

## Video Transcript: First Amendment Speech and Press Part II

[JEFF]

So now I want to tell you about my hero Justice Louis Brandeis. His concurring opinion in a case called *Whitney v. California* from 1927 is, many people think, the greatest statement of free speech of the 20th century. It's an amazing case, an amazing story.

Brandeis had been reading Thomas Jefferson who is his hero, and he read Jefferson's Inaugural, "We're all Republicans: we're all Federalists." He read the Virginia and Kentucky Resolutions. He was convinced, with Jefferson, that our rights of speech are natural rights that come from God or nature, and not government. And in the case *Whitney v. California*, he comes up with the most eloquent positive statement for why free speech is important in a democracy than anyone has ever written.

And he begins by talking about Jefferson and the revolutionaries of 1776. He says, "Those who won our revolution 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 government 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 the 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 threat 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."

Wow! Well you can hear in those extraordinary words the incredible faith that Brandeis has that if all of us take the time to educate ourselves, to develop our faculties of reason rather than passion, then we can deliberate thoughtfully with each other and the truth will ultimately emerge.

[KAGAN]

Justice Brandeis's take was much more "romantic" if you will. It wasn't about, you know, getting to truth through a competition of ideas, as in a marketplace. It was all about how, thinking about ideas, developed our faculties as human beings, and in so doing developed our ability to act as citizens in a democracy. So, so all of his metaphors, or all of his, the great lines of his opinion, which are many, many, many – are about how it is that you develop yourself as a human being and then how it is that human beings come together in a democratic form of government and decide the direction of their fates, the direction of their country.

[JEFF]

It's a much more optimistic vision of free speech than that of Holmes, and it's shaped not only by Jefferson but by the ancient Greeks and by 5th century Athens, which Brandeis thought was the most perfect expression of a functioning democracy.

And that's why Brandeis said, "As long as there's enough time for deliberation then the best response to bad words is good words, to hate speech is counter speech." And that's where he comes up with this extraordinary principle that as long as there's time enough for deliberation, then speech can only be banned if it's intended to and likely to cause imminent violence.

That's the principle you've got to remember and it's based on Brandeis's notion. If there's no time for deliberation: "Go kill Jeff now, he's talking for too long on the video." Well, that can be banned it should be, you know, if it's a real threat. But short of that: "Jeff is giving a boring talk for the video," or "I'd rather be doing something else," or insulting me in some ways. That's absolutely protected because it's necessary to allow you to deliberate with your fellow students about whether or not the video is good, or whether our government is good so that you can, through reason, ultimately achieve self-government.

[NARRATOR]

That's a pretty rigorous version of democracy, but it's probably what these guys, the Framers and Signers of the Constitution, believed. What Brandeis is saying is that democracy takes work and requires civic engagement and the free exchange of ideas.

This was the principle Brandeis articulated in the Whitney case way back in 1927. But his opinion is called a concurrence and wasn't the majority's view, or the law. However, Brandeis's amazing words laid the groundwork for later decisions where the Supreme Court would finally recognize the need for robust political discourse. In 1969, in the Brandenburg v. Ohio case, the Court finally overturned Whitney and said that the government cannot punish inflammatory speech unless that speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

This is the standard today for when the government can restrict speech, and it's a tough one to meet! We are living in a world where speech takes place not on soap boxes in the park, like in World War I, but on Twitter, and Facebook, and Google. And we all know that deliberation and speech on those platforms is instantaneous. We know how quickly Twitter mobs can mobilize.

The Framers feared this. They define them as: "factions, which are animated by passion rather than reason, dedicated to self-interest rather than the public good."

So, there's a big question that we all need to think about as citizens, what to do when there's no time for deliberation. How do we slow down speech, so that we all have time for sober second thoughts, to listen respectfully to our classmates and fellow citizens? And if there isn't enough time, does Brandeis's view – that good speech will crowd out bad speech – still hold?

[JEFF]

At its core, the First Amendment prevents the government from restricting speech based on its content. That means that the government can't punish you for criticizing the war or arguing in favor of a tax cut, but some restrictions are permitted.

The government is allowed to restrict what is considered low-value speech, like defamation. It can also restrict speech in the interests of protecting time, place, and manner. That means it can restrict speech in front of a schoolhouse or a jail.

[KAGAN]

It's important to understand about the First Amendment, that the First Amendment does not prohibit government from making any law respecting freedom of speech. For example, suppose the government says something like, "You can't march into town using a bullhorn after 10:00 p.m." I mean, we would think, "Well that's fine, like, because otherwise, nobody will get a good night's sleep." Or suppose the government said, "In order to have a parade at City Hall, you have to come get a permit, because it's important that not everybody bring their parades to City Hall at exactly the same time."

Or suppose I said a government says that there are certain forms of obscenity that can be prohibited. Now over time, that one has sometimes had its critics, but it's a long-standing view of the Court that the government can prohibit obscenity defined in a certain, particular way.

The most important thing to remember is what the First Amendment is most crucially about. If this speech is an attempt to prevent or restrict debate over ideas about how we govern ourselves, then those restrictions can't go forward, they're not consistent with the First Amendment that we know, and they're not consistent with the First Amendment that our founders envisioned.

[NARRATOR]

Something else that's important to point out. The First Amendment says: "Congress shall make no law..." That means that it applied to the Congress, and the Federal Government, but not to the States. Not until after the Civil War and the passage of the 14th Amendment, was the First Amendment applied to restrict the states, as well as Congress, from abridging the freedom of speech.

But even today it still says, "The government shall make no law..." It does not say, "Facebook shall make no law..." or "Twitter shall make no law..." or "Google shall make no law..."

That means that all of those internet platforms – where most of us do our speaking and listening – are free to restrict speech, or allow speech, whether or not the First Amendment would reach a different balance.

[JEFF]

And in fact, all of those platforms have adopted an approach to free speech that looks more like Europe than America. On Google, and Twitter, and Facebook you're not allowed to engage in certain kinds of hate speech, demeaning groups for example, all of which are illegal in Europe because Europe is really interested in protecting the dignity of those groups, unlike the U.S. where the First Amendment generally says, "Liberty is more important than dignity, and speech can only be banned if it's intended to and likely to cause imminent violence."

[KAGAN]

I think what the First Amendment is most about is how it is that thought and speech, reflection on ideas, can aid in democratic governance, and I think that that was Justice Brandeis's vision as well – it was this critical connection between free speech and democracy. Between an open discussion of ideas about public policy and how that was necessary in order to develop our faculty as citizens, which then would be used to determine the fate of our future.

[NARRATOR]

Now, in many ways the future of free speech will be determined not only by the Justices on the Supreme Court, but by the balances that Google, and Facebook, and Twitter and other internet platforms strike. And that's why you as citizens will have a crucial role in determining the future scope of free speech as you debate about where precisely the balance should be struck. Your views will be reflected in the policies of these companies.

But always as you have these debates, remember the basic principle of American free speech: the government can only ban speech if it's intended to and likely to cause imminent violence. That principle – fought over in the Courts since the time of the founding – makes America the country that protects free speech more than any other country in the world.