LOUIS D. BRANDEIS 100 THEN & NOW
Celebrating the 100th Anniversary of Louis D. Brandeis' Appointment to the U.S. Supreme Court

The Brandeis/*Citizens United* Question

Jon D. Levy*

The Question

How would Justice Louis Brandeis have decided Citizens United v. Federal Election Commission (2010)?[1] This question has been asked regularly at the presentations I have given on Brandeis's life and legal vision to both lay and legal audiences. The Brandeis/Citizens United question is not unexpected. Citizens United, like the body of Supreme Court campaign-finance decisions that preceded it, is legally complex and steeped in electoral law jargon. But the decision's legal complexity has not prevented the American public from appreciating the social significance of the key question that the case decided: Is a corporation a person for purposes of the First Amendment's guarantee of free speech?

In *Citizens United,* the Supreme Court ruled on the provision of the Bipartisan Campaign Reform Act of 2002 ("§ 441b"),[2] which prohibited corporations and unions from using their general treasury funds to pay for "electioneering communications" that advocate for or against a candidate in the period immediately preceding a federal primary or election. The Court determined that this provision violated the First Amendment because it chilled the right of corporations and unions to engage in protected political speech. The case was brought by Citizens United, a nonprofit corporation that wanted to

run television ads advertising a documentary it had produced that was critical of Hillary Clinton, then a candidate for the Democratic Presidential nomination.

The Court concluded that § 441b was facially unconstitutional and, therefore, void. In reaching this result, the Court repudiated two rationales that it had previously identified and approved in *Austin v. Michigan Chamber of Commerce* (1990)[3] as compelling governmental interests supporting the constitutionality of restrictions on corporate campaign spending: (1) preventing corruption and the appearance of corruption to protect the integrity of elections and the government (the "corruption rationale"), and (2) preventing the distortion of the nation's political dialogue that would result if corporations were free to spend unlimited amounts of their wealth, the accumulation of which is made possible by the state-authorized corporate form (the "antidistortion rationale"). In 2002, Congress embraced these rationales when it enacted the Bipartisan Campaign Reform Act, and in 2003 the Court upheld the constitutionality of § 441b in *McConnell v. Federal Election Commission* (2003).[4]

The *Citizens United* majority opinion, authored by Justice Anthony Kennedy, concluded, however, that these rationales and the § 441b restriction could not be reconciled with the First Amendment. As to the corruption rationale, the Court concluded "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[5] The Court also rejected the antidistortion rationale because it "would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form."[6] Thus, a lynchpin of the *Citizens United* decision is that corporations are "associations of citizens—those that have taken on the corporate form,"[7] entitled to the same level of First Amendment protection as are individual citizens.

The *Citizens United* decision served as a foundation for the Court's subsequent decision in *McCutcheon v. Federal Election Commission* (2014),[8] invalidating § 441b's limits on the total amount that an individual or group may contribute to candidates or political committees in an election cycle. Together, these two cases have altered America's campaign-finance landscape. Corporations no longer face limits on the

amounts they can spend on electioneering communications so long as they do not coordinate their spending with a candidate or party. In 2014, for example, the total amount spent by outside groups on U.S. Senate races was more than double the amount spent in 2010.[9]

The audiences at my presentations connect Justice Brandeis and *Citizens United* because of the work he performed during his thirty-nine-year legal career prior to his appointment to the Supreme Court in 1916. Brandeis became known as the "People's Lawyer" for his advocacy of progressive policies. He was "the nation's preeminent lawyer and among its leading public intellectuals—a combination of David Boies and Paul Krugman, with a touch of the early Ralph Nader thrown in."[10] In a letter to the editor of the *Boston Evening Transcript,* published in 1901, Brandeis was unequivocal about the role that corporations should play in American politics: "There can be no safety for the people unless they serve notice upon the corporations that they must 'keep out of politics.'"[11]

Brandeis's pre-judicial career strongly suggests that he would have supported § 441b and the objectives of reducing the potential corrupting and distorting effects that unrestricted campaign expenditures by corporations may have on government. But whether Brandeis, the "People's Lawyer," would have supported § 441b's restriction on campaign communications by corporations as a matter of sound public policy does not answer how he would have ruled as a judge on the constitutionality of the provision.

Speech as a "Political Duty"

Brandeis did not author or participate in a campaign finance-related First Amendment opinion during his twenty-three years on the Supreme Court. He has nonetheless figured prominently in the Supreme Court's modern campaign-finance decisions, beginning with the seminal case of *Buckley v. Valeo* (1976).[12] In *Buckley,* the Court recognized that campaign contributions and expenditures qualify as "speech" protected by the First Amendment. The Court's per curiam opinion invoked Brandeis's declaration "that in our country 'public discussion is a political duty,'" in concluding that legislated limits on

candidates' use of their own money violated the First Amendment's guarantee of free speech.[13] Brandeis's characterization of public discussion as being a "political duty" comes from his concurring opinion in *Whitney v. California* (1927),[14] which set forth his most complete formulation of the purpose of the First Amendment's guarantee of free speech. In *Whitney,* Brandeis identified the "freedom to think as you will and to speak as you think," as a foundation for the discovery of "political truth" and, therefore, an essential ingredient of democracy. He wrote:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[15]

Thus, Brandeis conceived of free speech as an essential facet of liberty, and liberty as both an end in itself and also the vehicle by which our democracy is maintained. Freedom of speech and the active public discourse it facilitates, he believed, produce a government in which "deliberative forces" will prevail over "the arbitrary."

Since *Buckley,* Supreme Court justices have relied on Brandeis's *Whitney* concurrence both to support and oppose the constitutionality of various campaign-finance laws.[16] For example, it was quoted by Justice William Brennan in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (1986) to emphasize that not only does the First Amendment "protect the integrity of the marketplace of political ideas," it also serves to advance liberty "both as an end and as a means."[17] In contrast, the *Whitney*

concurrence was invoked by Justice Antonin Scalia in his dissent in *Austin* to support his position that Michigan's regulation of campaign spending by corporations violated the First Amendment because the regulation was not shown to be narrowly tailored to serve a compelling state interest—a constitutional requirement traceable to several opinions, including the *Whitney* concurrence.[18] The opinion was cited most recently by Justice Stephen Breyer in his dissenting opinion in *McCutcheon.* He explained that by creating a politically oriented marketplace of ideas, the First Amendment ultimately produces the public opinion that guides the nation's elected leaders. "This is not a new idea," Breyer observed. "Eighty-seven years ago, Justice Brandeis wrote [in *Whitney*] that the First Amendment's protection of speech was 'essential to effective democracy.'"[19]

In *Citizens United,* the *Whitney* concurrence surfaced in Justice John Paul Stevens's dissenting opinion,[20] which quoted Brandeis's statement that "[f]reedom of speech helps 'make men free to develop their faculties'" to support the proposition that the First Amendment protects "the individual's interest in self-expression" as distinguished from corporate speech, which, according to Stevens, "is derivative speech, speech by proxy."[21] Justice Stevens thus reasoned that "[a] regulation such as [§ 441b] may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice."

Whitney concerned the constitutionality of a California law that criminalized speech advocating the overthrow of the government and thus had nothing to do with the regulation of campaign spending by corporations.[22] Nonetheless, Brandeis's concurring opinion has been influential in campaign-finance cases because it establishes the importance of speech to the speaker, to society, and to democratic governance. The *Whitney* concurrence sheds light on how Brandeis would approach the issues presented in *Citizens United* when read in conjunction with other Brandeis opinions addressing (A) the primacy of the individual citizen under the Constitution, (B) the evolving nature of corporations in American society, and (C) the importance of judicial restraint.

The Constitutional Primacy of the Individual Citizen

Brandeis's *Whitney* concurrence was not the first time that he spoke of the individual citizen as the primary unit of democratic government. Writing in dissent in *Gilbert v. State of Minnesota* (1920)[23]—a First Amendment challenge to a Minnesota statute that criminalized teaching or advocating against enlisting in the military—Brandeis equated the individual citizen with the government itself, reasoning that the Minnesota law "affects directly the functions of the federal government" because it "affects rights, privileges, and immunities of one who is a citizen of the United States, and it deprives him of an important part of his liberty."[24] The *Gilbert* dissent also introduced the idea that public speech is a "political duty." Brandeis wrote that the "[f]ull and free" exercise of First Amendment rights "by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself," and in "frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril."[25] Thus, the First Amendment protects the ability of individual citizens to develop themselves intellectually, culturally, and otherwise, so as to be capable of fulfilling their political duty to engage in the public discourse from which "the greatest promise of wisdom in governmental action" derives.[26]

Brandeis's belief in the constitutional primacy of the individual citizen is similarly reflected in his treatment of the Fourth and Fifth Amendments in his dissenting opinion in *Olmstead v. United States* (1928),[27] where he articulated, for the first time in American legal history, a constitutionally based right of individual privacy. Writing in decidedly humanistic terms, Brandeis cast the Constitution as having been designed to advance human potential:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against

> the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.[28]

It is hard to reconcile Brandeis's humanistic expression of the Constitution's purpose with the view adopted in *Citizens United* that all corporations, regardless of their size, function, or purpose, are equivalent to "associations of citizens." In describing the aspects of liberty secured by the First, Fourth, and Fifth Amendments in *Whitney, Gilbert,* and *Olmstead,* Brandeis employed terms that apply exclusively to human beings—"citizen," "American," "beliefs," "thoughts," "emotions," "sensations," "spiritual nature," "feelings," "pain," "pleasure," and "satisfactions of life." Brandeis understood people to be the primary object of the liberty protected by the Bill of Rights.

Thus, the "duty" of speech that Brandeis identified in *Gilbert* and *Whitney* is foremost a duty owed by the individual citizen. In addition, although one can easily conceive of ways in which this individual duty may be fulfilled by groups of citizens working in association with one another, it is hard to imagine that Brandeis would have agreed that a large business corporation would or should fulfill this essential duty. This does not exclude the possibility that he might have been persuaded that a nonprofit corporation, such as Citizens United, organized for the specific purpose of expressing the shared political views of its members, should be treated as an association of citizens who have joined together to engage in protected speech, and is thus deserving of the same level of First Amendment protection as each of its individual members. Large business corporations, however, are neither organized nor equipped to express the shared beliefs of the multitude of shareholders who own the corporation. A publicly traded corporation, for example, does not express the collective spirit, feelings, intellect, and beliefs of the thousands of shareholders (many of which may also be corporations or other types of business or financial entities) who own it. Brandeis would likely have concurred with the statement in Justice Stevens's *Citizens United* dissent that our nation's founders "had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind."[29]

The Evolving Nature of Corporations

Brandeis's probable approach to the First Amendment question in *Citizens United* becomes clearer when one considers his understanding of the nature of corporations and the role they had come to play in American society by the early part of the twentieth century. In *Louis K. Liggett Co. v. Lee* (1933),[30] the Court ruled that a Florida statute that imposed a greater licensing tax on chain stores with locations in more than one county, than on those with locations within a single county, violated the Fourteenth Amendment's equal protection guarantee. The majority opinion explained that basing an increased rate of tax on nothing more than the presence of a company's stores in more than one county "finds no foundation in reason or in any fact of business experience."[31] Brandeis disagreed, basing his dissent on the majority opinion's failure to recognize that because the corporate form is created by the state, corporations are properly subject to extensive regulation and restrictions. The "privilege of doing business in corporate form" was not, he wrote, "inherent in the citizen," and society need not "accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation."[32] Brandeis invoked the concentration of wealth made possible by the corporate form as further justification for the Florida statute:

> [S]ize alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds

> of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And, as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert that this "master institution of civilised life" is committing it to the rule of a plutocracy.[33]

Louis K. Liggett Co. came before the Court during the Great Depression. In his dissent, Brandeis attributed the nation's economic woes to income disparities that he ascribed to the concentration of individual wealth enabled by the corporate form: "Such is the Frankenstein monster which states have created by their corporation laws," he wrote.[34] Brandeis found no reason to hold that the Fourteenth Amendment prevented state governments from treating corporations less favorably than people. He concluded, "The difference in power between corporations and natural persons is ample basis for placing them in different classes."[35]

Brandeis's position in *Louis K. Liggett Co.* harkened back to his earlier dissenting opinion in *Quaker City Cab Co. v. Commonwealth of Pennsylvania* (1928),[36] another equal protection case. There, the Court's majority invalidated a Pennsylvania gross receipts tax imposed on taxis operated by corporations, but not on taxis operated by individuals and partnerships. Brandeis dissented, explaining that Pennsylvania had good reason to distinguish corporations from citizens:

> But there are still intelligent, informed, just-minded, and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the liberty of the

> citizen; that it tends to increase the subjection of labor to capital; that, because of the guidance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain; that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that the process of absorption should be retarded.[37]

Brandeis thus condemned the concentration of wealth under the control of the managers of America's "great corporations" as harming the lives and property of the very workers and shareholders who made the corporations possible. His distrust of the corporate form evidences that, unlike the Court's majority in *Citizens United,* Brandeis would probably have found the corruption and antidistortion rationales underlying § 441b to be supported by both reason and experience and, therefore, sufficiently compelling to satisfy the requirements of the First Amendment. Brandeis himself is echoed in the assertion in Justice Stevens's *Citizens United* dissent "that corporations have 'special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets'—that allow them to spend prodigious general treasury sums on campaign messages that have 'little or no correlation' with the beliefs held by actual persons."[38] And Justice Stevens's dissent cited favorably to Brandeis's *Louis K. Liggett Co.* dissent and its discussion of the "fears of the 'evils' of business corporations."[39]

For Brandeis, the corporate form had, as he wrote in *Louis K. Liggett Co.,* pointed the country toward the "rule of a plutocracy," and had enabled a growing aggregation of capital, which was, as he wrote in *Quaker City Cab Co.,* "an insidious menace to the liberty of the citizen." If he had sat on the *Citizens United* case, Brandeis surely would have been inclined to respect the Court's existing precedent in *Austin* and *McConnell,* and Congress's determination of the need to impose limits on independent campaign spending by corporations.

Judicial Restraint

Another fault-line in *Citizens United* was whether the constitutionality of § 441b should be judged by an "as-applied analysis" that focuses on the relevant facts surrounding the actual speaker (Citizens United) and speech (its advertisements for its video-on-demand documentary about Hillary Clinton) at issue in the case, or by a "facial analysis" that determines the constitutionality of the provision on its face. In its appeal to the Supreme Court, Citizens United asserted an as-applied challenge, claiming that § 441b was unconstitutional as applied to it, a nonprofit corporation funded overwhelmingly by individuals, and organized to engage in and, in fact, engaging in political speech. The Government, in defending the law, similarly urged the Court to judge the constitutionality of the statute as applied. The Court's majority in *Citizens United* opted instead to judge the facial constitutionality of § 441b and to not limit its review to an as-applied challenge. Justice Kennedy explained that deciding the case on a narrower "as-applied" basis would leave the constitutionality of the law to be settled on a case-by-case basis, which would have the effect of chilling political speech: "Any other course of decision would prolong the substantial, nationwide chilling effect caused by § 441b's prohibition on corporate expenditures."[40]

Writing in dissent, Justice Stevens took the majority opinion to task for not limiting itself to the as-applied challenge presented by the parties: "It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents."[41]

Whether the Court should have limited its review in *Citizens United* to an as-applied challenge is a question Brandeis would have undoubtedly had an opinion on. He joined the Supreme Court at the height of the *Lochner* era, a period in which the Court tended not to defer to legislative judgments, particularly with respect to laws related to economic and commercial issues, and Brandeis frequently wrote of the need for the Court to

exercise greater restraint. In *New State Ice Co. v. Liebmann* (1932),[42] he explained that a judge's "decision that the Legislature's belief of evils was arbitrary, capricious, and unreasonable may not be made without enquiry into the facts with reference to which it acted[,]" and the Court's function "is only to determine the reasonableness of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided."[43] "[G]overnment," he stressed in another dissenting opinion, "is not an exact science" and "[w]hether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby."[44]

Brandeis's emphasis on the importance of judicial deference to legislative judgments was related to his core belief that the Constitution should not be applied by judges so as to impose their own personal policy preferences. Thus, he warned in *New State Ice Co.:* "[I]n the exercise of this high power [of constitutional review], we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."[45] And democratic decision-making, he explained in *Eisner v. Macomber* (1920), requires deference to legislative judgments: "[T]he high prerogative of declaring an act of Congress invalid, should never be exercised except in a clear case," and the Court must "presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.'"[46]

In his concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936), Brandeis set forth what is among the most authoritative accountings of the self-imposed rules that govern the Supreme Court's exercise of its constitutional review authority.[47] The *Ashwander* concurrence was cited in *Citizens United* in both Chief Justice John Roberts's concurring opinion and Justice Stevens's dissenting opinion. Brandeis explained in *Ashwander* that the Supreme Court should not anticipate a question of constitutional law in advance of the need to decide it. Further, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality

is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[48]

Brandeis adhered to the *Ashwander* principles in his *Whitney* concurrence. There, he deferred to the California Legislature's findings that the Criminal Syndicalism Act was needed to preserve public peace and safety (a need that Brandeis might have been personally skeptical about), and therefore treated the law as facially constitutional. He explained that given the legislative determination of the need for the law, its constitutionality should remain open to be determined based on the facts and circumstances in which the law was sought to be applied: A defendant charged with violating the Act must have the right to challenge "whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature."[49] Because Brandeis concluded that Whitney had not demonstrated that the Act was unconstitutional as applied to her expressive conduct, he concurred in the conclusion that the First Amendment had not been violated and that Whitney's conviction should be upheld.

Using Brandeis's opinions as guideposts, it is fair to reason that if he had participated in *Citizens United,* he would have limited his constitutional review to the as-applied challenge presented by the parties, thereby focusing on the facts and circumstances of the actual speaker and speech at issue in the case. With this approach, he may or may not have found § 441b unconstitutional as applied to Citizens United and its advertisements, but the law would have remained in effect. The question of the statute's constitutionality, as applied to other types of corporations under different circumstances, would have been preserved for future cases.

The Answer

The "political duty" Brandeis spoke of in his *Whitney* concurrence is a duty owed by the individual citizen, and it is the speech associated with the exercise of that duty that is entitled to the highest degree of First Amendment protection. Accordingly, it is fair to project that if Brandeis were to decide *Citizens United,* he would not agree that every

corporation, regardless of size, organization, or purpose, is an "association of citizens" whose speech is entitled to the same heightened First Amendment protection as that of individual citizens. He would also recognize that Congress may have a valid and compelling basis on which to differentiate between the campaign-related speech of individual citizens and that of corporations in the period immediately preceding a federal primary or election. In addition, his philosophy of judicial restraint would have led him to limit his constitutional analysis in the case to the as-applied challenge presented by the parties.

Ultimately, it is highly probable that Brandeis would have found the statute at issue in *Citizens United*, § 441b of the Bipartisan Campaign Reform Act of 2002, to be constitutional.

***Jon D. Levy** is a U.S. district judge of the United States District Court for the District of Maine and former justice of the Maine Supreme Court. He has given a number of talks in Maine related to the legacy of Louis D. Brandeis, including "The Vision of Louis Brandeis" and "Smartphone Privacy: How Justice Louis Brandeis Foretold the Outcome of Riley v. California, 134 S. Ct. 2473 (2014)."

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Notes

1. 558 U.S. 310.

2. The provision passed by Congress in 2002 was § 203 of the Bipartisan Campaign Reform Act, which amended the federal statute at 2 U.S.C. § 441b.

3. 494 U.S. 652.

4. 540 U.S. 93.

5. 558 U.S. at 357.

6. *Id.* at 349.

7. *Id.* at 356.

8. 134 S. Ct. 1434.

9. Gabrielle Levy, "How Citizens United Has Changed Politics in 5 Years," *U.S. News and World Report*, Jan. 21, 2015. (http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics).

10. Michael Waldman, "Mr. Public Interest," *Democracy* (Summer 2010), http://www.democracyjournal.org/17/6764.php.

11. Brandeis and Harlan Watch blog, Mar. 9, 2012, https://brandeiswatch.wordpress.com/2012/03/09/brandeis-on-corporations-and-voting/.

12. 424 U.S. 1.

13. *Id.* at 53.

14. 274 U.S. 357, 375.

15. *Id.* at 375 (footnote omitted).

16. *See First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 791 n.31 (1978); *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 257 n.10 (1986); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 689 (1990); *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 401, 411 (2000); *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 466 (2010); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806, 2835 (2011); *McCutcheon v. Fed. Election Comm'n,* 134 S. Ct. 1434, 1467 (2014).

17. 479 U.S. 238, 257 & n.10 (1986).

18. 494 U.S. at 689.

19. 134 S. Ct. at 1467.

20. I note that though Justice Stevens's opinion concurred in part and dissented in part, for the purposes of this article, I refer to the opinion as a dissent.

21. 558 U.S. at 466.

22. In *Whitney,* the Court's majority viewed California's Criminal Syndicalism Act as an appropriate exercise of the State's police power to punish those who abuse the right to free speech, "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." 274 U.S. at 371. This standard is commonly referred to as the "bad tendency test." In his concurring opinion, Brandeis contended that the rights of free speech and free association are so vital to liberty that "even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious." *Id.* at 377. Thus, Brandeis believed that the First Amendment bars the government from

criminalizing speech that advocates the use of force or the violation of the law unless the speech is likely to produce imminent and serious harm. The majority decision in *Whitney* was overruled more than forty years later in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), and the Court has since followed Justice Brandeis's heightened standard—commonly referred to as the "imminent lawless action test."

23. 254 U.S. 325, 334.

24. *Id.* at 336.

25. *Id.* at 338.

26. *Id.*

27. 277 U.S. 438.

28. *Id.* at 478.

29. 558 U.S. at 428.

30. 288 U.S. 517.

31. *Id.* at 534.

32. *Id.* at 548.

33. *Id.* at 565 (footnote omitted).

34. *Id.* at 567 (footnote omitted).

35. *Id.* at 572.

36. 277 U.S. 389.

37. *Id.* at 410–11.

38. 558 U.S. at 438 (citations omitted).

39. *Id.* at 427.

40. *Id.* at 333.

41. *Id.* at 405.

42. 285 U.S. 262.

43. *Id.* at 285–87. *New State Ice Co.* concerned the Fourteenth Amendment's due process clause for which the Court generally reviews legislative judgments for "reasonableness," and not the First Amendment's free speech clause for which the Court applies strict scrutiny and requires a compelling state interest.

44. *Truax v. Corrigan,* 257 U.S. 312, 356–57 (1921).

45. 285 U.S. at 311.

46. *Eisner v. Macomber,* 252 U.S. 189, 238 (1920).

47. 297 U.S. 288, 341.

48. *Id.* at 348.

49. 274 U.S. at 379.

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