



Celebrating the 100th Anniversary of Louis D. Brandeis' Appointment to the U.S. Supreme Court

Brandeis, Speech, and Money

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Justice Louis D. Brandeis was a driving force across a vast expanse of law. To study his life is to gain introduction to an astounding range of jurisprudence, from health and safety regulation, to labor law, to antitrust to federal jurisdiction, to privacy law, to freedom of speech. This breadth was extraordinary enough at the time, but as the practice of law has become more specialized over the past century, it has become more extraordinary still.

But something else has changed in the hundred years since Brandeis's appointment to the Supreme Court. One of Brandeis's many interests—freedom of speech—has increased its dominion. A right invoked in 1919 by lowly dissenters defending themselves against felony charges has become an all-purpose tool used by businesses and individuals to challenge a wide array of regulations. This expansion has led the First Amendment to encroach on many of Justice Brandeis's other areas of expertise. Products manufacturers claim First Amendment rights not to provide health and safety information to consumers. Labor unions are beset by the First Amendment claims of nonmembers on one side and employers on the other. Internet service providers and search engines claim First Amendment rights to avoid anticompetitive regulation.

These are cases that Brandeis would have recognized, but this is not Brandeis's First Amendment. In these cases and others, a surprising number of Brandeis's other interests

have taken on First Amendment overtones that they would not have had in his time. To illustrate this phenomenon I discuss cases involving health and safety regulation, labor law, and the law of unfair competition. I then note that, although these cases would not likely have raised First Amendment issues in Brandeis's eyes, they would have been familiar to him from another part of the Supreme Court's docket. Finally, I ask what Brandeis's view of freedom of speech can tell us about how to understand these cases and our own First Amendment moment.

Contemporary Claims in First Amendment Litigation

In recent years, a wide variety of regulation has given rise to First Amendment claims. From labels on food to net neutrality rules, various state and federal requirements have come under challenge on First Amendment grounds. This trend is apparent in three substantive areas in which Brandeis was influential: health and safety regulation, labor law, and the law of unfair competition.

Health and Safety Regulation

As a litigator, Brandeis became famous for championing health, safety, and welfare legislation enacted by states to protect workers. His voluminous "Brandeis briefs" sought to demonstrate the factual basis for such legislation and thus to frame it not as an encroachment on business owners' constitutional liberties, but as a legitimate exercise of the state's power to protect citizens.¹ As a justice, he continued to champion states' experiments with progressive legislation.² While the Court that Brandeis joined in 1916 was in the thick of the "*Lochner* era," in which the Justices struck down public welfare legislation in the name of the economic due process rights of business owners,³ the Court he left in 1939 had abandoned *Lochnerism* and acquiesced in the progressive legislation Brandeis had long championed.⁴

In recent years, certain types of public welfare legislation have come under renewed attack. Many businesses have challenged labeling and disclosure requirements as unconstitutional compelled speech under the First Amendment. Just as the state cannot

force schoolchildren to recite the Pledge of Allegiance,⁵ the businesses argue, so it cannot force businesses to provide information that they do not wish to provide. Businesses have made this claim against requirements including nutritional labeling,⁶ country-of-origin labeling for meats,⁷ hormone labeling for milk,⁸ labeling for genetically modified foods,⁹ securities disclosures regarding whether minerals are conflict-free,¹⁰ radiation warnings for cellular telephones,¹¹ graphic warnings on cigarette labels.¹² Moreover, many of these challenges have succeeded.¹³ When they succeed, they block disclosure requirements that are usually part of a larger regulatory regime governing a particular product or service.

Labor Regulation

Similar claims have arisen in the labor context. In 2001, the National Labor Relations Board required workplaces to display a poster informing workers of their rights under federal labor law. In 2013, the Court of Appeals for the District of Columbia Circuit struck down the posting requirement. Likening the employers to schoolchildren being forced to recite the Pledge of Allegiance, the court concluded that requiring employers to display a poster that they did not want to display violated their First Amendment rights.¹⁴

An interesting aspect of this case is that the poster in question was entitled “Employee Rights Under the National Labor Relations Act” and consisted entirely of summaries of key provisions of that Act.¹⁵ Thus, for example, the poster stated that an employee has a right to join a union, as well as a right not to join a union. The poster was, put simply, a restatement of the National Labor Relations Act, a law that unquestionably governs the relationship between covered employers and employees. The National Labor Relations Act is itself constitutional: Brandeis himself helped to determine that when he voted to uphold it against a Commerce Clause challenge in 1937.¹⁶ Yet, according to the D.C. Circuit, requiring workplaces to display a poster summarizing the National Labor Relations Act is unconstitutional.

But the First Amendment may be poised to make a much more significant foray into labor law. In the Supreme Court’s current term, the Court is hearing a challenge to “agency shop” fees for public sector unions. Employees who choose not to join the union

are typically required to pay an “agency shop” fee to the union. This fee is designed to combat a free-rider problem: Without the fees, nonmembers would benefit from the union’s collective bargaining efforts without having to pay for them. Every employee would have an incentive not to join the union but instead to free-ride on other people’s dues. In *Friedrichs v. California Teachers Association*, the Supreme Court will decide whether agency shop fees violate the First Amendment.¹⁷ In this case, government employees who pay agency shop fees to public-sector unions claim that these fees are used for collective bargaining activities with which they do not agree. In their view, their forced contribution to collective bargaining amounts to a form of compelled speech that violates their First Amendment free speech rights. If the Supreme Court agrees, agency shop fees will be unconstitutional for public-sector unions. If this occurs, the First Amendment will have accomplished one of the most profound revolutions in labor law since the passage of the National Labor Relations Act in 1935.

Antitrust and Unfair Competition

The First Amendment has also encroached on the law of unfair competition. Although Brandeis took a dim view of consumers (calling them “servile, self-indulgent, indolent, ignorant”¹⁸), he took an even dimmer view of anticompetitive practices and what he called “the curse of bigness,” as manifested in large corporate entities.¹⁹ Accordingly, Brandeis advocated various reforms to limit big business and monopolistic practices. Although some of his views proved idiosyncratic, he was at the center of major cultural and political discussions that culminated in the Clayton Antitrust Act of 1914.

Today, antitrust and the law of unfair competition fall short of Brandeis’s personal vision, but they do implement various protections against monopolistic and anticompetitive conduct. Conflicts arise, however, when the law of unfair competition meets the information economy. Businesses that center around information find it relatively straightforward to frame their activities as “speech.” This framing, as we have already seen, has important implications for the fate of economic regulation. Two

examples illustrate what is at stake and how prominent the First Amendment may become.

First, the idea of net neutrality is that Internet service providers should treat all data on the Internet the same way (rather than, say, privileging content from business partners). This idea, which extends beyond the protections of antitrust, nevertheless reflects similar ideas about protecting the interests of consumers by preventing certain agreements and acts of favoritism by service providers. A 2010 attempt to implement net neutrality principles by the Federal Communications Commission was challenged by Verizon and ultimately struck down by the D.C. Circuit on administrative law grounds.²⁰ In response, in 2015 the FCC reclassified Internet service as a telecommunications service and implemented new net neutrality rules, which took effect in June 2015.

While administrative law principles have taken center stage in the net neutrality debate, the First Amendment has also played a part. In challenging the 2010 net neutrality rules, Verizon also asserted that the rules violated its First Amendment rights. Verizon likened itself and other Internet service providers to editors of a newspaper. Just as newspapers exercise editorial discretion in deciding what news to publish and how to arrange it, Internet service providers decide which content to privilege on the Internet—what content moves at a fast speed, what moves at a slower speed, and so on. Net neutrality rules interfere with the Internet service providers' editorial discretion and thus infringe on their First Amendment rights.²¹ Because the D.C. Circuit struck down the 2010 net neutrality rules on other grounds, the court did not reach Verizon's First Amendment argument.²² After the publication of the 2015 rules, some Internet service providers challenged the new rules in the D.C. Circuit on First Amendment and other grounds.²³ Those cases are still pending.

Meanwhile, Internet search engines, such as Google, have already had success in using the First Amendment to block challenges to their business practices. Recently, a Federal Trade Commission investigation indicated that Google sometimes skews search results to favor its own services over those of rivals.²⁴ This type of conduct would usually raise questions under antitrust law. And on occasion, individual businesses have

challenged search engines like Google on the ground that their search processes involve unfair or monopolistic practices.²⁵ While these claims may or may not ultimately have merit, so far search engines have avoided litigating the merits by invoking the First Amendment. Like Internet service providers, search engines allege that they are akin to newspaper editors and that search results are the products of editorial discretion. Courts, accepting the framing of search processes as speech, conclude that these processes are immune from review for unfair or anticompetitive practices.²⁶ Because information is their business, these businesses claim—and so far receive—immunity from anticompetition laws.

New Claims, Old Structure

It is safe to say that, to Brandeis, the cases just summarized would have been unrecognizable as First Amendment cases. He would have viewed them as matters of public welfare, labor, and competition, far afield from the concerns of the First Amendment. This is not to say that Brandeis would necessarily have supported all of the laws that have come under challenge. For example, while Brandeis supported state public welfare legislation, his worries about the curse of bigness applied to the federal government as well as to big business. He might have had some qualms about the extent to which the modern administrative state—the Food & Drug Administration, for example, or the United States Department of Agriculture—regulates alongside (and often to the displacement of) the states. Whatever objections Brandeis might have had to these regulations, however, they would not have been First Amendment objections.

But the fact that Brandeis would not have recognized these cases as First Amendment cases does not mean that he would not have recognized them at all. Their structure would have been all too familiar from another part of the Supreme Court docket: the *Lochner* era challenges to public welfare legislation. During the *Lochner* era, businesses claimed immunity from various forms of regulation by invoking the Due Process Clause of the Fourteenth Amendment: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”²⁷ Business entities claimed that the Due Process

Clause protected economic rights, particularly liberty of contract. They further claimed that many forms of public welfare regulation, such as minimum wage and maximum hours laws, unconstitutionally infringed their Fourteenth Amendment economic due process rights.

Thus, businesses in the *Lochner* era claimed a liberty right to be immune from certain forms of economic regulation. Similarly, today some businesses claim a liberty right to be immune from certain forms of economic regulation. This time, however, the right they claim is a First Amendment right, and the regulations at issue involve the provision of information. Thus, instead of challenging regulations governing the health and safety of workers, business challenge regulations governing the health and safety information they must supply to consumers. Instead of claiming immunity from labor laws, employers claim immunity from having to post the very laws that now govern the employment relationship. Instead of challenging unfair competition laws wholesale, Internet service providers and search engines claim that such laws do not apply to them because their business activities are immunized by the First Amendment. Such claims echo the structure of *Lochner*-era claims, and their thrust is the same: businesses have a constitutional right to be left alone to make their own decisions. To Brandeis—progressive reformer, father of the Brandeis brief—this basic claim would have been all too familiar.

Brandeis was also prescient in recognizing the potential for overlap between economic and speech claims. Not all of the speech claimants he encountered were lone dissenters and lowly pamphleteers: he also heard claims by entities that made money by publishing speech, such as newspapers. In a case involving the denial of second-class mail rates to a Socialist newspaper, Brandeis pointed out to his colleagues that the First Amendment claim they were rejecting could be reframed as of “the same nature as—indeed, it is a part of—the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations.”²⁸

This argument should not be mistaken for a belief on Brandeis’s part that free speech and economic liberty were one and the same. His remarks here and elsewhere suggest

that his aim was to point out what he perceived as the hypocrisy of protecting economic rights while disregarding free speech and other civil liberties. Privately, he told Felix Frankfurter that he had grave doubts about using the Fourteenth Amendment Due Process Clause to protect substantive rights at all, but that if it were to be used, it ought to protect “fundamental rights” such as the rights of free speech, education, choice of profession, and locomotion.²⁹ It was “absurd,” he went on, to characterize property rights as fundamental “in the sense that you can’t curtail [property’s] use or its accumulation or power,” though perhaps property rights might be fundamental in some more limited respect. Speech, by contrast, was fundamental in the sense that it ought not to be impaired except in the case of a clear and present danger.³⁰

Brandeis, then, distinguished free speech from economic due process and became a champion of the former while remaining hostile to the latter. How did he understand the difference, and can his views assist us with the free-speech claims of today?

Brandeis’s First Amendment

Brandeis’s writings on free speech are the single richest juridical contribution to our understanding of the First Amendment. Very few other opinions remotely approach the work that Brandeis did in explicating what freedom of speech is and why the Constitution protects it. I cannot do justice to these writings here, nor do I intend to try. Instead, I will draw briefly upon the most famous of Justice Brandeis’s First Amendment opinions, his concurrence in *Whitney v. California*,³¹ to begin to gain a foothold on modern developments in the First Amendment.

At the outset, let us note that Brandeis would not have made the mistake that characterizes so much free-speech litigation today: the notion that because something is made of words it is protected by the First Amendment. This proposition is, and has always been, false. It goes without saying that First Amendment protection does not extend to insider trading, anticompetitive agreements, contracts, bad advice from lawyers, conspiracy to commit murder, or any number of other ways that people use speech every day. The phrase “the freedom of speech” in the First Amendment does not cover

everything that is called “speech” in real life. Instead, the phrase “the freedom of speech” indicates that speech sometimes serves a function that is important enough to find special protection within the Constitution. We use speech for any number of reasons, however, and not all of them will serve the function that makes “the freedom of speech” worth protecting. Therefore, the bare fact that mandated product labels are made of words—or that agency shop fees underwrite a process of collective bargaining that involves words, or that internet companies traffic in data that can be analogized to words—is not enough to bring these activities under the umbrella of the First Amendment.

What is the special purpose that speech sometimes serves? Brandeis had a complex view, set forth most comprehensively in his *Whitney* concurrence. It begins with the purpose of democratic government. The “final end of the state,” Brandeis says, is “to make men free to develop their faculties.”³² Democracy provides opportunities for the development and fulfillment of individual citizens. This view is itself impliedly premised on the idea that individual citizens are beings capable of, and entitled to, development and fulfillment. Individual “liberty”—in a larger sense than simply freedom of speech—is thus at the root of Brandeis’s conception of the First Amendment.³³ Human beings are entitled to development and fulfillment, and the aim of democracy is to promote those ends.

Democracy itself, however, depends upon freedom of speech. Brandeis argues that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”³⁴ He bolsters this claim from two directions. First, he seems genuinely to believe that free speech leads toward good policymaking—toward “political truth.” He attributes to the Founders, and endorses himself, an optimistic belief “in the power of reason as applied through public discussion.”³⁵ Second, he warns that, whatever the truth-producing powers of free speech, repression inexorably leads to bad policymaking and ultimately to instability within the democratic state. The Founders, he says, knew

that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable

government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.³⁶

With freedom of speech, democratic government may be good government; without it, democratic government will certainly be poor and unstable. Free speech is so important that individuals not only have a *right* to freedom of speech, but they also have a *duty* to engage in public discussion.³⁷ In light of its importance to democracy, freedom of speech may not be abridged except in the face of a “clear and present danger” of serious injury to the State.

Thus, democratic legitimacy depends upon freedom of speech. Free speech is necessary to democratic government, which in turn enables the development and fulfillment—and ultimately the happiness—of individual citizens.

If such is the function of the freedom of speech, what are its bounds? What speech does it encompass? Brandeis does not give a full answer, nor does he need to in order to answer the questions before him. The cases Brandeis saw involved speech that anyone would classify as political, though the various Justices disagreed about how dangerous it was. But Brandeis does characterize the freedom of speech as denying the state “the power to prohibit dissemination of social, economic and political doctrine.”³⁸ This suggests two important points about Brandeis’s view of free speech.

First, Brandeis’s view of “the freedom of speech” extends beyond purely political speech to speech on social, economic, and political conditions. This is a large sphere, but it is not all speech. It may not include, for example, negotiations over a business contract, or the final contract itself. Most people would find it very strange if a party agreed to a contract one day and the next day reneged, invoking “freedom of speech.” Similarly, the freedom of speech may not include collective bargaining, which is a similar negotiation process. Although individuals are entitled to have and express views on the law of contracts, collective bargaining, and particular instantiations of both of these, the process of negotiation may fall outside the realm of public deliberation.

Second, Brandeis's primary concern was with the state restricting dissemination of information. Public discussion was necessary to good government because it provided information and ideas, from which good policies could arise. Many of today's challenges involve "speakers" who object to the government's requiring them to provide factual information to the public: nutritional information, country-of-origin information, information about labor law. It is difficult to see how the provision of such information to the public implicates the danger Brandeis saw in the restriction of information. Similarly, the First Amendment claims of Internet service providers and search engines assert control over how information is provided to the public. It seems likely that Brandeis would be more concerned about the public's right to access information than in internet businesses' right to control it. If the government were to restrict dissemination of information over the Internet, then that would raise First Amendment problems. But these cases ask whether the government has a role to play in ensuring that information is disseminated to the public in ways that do not involve anticompetitive behavior. It is easy to imagine how Brandeis would answer that question.

One objection to this view is that it underestimates the damage that the government can do in the name of providing information to the public. Often the objections to compelled disclosures are that they are expensive and unnecessary. Business entities must spend money to comply with them. Meanwhile, the government can be selective or arbitrary in the information it requires. And compelled disclosures certainly change the baseline levels of information that would exist in the absence of governmental intervention. The question is why these objections implicate the First Amendment rather than embodying a general libertarian sentiment of the kind that drove the invalidation of public welfare legislation in the name of economic due process. Brandeis did not share this libertarian distrust. Even in the context of free speech, he understood the importance of representative democracy, and he did not take lightly the overriding of majoritarian processes through judicial review. He would demand a good reason for invalidating legislation that provides information to the public. The bare fact that the information is made of words would not suffice.

Decades ago, when the First Amendment was in its infancy and economic due process in its heyday, Brandeis reminded his fellow Justices that the speech claims they rejected could be reframed as the economic liberty claims they embraced. Today, when economic regulation receives the lightest of scrutiny and the First Amendment is a powerful tool, many entities have every reason to frame their objections in free-speech terms. As long as economic and speech regulations are treated differently, someone will attempt to leverage the difference between the two. As long as they are treated differently, the challenge for courts will be to distinguish them in a principled fashion. The task is daunting, perhaps insuperable. But one could do worse than to begin with the distinguished Justice who figured centrally in both the end of the *Lochner* era and the dawn of the modern First Amendment.

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Notes

1. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908).
2. See, e.g., *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (Brandeis, J., dissenting).
3. See *Lochner v. New York*, 198 U.S. 45 (1905).
4. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)
5. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
6. *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).
7. *American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).
8. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).
9. *Grocery Mfrs. Ass'n v. Sorrell*, 2015 WL 1931142 (D. Vt. Apr. 27, 2015).

10. Nat'l Ass'n of Manufacturers v. S.E.C., 800 F.3d 518 (D.C. Cir. 2015).
11. Compare CTIA-Wireless Ass'n v. City of Berkeley, 2015 WL 5569072 (N.D. Cal. Sept. 21, 2015) (upholding regulation), with CTIA-Wireless Ass'n v. City & Cty. of San Francisco, 494 F. App'x 752 (9th Cir. 2012) (striking down regulation).
12. R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012).
13. Thus far, the nutritional labeling and country-of-origin challenges are alone in finding no success in any court of which I am aware. A challenge to Vermont's genetically engineered foods labeling law, the first in the country to take effect, is still ongoing.
14. Nat'l Ass'n of Mfrs. v. Nat'l Labor Rel. Bd., 717 F.3d 947 (D.C. Cir. 2013).
15. Versions of the poster in various languages may be viewed at <https://www.nlr.gov/poster>.
16. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).
17. Friedrichs v. California Teachers Association (S.Ct. No. 14–915). In the 1970s, the Supreme Court concluded that it would violate the First Amendment rights of nonmembers for the unions to use the agency shop fees on matters that did not relate to collective bargaining (such as political efforts). Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Thus the First Amendment has already limited agency shop fees to collective bargaining efforts that benefit nonmembers.
18. Brandeis to George Soule, 22 April 1923, in *Letters of Louis D. Brandeis, 1921–1941: Elder Statesman Letters*, vol. 5, edited by Melvin I. Urofsky and David W. Levy (New York: State University of New York Press, 1978), 92.
19. Louis D. Brandeis, *The Curse of Bigness* (New York, NY: Viking Press, 1934).
20. Verizon v. F.C.C., 740 F.3d 623 (D.C. Cir. 2014).
21. Joint Brief for Verizon and MetroPCS, Verizon Communications Inc. v. Federal Communications Commission, 2012 WL 9937411 (D.C. Cir. 2014), at 43.
22. 740. F.3d at 634.
23. See U.S. Telecom Ass'n v. FCC, No. 15–1063 (and consolidated cases) (D.C. Cir. 2015).
24. Rolfe Winkler and Brody Mullins, "How Google Skewed Search Results," *Wall Street Journal* (19 March 2015).

25. See, e.g., *S. Louis Martin vs. Google Inc.*, No. CGC-14–539972 (Cal. Sup. Ct. Nov. 13, 2014); *Langdon v. Google Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *Search King Inc. v. Google Tech Inc.*, 2003 WL 21464568 (W.D. Okla. 2003).

26. See, e.g., *S. Louis Martin v. Google Inc.*, No. CGC-14–539972 (Cal. Sup. Ct. Nov. 13, 2014); *Zhang v. Baidu.com Inc.* 2013 WL 2458834 (S.D.N.Y. 2013); *Langdon v. Google Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *Search King Inc. v. Google Tech Inc.*, 2003 WL 21464568 (W.D. Okla. 2003).

27. U.S. Const. amend. XIV, § 1.

28. *U.S. ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 432 (1921) (Brandeis, J., dissenting).

29. Conversation between Frankfurter and Brandeis, 19 July 1923. Melvin Urofsky, “The Brandeis-Frankfurter Conversations,” (1985) *S.Ct. Rev.*: 299, 320.

30. *Id.*

31. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

32. *Id.*, 375 (Brandeis, J., concurring).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* (“[P]ublic discussion is a political duty”).

38. *Id.*, 374 (Brandeis, J., concurring).

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