the framers of the Constitution valued this as key to the maintenance of the republic.

During the early 20<sup>th</sup> century, the Supreme Court decided on a string of cases that delineated a line between a person’s 1<sup>st</sup> Amendment rights and the government’s power to protect the public from violent action. Even though the opinions given in these cases gave concern for the free interaction of ideas, the application of the ‘clear and present danger’ phrase led to acceptance of an encroachment upon 1<sup>st</sup> Amendment rights that should not have been constitutional.

In 1917, a group was convicted of a conspiracy to violate the Espionage Act of June 15, 1917, by causing and attempting to cause insubordination in the military of the United States. During wartime this posed a “clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” (Schenck v. United States) This case was the start of the ‘clear and present danger’ test for when Congress has the right to breach 1<sup>st</sup> Amendment rights.

In 1919, a group was indicted for the publication of two leaflets. One stated that “the President’s cowardly silence about the intervention in Russia reveals the hypocrisy of the plutonic gang in Washington.” The other stated “Workers-Wake up” The Court decided that this did meet the ‘clear and present danger’ test. Already the problems of the ‘clear and present danger’ test were becoming evident. Justice Holmes, who wrote the original text that this test was based on, disagreed with the Court’s decision. Justice Holmes argues “It is said that the manifesto was more than a theory, that it was an

incitement. Every idea is an incitement...I believe the defendants had as much right to publish as much as the Government has to publish the Constitution of the United States now vainly invoked by them...defendants are made to suffer not for what the indictment alleges but for the creed that they avow – a creed that I believe to be the creed of ignorance and immaturity when honestly held...no one has a right to even consider in dealing with the charges before the Court.” (Abrams v. United States) Justice Holmes is against the breach of 1<sup>st</sup> Amendment rights for this extension of the ‘clear and present danger’ test.

In 1919, Miss Whitney was convicted of the felony of assisting in organizing the Communist Labor Party of California, of being a member of it, and of assembling it. The Court upheld this conviction. *Whitney v. California* was the height of the application of the ‘clear and imminent danger of substantive evil’ phrase. This case actually made it constitutional for a federal law to make it a crime to be affiliated with a group that the government considered a threat. Since then, the mistake has been realized, and this case has been overturned.

All of the applications of ‘clear and present danger’ type tests were wiped away by the modern decision of *Brandenburg v. Ohio*. In 1969, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism 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”. As much as this case paralleled *Whitney*, the court saw the error in the prior reasoning, and did not convict Brandenburg for merely advocating ideas. *Whitney v. United States* was the pinnacle of the ‘clear and present danger’ reasoning for suppressing 1<sup>st</sup> Amendment rights. This case tears that all away. “*Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*. 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 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.”

The line of balance between free ideas and proper governmental interest may again need better clarification. Once again the United States is faced with the fear of people inside the United States seeking to bring down the United States government. The right to hold a point of view and to non-violently express that view should never again be suppressed. Only the violent actions should be prohibited in the interest of maintaining the environment of free expression of ideas. We should have learned our lesson from the experience of interacting with the idea of communism. The suppression of ideas was not worth what patience and equal argumentation would have eventually yielded. Preemptive actions are before immediate need for public safety could become evident. Allowing preemptive action against any group would allow the stifling of ideas that the majority currently disagreed with. It is easy for public fear to desire the suppression of individual rights, but the protection of a minority’s rights from the majority is exactly what the founders wanted to protect. At the conclusion of the Constitutional Convention, Benjamin Franklin was asked, “What have you wrought?” He answered, “...a Republic,

if you can keep it.”

## Bibliography

The Constitution of the United States (1787)

Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919)

Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)

Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919)

Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927)