***We the People: the Citizen & the Constitution***

2019-2020 High School Hearing Questions

Information, Tips, Analysis, & Resources from the Oregon high school We the People community

Unit 5 / Q. 2

**The U.S. Supreme Court has used a two-pronged test to evaluate speech. First, speech can be prohibited if it is “directed to inciting or producing imminent lawless action” and second, if it is “likely to incite or produce such action.”\* Using this test, the Court held that an Ohio law violated Clarence Brandenburg’s right to speech in *Brandenburg v. Ohio*. Do you agree or disagree with the Court’s decision and the use of a two-pronged test?**

* Under what conditions, if any, should freedom of expression be limited?
* Why is freedom of expression a necessary part of representative government?

*\** Brandenburg v. Ohio, 395 U.S. 444 (1969).

**Collaboration Tips**

**5** different questions are in this overall question.

Historical events/context that connects to this question:

* **KKK and the civil rights era**

Vocabulary/Terms:

* **Imminent lawless action**
* **Abstract speech**
* **Wrong vs. unlawful**
* **Doctrines of criminal syndicalism**

Possible Current Events:

* **Obama era drone strikes**
* **Charlottesville**
* **Proud Boys v. Antifa**

Possible Court Cases:

* ***Chaplinsky v. New Hampshire***
* ***Abrams***
* ***Schenk***
* ***Debbs***
* ***Gitlow***

**Comments from Justice Jack Landau:**

*Over the course of the twentieth century, the US S Ct has recognized a number of limitations on freedom of expression. The Court has always recognized that defamation constituted a limitation on free expression, though in NY Times v. Sullivan (1964), it recognized constitutional limits on actions for defamation. Similarly, the Court has recognized that laws prohibiting false advertising may constrain free expression, though again, the Constitution may impose some limits on such legislation. See, e.g., Konigsberg v. State Bar (1961). Laws restricting the publication of obscenity also constitute a permissible limit on free expression; obscenity is not considered "expression" for purposes of the First Amendment. Roth v. US (1957). (Note that state constitutions can be more protective, and Oregon's is more protective in the area of obscenity. See State v. Ciancanelli (2005).) Laws may also impose "time, place, and manner" restrictions on free expression so long as the restrictions are content neutral, narrowly tailored and serve significant government interests. See Ward v. Rock Against Racism (1989). Laws -- the Freedom of Information Act, for instance, contains exceptions for matters of national security -- may prohibit disclosure of certain government information, though again there are constitutional limits. See US v. Nixon (1974).*

 *And laws may prohibit expression that urges others to take immediate action that is against the law. This is the category of limitations illustrated by the Brandenberg case. The Brandenberg "imminent lawless action" test was supposed to be an improvement on the more quotable, but less precise, "clear and present danger" test of Schenck v. US (1919). See, for example, Dennis v. United States (1951), in which the Court upheld the constitutionality of convictions for urging the overthrow of the government at some undefined point in the future. (So much for the "present" part of "clear and present danger.") The Brandenberg test required actual imminence, as confirmed in Hess v. Indiana (1973) (advocacy of illegal action at some undefined time in the future isn't sufficient). Still Brandenberg has suffered withering criticism from commentators and inconsistent application in lower courts.*