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THE FIRST AMENDMENT AND THE IDEAL OF CIVIC COURAGE: THE BRANDEIS OPINION IN *WHITNEY v.* *CALIFORNIA*

VINCENT BLASI*

"[T]he working class and the employing class have nothing in common. . . ." So began the Preamble to the Constitution of the I.W.W., the Industrial Workers of the World. "Between these two classes a struggle must go on until the workers of the World organize as a class, take possession of the earth, and the machinery of production and abolish the wage system."² Nicknamed the Wobblies, this group advocated a form of militant unionism built around the ideal of One Big Union embracing all industries. The I.W.W. enjoyed its strongest appeal among the miners, loggers, agricultural laborers, and construction workers of the West during

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1. *Fiske v. Kansas*, 274 U.S. 380, 383 (1927) (quoting the Preamble of the I.W.W.).

2. *Id.*

the years preceding World War I. Because of their revolutionary rhetoric and frequent involvement in strikes that led to violence, the Wobblies came to occupy a special place in the demonologies of both the American business community and the moderate labor union movement.³

The advent of World War I exacerbated the class conflicts on which the Wobblies thrived. Like some other segments of the populace, the Wobblies viewed the nation's entry into the war with suspicion, considering it a sacrifice of the lives of workingmen to protect the profits of J.P. Morgan and John D. Rockefeller. A Wobbly response to military recruitment appeals was the slogan, "Don't Be a Soldier, Be a Man." When the government embarked on a campaign to increase wartime industrial production, some Wobblies distributed posters that read: "Slow down. The hours are long, the pay is small, so take your time and buck them all."⁴

The historian Robert Murray describes the reaction these anti-war activities engendered:

As a result of these rabid assertions and "slow-down" tactics, the Wobblies were suspected of every type of crime. It was claimed that they drove spikes into logs, set buildings on fire, blew up munitions factories, destroyed grain, poisoned cattle, and smashed farm machinery in order to hinder the war effort. . . . It was even rumored that the Wobblies threw union workmen under the wheels of freight trains if they refused to cooperate in harassing the war program.

3. See M. DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 291-397 (1969); R. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA* 26-32 (1955); W. PRESTON, *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933*, at 35-62 (1963).

4. R. MURRAY, *supra* note 3, at 29. These protests apparently did not have the endorsement of the I.W.W. leadership. Big Bill Haywood, General Secretary of the I.W.W., decided not to oppose the war because he considered the war issue a diversion from the central concerns of the class struggle: working conditions and industrial ownership. Haywood "even modified the I.W.W.'s pre-war songs and pamphlets so as to eliminate their anti-war sentiments." Weinstein, *The I.W.W. and American Socialism*, 1 *SOCIALIST REVOLUTION* 3, 27 (1970). This gesture did not prevent the Justice Department from prosecuting Haywood and virtually the entire Wobbly leadership for dubious violations of the Espionage Act, a move that severely incapacitated the organization. After numerous convictions and stiff sentences, many Wobbly leaders languished in Leavenworth prison. A few others, Haywood included, jumped bail and fled to Russia. See M. DUBOFSKY, *supra* note 3, at 353-60, 434-37, 457-62.

Not bothering to separate fiction from truth, the American public now shrieked at the I.W.W. Patriotic societies called them "traitors" and "agents of Germany," and maintained that German gold was financing their program. The newspapers labeled the organization "America's canker sore" and characterized the Wobbly as "a sort of half wild animal. . . ."

Infuriated by the Wobblies' lack of patriotism, the population countenanced almost any type of action against them. Not only were their headquarters and meeting halls raided, but some members were seized, loaded into cattle cars, and shipped hundreds of miles without food or water. Others were whipped and tarred and feathered, or were hunted down like fair game thereby giving sport to whole communities. A few, like I.W.W. official Frank H. Little of Butte, Montana, were brutally murdered.⁵

Only in comparison to these tales of vigilantism does the legislative response to the Wobblies seem tame. Prompted by an Australian statute that outlawed the I.W.W. by name, between 1917 and 1919 twenty-three states adopted notably similar statutes creating the new crime of criminal syndicalism.⁶ The California law was typical. It defined criminal syndicalism as "any doctrine or precept advocating . . . the commission of crime, sabotage . . . or unlawful acts of force and violence . . . as a means of accomplishing a change in industrial ownership or control, or effecting any political change."⁷ Criminal liability, punishable by up to fourteen years in prison, was attached not only to the act of personally advocating violence but also to that of knowingly becoming a member of a group assembled to advocate, teach, or aid and abet criminal syndicalism.⁸

The California statute took effect on April 30, 1919.⁹ By the end of that year, 108 persons had been arrested and charged with its

5. R. MURRAY, *supra* note 3, at 29-30. See also M. DUBOFSKY, *supra* note 3, at 376-422; W. PRESTON, *supra* note 3, at 88-117.

6. Whitten, *Criminal Syndicalism and the Law in California: 1919-1927*, TRANSACTIONS AM. PHIL. SOC., March 1969, at 65.

7. Cal. Stats. 1919, p. 281, 2 Hennings Gen. Laws, p. 3281, § 1, cited in Comment, *Criminal Law: Criminal Syndicalist Act: Constitutional Law, Validity of the Act Under the Free Speech Clause*, 10 CALIF. L. REV. 512, 512 n.1 (1922).

8. See Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 326-27 (1941).

9. Whitten, *supra* note 6, at 25.

violation.¹⁰ Most of those arrested were Wobblies.¹¹ Evidence indicates that some law enforcement authorities invoked the law as a pretext for breaking up political meetings, with no intention of pressing charges.¹²

One of the most prominent persons convicted of violating the California Criminal Syndicalism Act was Anita Whitney. Fifty-two years old when arrested, Ms. Whitney was the daughter of a former California state senator and the niece of Justice Stephen J. Field, the nineteenth century's leading exponent of the view that the entrepreneurial liberties of businessmen are protected by the due process clause of the fourteenth amendment.¹³ She was, in the parlance of the day, a social worker and a clubwoman. After graduating from Wellesley College, she did settlement work in the tenements of the lower east side of Manhattan, taught in the Oakland public school system, and served as the first probation officer of Alameda County, California. For seven years she was secretary of the Associated Charities of Oakland. She campaigned against race-track gambling and for women's suffrage. She was the president of the California Civic League. She also was a member of the Socialist Party. After passage of the Criminal Syndicalism Act, she served as treasurer of the Labor Defense League, a body formed by various labor organizations to employ counsel for those charged under the law. She was said by one admirer to have spent virtually her entire savings providing bail money for persons she considered to be political prisoners.¹⁴

Anita Whitney was invited to give an address on November 28, 1919, before the Women's Civic Center of Oakland, a group she had helped to found. Her topic was announced as "The Negro Question." She planned to protest recent lynchings and race riots. The local American Legion and other patriotic organizations

10. *Id.* at 66. In the first five years of its operation there were 531 indictments under the California Criminal Syndicalism Act and 164 convictions. *Id.*

11. *Id.* at 31.

12. See Comment, *Limitations on the Right of Assembly*, 23 CALIF. L. REV. 180, 182 (1935).

13. Whitten, *supra* note 6, at 40 n.109. On the judicial philosophy of Justice Stephen Field see C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1930).

14. Whitney's civic activities are described in Whitten, *supra* note 6, at 40 n.109, and Shipman, *The Conviction of Anita Whitney*, THE NATION, Mar. 20, 1920, at 365.

sought to prevent her from speaking on the ground that she was a determined opponent of the war and had helped secure counsel for I.W.W. defendants. An injunction against the speech was sought, but the judge refused to issue it. The Women's Civic Center was asked to withdraw the invitation to Ms. Whitney, but voted by a three-to-one margin not to do so.¹⁵ A police inspector, one Fenton Thompson, sought permission to arrest her for violating the Criminal Syndicalism Act, but the Oakland chief of police, Walter Peterson, refused to authorize the arrest. Chief Peterson, a staunch supporter of the Syndicalism Act, later explained his reasons:

I investigated Anita Whitney's record in 1919. I found that she had always done an enormous amount of good in the community. I wasn't in sympathy with her pacifistic ideas and a lot of her other notions. But I recognized that it wasn't in her nature to commit violence nor to encourage it. She was one of those idealists who want to make the world better for everyone.¹⁶

Inspector Thompson was not to be denied, however. He secured permission for the arrest from Peterson's superior, Commissioner F.F. Morse. Immediately after Ms. Whitney completed her address to the Women's Civic Center, Thompson took her into custody and had her charged with violating the advocacy and membership provisions of the criminal syndicalism law.¹⁷

The basis for the prosecution was Whitney's participation a few weeks before her arrest in the founding of the Communist Labor Party of California. In the wake of the Bolshevik triumph in Russia, the Socialist Party of the United States was sharply divided on the question of whether to embrace the principles of Soviet Communism. At a series of tumultuous meetings in Chicago during the summer of 1919, those members who favored joining the Communist International were expelled from the Socialist Party. They rented another hall in the city, founded a new party, the Community Labor Party, and adopted a National Program. This document called for a "unified revolutionary working class movement in America," endorsed the general strike as a political weapon, and

15. Porter, *The Case of Anita Whitney*, THE NEW REPUBLIC, July 6, 1921, at 165; Shipman, *supra* note 14, at 365.

16. *The Pardon of Anita Whitney*, THE NEW REPUBLIC, Aug. 10, 1927, at 310-11.

17. *Id.*

amid a long list of resolutions commended the example of the Industrial Workers of the World for their struggles and sacrifices in the class war.¹⁸

Upon learning of the fissure, the Oakland local of the Socialist Party, of which Whitney was a member, withdrew from the national party and scheduled a convention for the purpose of organizing the Communist Labor Party of California. Ms. Whitney attended this convention as a delegate and served on its credentials and resolutions committees. The latter committee proposed a resolution recognizing "the value of political action" and urging workers to "vote for the party which represents their immediate and final interests."¹⁹ On the floor of the convention, Whitney argued for adoption of this electoral politics strategy, but her proposal was defeated after lengthy debate and the more militant National Program adopted in Chicago was accepted in its stead. She remained in attendance at the convention until it adjourned, and subsequently attended at least one meeting of the state executive committee of the newly formed party.²⁰

Three months after her arrest, Anita Whitney was brought to trial. The prosecution's first witness was a reporter for an Oakland newspaper who had covered the Communist Labor Party convention in which Ms. Whitney had participated. The journalist described the lively proceedings of the convention, including the adoption of the resolutions endorsing the general strike and the class struggles of the I.W.W. He also reported that at the convention a bookcase displaying an American flag had been covered over with a red flag. On cross-examination, however, the witness admitted that shortly after the convention Fenton Thompson, the police inspector who effectuated Whitney's arrest, had boasted to him that the red flag had been placed over the bookcase by one of Mr. Thompson's undercover agents.²¹ The prosecution called more than twenty witnesses, most of whom testified about I.W.W. acts

18. T. DRAPER, *THE ROOTS OF AMERICAN COMMUNISM* 148-96 (1957); D. SHANNON, *THE SOCIALIST PARTY OF AMERICA* 126-49 (1955).

19. *The Pardon of Anita Whitney*, *supra* note 16, at 310.

20. *Id.*

21. The reporter's testimony is quoted in Shipman, *supra* note 14, at 366, and Whitten, *supra* note 6, at 45. In his testimony at trial, Inspector Thompson disputed the reporter's account of the incident. Whitten, *supra* note 6, at 45.

of sabotage and violence committed between 1913 and 1918. Some Wobbly songs were read to the jury.²²

Whitney was represented by Thomas O'Connor, a renowned San Francisco defense attorney. At the time, there was an influenza epidemic in the Bay Area. During the trial one of the jurors died from the flu. Another juror and Ms. Whitney contracted the disease and were for a while seriously ill. Mr. O'Connor caught the flu in the midst of the prosecution's case. For several days he continued to represent Whitney despite a raging fever. Eventually, however, he was forced to request a continuance. After two days he was reported to be delirious, his condition worsening. The judge ordered the trial resumed, and Whitney found a new attorney. O'Connor died two days later.²³

When the prosecution's case was completed, Ms. Whitney's replacement attorney called only one new witness, the defendant herself. She testified that never in her life had she believed in, advocated, or engaged in violence. Her testimony took up three pages of the thousand-page trial transcript.²⁴

The trial consumed four weeks. After six hours of deliberation, the jury found Anita Whitney guilty of organizing or knowingly becoming a member of an organization that advocates criminal syndicalism. On the remaining counts relating to individual advocacy of criminal syndicalism the jury was hung.²⁵ Four days after the verdict, she was sentenced to a term of one to fourteen years in the penitentiary at San Quentin. Her petition for bail pending appeal was denied. After ten days confinement in the county jail, however, she was released on \$10,000 bail on the testimony of three physicians that her physical condition was such that further incarceration would seriously impair her health.²⁶ Because the bulk of her personal funds were tied up posting bail for others convicted of violating the Syndicalism Act, she had to rely on donations to make her own bail.²⁷ The conviction was much publicized in Cali-

22. My account of the trial is taken from a report issued by the Office of the Governor of California and reprinted in *The Pardon of Anita Whitney*, *supra* note 16, at 311.

23. *Id.*

24. Shipman, *supra* note 14, at 366.

25. *Id.*

26. *Id.*

27. *Id.* at 366-67.

fornia and even attracted some attention nationwide. Critical accounts of the trial appeared in *The Nation* and *The New Republic*.²⁸

Whitney's appeal eventually reached the United States Supreme Court and provided the occasion for what may be the most important judicial opinion ever written on the subject of freedom of speech. But I must stress the word "eventually," for the appeals process took an astonishing seven years to reach fruition.

First, the appeal was heard by the California District Court of Appeal. The primary objection raised by Whitney's attorneys was that the evidence was insufficient to support her conviction.²⁹ She did not deny her membership in the Communist Labor Party but claimed that the record failed to establish either that the party advocated criminal syndicalism or that she possessed sufficient knowledge of any such advocacy. In particular, she claimed that the admission of so much colorful testimony regarding the I.W.W. was prejudicial to the determination of these points.³⁰

The Court of Appeal was not persuaded. It held that evidence of Wobbly violence was admissible in the prosecution of Whitney because the Communist Labor Party had passed a resolution commending the I.W.W.³¹ Regarding the question of her personal knowledge and intentions, the court offered a pointed rejoinder:

That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose purposes and sympathies savored of treason is not only past belief, but is a matter with which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act.³²

28. See Porter *supra* note 15, and Shipman, *supra* note 14.

29. People v. Whitney, 57 Cal. App. 449, 452, 207 P. 698, 699 (1922), *aff'd*, 274 U.S. 357 (1927).

30. *Id.*

31. *Id.*

32. *Id.* at 452-53, 207 P. at 699.

Under California procedure the next step was a petition to the state supreme court, but that court voted, two justices dissenting, not to exercise its discretionary jurisdiction to hear the case.³³

The state appellate process having been exhausted, Whitney's lawyers sought review in the United States Supreme Court. At this stage, she was represented by two of the ablest and most prominent civil liberties lawyers of the day, Walter H. Pollak and Walter Nelles.³⁴ The appeal faced a major jurisdictional hurdle: nowhere in the opinion of the California appellate court, or in the record of the case as originally sent to the Supreme Court, did any reference to a federal constitutional claim appear. The California court's opinion discussed only issues of state law. The jurisdiction of the United States Supreme Court in a case of this type is limited to correcting errors of federal law. On October 19, 1925, after hearing oral argument in the case, the Supreme Court dismissed the Whitney appeal for lack of jurisdiction.³⁵

The decision set off a firestorm of national debate. "There's something obviously rotten in the State of California," wrote the *Baltimore Sun*.³⁶ "[O]ur liberties are at a low ebb, indeed," said the *New York World*, "if such a thing can come to pass in an American state."³⁷ The *San Francisco Call* ran a headline that read: "Patriotic Citizens Deplore Martyrdom of Gentle Woman."³⁸ The California legislator who had led the fight for passage of the syndicalism law proclaimed his dismay that it should be applied to Ms. Whitney, stating: "The law was never intended to halt free speech nor to punish persons for their thoughts."³⁹

Opinion was not unanimous. The *Mobile Register* applauded the Court's refusal to upset the conviction, stating, "American citizens as a whole will decide that persons who do not want to be branded

33. *Id.* at 453, 207 P. at 698.

34. For an informative reminiscence of Walter Pollak written by his son, a former law dean and current federal district judge, see Pollak, *Advocating Civil Liberties: A Young Lawyer Before the Old Court*, 17 HARV. C.R.-C.L. L. REV. 1 (1982). Perhaps with Whitney in mind, Judge Pollak describes his father as "the paradigm of the creative barrister retained on appeal to recoup what has been dissipated below." *Id.* at 5.

35. 269 U.S. 530 (1925).

36. *The Jailing of Anita Whitney*, LITERARY DIGEST, Nov. 14, 1925, at 14-15.

37. *Id.*

38. *Id.*

39. *Id.* (quoting Assemblyman William J. Locke).

as Reds should stay out of Red company.”⁴⁰ The editor of the *Iowa Legionnaire* commented: “I hope she is compelled to serve the full fourteen years.”⁴¹ The *Sacramento Bee* reminded its readers that the syndicalism law was passed in the wake of a long series of Wobbly “outrages in this state, from sabotage by the torch in the grain fields to the attempted assassination of the Governor.”⁴² Now, with the conviction of Ms. Whitney, noted the paper, “there burst out in radical centers a wailing and a sobbing at the ‘martyrdom’ of this ‘gentle woman’—the ‘gentle woman’ whose purse-strings have yielded the sinews of war for the I.W.W. for years past; the ‘gentle’ woman who willingly serves upon a resolutions committee of an organization advocating force to overthrow the Government at a convention where the red flag is draped over the Stars and Stripes!”⁴³

After relief from the Supreme Court seemed no longer possible, a vigorous effort was mounted to persuade the Governor of California to pardon Anita Whitney.⁴⁴ Celebrities such as the novelist Upton Sinclair wrote letters to the Governor in support of clemency.⁴⁵ So did Jane Addams, Felix Frankfurter, Zechariah Chafee, the Dean of the Columbia Law School, and the presidents of Wellesley, Smith, Vassar, and Swarthmore Colleges.⁴⁶ *The New Republic* organized a write-in campaign among its readers.⁴⁷

Whitney herself had misgivings about seeking a pardon. In a front page story in the *San Francisco Chronicle*, she is reported as saying, “It must be remembered that 150 men have been imprisoned for the same offense. About 70 of them are now behind the walls. It is true that I am the only woman to go to prison under the law, but I should receive no favors because of my sex.”⁴⁸ During this period, the *Literary Digest* ran a photograph of Ms. Whitney

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *San Francisco Chron.*, Oct. 22, 1925, at 1, col. 5.

45. *N.Y. Times*, Oct. 21, 1925, at 25, col. 4.

46. *N.Y. Times*, Nov. 4, 1925, at 25, col. 7.

47. *The Case of Anita Whitney*, *THE NEW REPUBLIC*, Nov. 4, 1925, at 272.

48. *San Francisco Chron.*, Oct. 22, 1925, at 1, col. 5.

in her jail cell, captioned by a quote from the prisoner: "Why should I ask for pardon when I have done no wrong?"⁴⁹

Despite all the publicity and pressure, Governor Richardson decided against pardoning her. In an open letter to Upton Sinclair, the Governor stated: "Her powerful influence and wealth have kept her out of prison for nearly six years. Other violators of this law, who have lacked this influence, have been serving their terms in prison."⁵⁰

Then, in a rather surprising development, the United States Supreme Court on December 14, 1925, issued the following order:

The petition for rehearing in this cause, which was heretofore dismissed for lack of jurisdiction, having been considered by the court, is hereby granted, and the cause is set down for further hearing on Monday, March 15 next, when the issue as to the jurisdiction of this court and the merits of the case will be reargued.⁵¹

It seems Whitney's lawyers had arranged for the California appellate court to enter a supplementary order, pursuant to stipulation by the parties, stating that the issue of the constitutionality of the Syndicalism Act and its application in the present case had been decided by the state court, despite the fact that its original opinion had made no mention of any federal constitutional issues. This supplementary order had been added to the record over two years after the first appeal to the Supreme Court, though prior to the Court's initial denial of jurisdiction.⁵² After hearing oral argument a second time, the Supreme Court ruled that it had jurisdiction and proceeded to consider the appeal on the merits.

Whitney's lawyers argued that the California Criminal Syndicalism Act violated the federal constitution for three separate reasons. First, they claimed unsuccessfully that the law was void for vagueness because it failed to provide an ascertainable standard of guilt.⁵³ Second, they contended that the law violated the equal pro-

49. *The Jailing of Anita Whitney*, *supra* note 36, at 14.

50. Open letter from Governor Richardson to Upton Sinclair, *reprinted in* THE NEW REPUBLIC, Dec. 30, 1925, at 759.

51. *Whitney v. California*, 269 U.S. 538 (1925) (granting petition for rehearing).

52. *Whitney v. California*, 274 U.S. 357, 360-61 (1927).

53. *Id.* at 368-69.

tection clause of the fourteenth amendment because it prohibited only advocacy of the use of violence to bring about a change of industrial ownership, not advocacy of the use of violence to maintain the status quo.⁵⁴ At first blush this may seem an odd point, but in the age of Pinkerton detectives and goon squads the use of violence by management was a familiar feature of the American scene. Nevertheless, the Court emphatically rejected the equal protection argument. "The Syndicalism Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited," said Justice Sanford's majority opinion.⁵⁵

The third and final contention of the appeal concerned the freedom of speech. The majority viewed the issue as largely resolved by the decision two years earlier in *Gitlow v. New York*.⁵⁶ That case, which incidentally had been argued on behalf of the petitioner by the same lawyers, Nelles and Pollak, who represented Ms. Whitney in her appeal, upheld New York's criminal anarchy law, which made it a crime to urge the propriety of overthrowing organized government by force or violence or assassination of the executive head.⁵⁷ Passed in the wake of the assassination of President McKinley and aimed at the anarchists of the day,⁵⁸ people who eschewed organization on principle, the New York law had no provision for criminal liability based on membership or association. Despite this difference, Justice Sanford, who also had written for the majority in *Gitlow*, viewed Whitney's appeal as raising no important new free speech issue.⁵⁹

In *Gitlow*, the Court had upheld the power of states to identify and prohibit categories of utterance that pose general dangers to the community, limited only by the constraint that the legislative estimation of danger not be arbitrary or unreasonable.⁶⁰ Justice Holmes's dissent in that case, joined by Justice Brandeis, had ar-

54. *Id.* at 369-71.

55. *Id.* at 370.

56. 268 U.S. 652 (1925).

57. *Id.* at 654.

58. See Comment, *Criminal Law: Criminal Syndicalism: Red Flag Law: History of Enforcement in California*, 19 CALIF. L. REV. 64 (1930).

59. *Whitney*, 274 U.S. at 371-72.

60. 268 U.S. at 668-69.

gued that only a clear and present danger, assessed in the light of the particular circumstances of each individual case, could justify the regulation of speech.⁶¹ Holmes thought that Gitlow's long-winded revolutionary manifesto, written in turgid, abstract prose, posed no such danger.⁶² After reading the tract, Professor Chafee came to the same conclusion: "Any agitator who read these thirty-four pages to a mob would not stir them to violence, except possibly against himself. This Manifesto would disperse them faster than the Riot Act."⁶³ But the Court concluded that the first amendment requires neither a case-by-case assessment of danger nor a plausible belief that danger is imminent. With a large dose of metaphor, Justice Sanford explained the majority's logic:

The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency.⁶⁴

This earnest expression of concern received from Holmes a characteristically laconic retort:

[W]hatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the commu-

61. *Id.* at 672-73 (Holmes, J., dissenting).

62. *Id.* at 673.

63. Z. CHAFEE, *supra* note 8, at 319.

64. *Gitlow*, 268 U.S. at 669. For a sympathetic, though not approving, discussion of the Sanford opinion in *Gitlow*, see H. KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 150-55 (1988).

nity, the only meaning of free speech is that they should be given their chance and have their way.⁶⁵

With *Gitlow* the precedent most closely on point, it is not difficult to understand how the majority of the Court viewed *Whitney* as an easy case. Whitney's free speech claim differed from *Gitlow*'s largely in that she was convicted not of personally advocating revolution by force but of associating with, and arguably lending support to, those who did. To Justice Sanford, with his focus on the power of the state to legislate against incipient dangers, this distinction was not one that favored Ms. Whitney:

The essence of the offense denounced by the [Syndicalism] Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. . . . That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear.⁶⁶

It is, said Justice Sanford, an abuse of the rights of free speech, assembly, and association for an individual, whatever her personal beliefs, to join an organization that advocates criminal syndicalism, "thus menacing the peace and welfare of the State."⁶⁷

Justice Louis Brandeis filed a separate opinion, joined by Justice Holmes, in which he took sharp issue with the majority's interpretation of the first amendment. As he had done in previous cases in which he had dissented, Brandeis argued that the government can prohibit speech that advocates violent revolution only if under the particular circumstances of the case the speech in question creates a clear and imminent danger of serious injury to the state.⁶⁸ To students of Justice Brandeis's thought, what is most striking about his *Whitney* opinion is not the position he took in the case but rather his tone and emphasis.

65. *Gitlow*, 268 U.S. at 673.

66. *Whitney*, 274 U.S. at 371-72.

67. *Id.* at 372.

68. *Id.* at 373 (Brandeis, J., concurring); see *Schaefer v. United States*, 251 U.S. 466, 482-95 (1920) (Brandeis, J., dissenting); *Pierce v. United States*, 252 U.S. 239, 253-73 (1920) (Brandeis, J., dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 334-43 (1920) (Brandeis, J., dissenting).

In his previous opinions on the subject of freedom of speech, Brandeis had assumed the posture of the dispassionate, well-informed, precise lawyer. In *Schaefer v. United States* he had demonstrated in painstaking detail how the publications for which the defendants had been convicted could not reasonably be thought to have obstructed military recruiting "even remotely or indirectly," and could not fairly be characterized as willful falsifications designed to hinder the war effort.⁶⁹ In *Pierce v. United States* he had dissected the defendants' pamphlet to show that its offending passages were statements of opinion rather than, as one count of the indictment demanded, statements of fact, and that the statutory requirements relating to the defendants' knowledge and intent could not be satisfied by a process of inference from the contents of the pamphlet.⁷⁰ In *Gilbert v. Minnesota* Brandeis had developed an intricate and ingenious argument to establish that the powers of the individual states to legislate against antiwar propaganda are preempted or otherwise constrained by federal responsibility to determine whether and how to conduct war.⁷¹ In a much publicized and sharply contested case involving the newspaper *The Milwaukee Leader* he had traced the history of federal legislation concerning the mails and executive branch opinions regarding the postal power to refute the majority's conclusion that socialist literature could be denied second-class postal privileges.⁷²

These opinions were not technical in the sense of relying on fine points or arcane sources of authority. Some of these earlier Brandeis opinions display an unmistakable regard for the importance of free speech. But they do so always in a careful, measured fashion, shorn of rhetoric and dominated by points of statutory construction and evidentiary insufficiency.

The *Whitney* opinion is different. Given his previous tendencies, one might have expected Brandeis to emphasize the attenuated nature of Ms. Whitney's connection to the advocacy of violence or the broad sweep of the syndicalism statute as evidenced by its application to her. One might have predicted that he would find some

69. *Schaefer*, 251 U.S. at 482-95.

70. *Pierce*, 252 U.S. at 253-73.

71. *Gilbert*, 254 U.S. at 334-43.

72. *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 417-36 (1921) (Brandeis, J., dissenting).

way to interpret the federal constitution to limit states from introducing in prosecutions of this sort inflammatory evidence of Wobbly misdeeds. Instead, the opinion dwells almost exclusively on what might be considered the cornerstone issue of first amendment interpretation: namely, under what circumstances does the first amendment prohibit the government from making the advocacy of revolution a crime?⁷³ And rather than adopting the modulated voice of the careful lawyer, Brandeis sounds almost like a dewy-eyed idealist in the way he articulates the argument for a strong principle of freedom of speech. It is, I believe, the idealism that permeates his *Whitney* opinion that makes it arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment.

The heart of that essay is contained in three paragraphs:

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

73. The focus of the opinion probably can be traced to the fact that its famous language originally was drafted for a dissent in *Ruthenberg v. Michigan*, 273 U.S. 782 (1927). However, Ruthenberg died before the Court's judgment was announced, thus rendering the case moot. Brandeis then transplanted the language to his opinion in *Whitney*. See Cover, *The Left, the Right, and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 384 (1981). Ironically, Charles Ruthenberg was one of the leaders of the Left Wing revolt at the Chicago meetings of the Socialist Party that precipitated the events that led to the prosecution of Anita Whitney. See T. DRAPER, *supra* note 18, at 193-96.

The drafting history of the *Whitney* opinion also serves to negate certain unflattering inferences that might be drawn from the fact that Brandeis did not dissent in the case but rather concurred in the affirmance of Ms. Whitney's conviction. He did so on procedural grounds that seem unduly technical: because her lawyers introduced no evidence of the lack of a clear and present danger and the government claimed its evidence of dangerous Wobbly plans was relevant under a conspiracy theory, the Supreme Court was precluded as a procedural matter from reversing the conviction on constitutional grounds. *Whitney*, 274 U.S. at 379. Despite his well-earned reputation as a judge who took jurisdictional and procedural strictures seriously, see, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis J., concurring); *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274 (1928), one might question Brandeis's motives in *Whitney* were it not for his clearly documented intention to dissent in *Ruthenberg*. To a person of Brandeis's democratic, reformist sensibilities, Charles Ruthenberg had to be a much more threatening and less appealing figure than Anita Whitney. For an insightful speculation regarding why Brandeis did not dissent in *Whitney*, see H. KALVEN, *supra* note 64, at 164-65.

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. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; 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. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was

advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.⁷⁴

Other passages are also important, especially one in which Brandeis asserts that "[p]rohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."⁷⁵ He pushed this point very far indeed. "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."⁷⁶ But the lasting significance of the Brandeis opinion in *Whitney* lies not in the test he proposed or the indication he gave of where he would draw the line.⁷⁷ What makes this opinion a document of extraordinary importance is what Brandeis had to say about, in his words, "why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."⁷⁸

74. *Whitney*, 274 U.S. at 375-77 (footnotes omitted).

75. *Id.* at 377.

76. *Id.* at 378.

77. For a valuable discussion of the Brandeis opinion in *Whitney* that emphasizes its contribution to the development of a desirable test for ruling upon disputes over subversive advocacy, see H. KALVEN, *supra* note 64, at 156-66.

78. *Whitney*, 274 U.S. at 374.

The first of the three paragraphs that constitute the heart of the opinion contains a list of propositions, succinctly stated and delphic in tone, that do not obviously add up to a coherent philosophy. For years I suspected Brandeis of pleading in the alternative in this paragraph.⁷⁹ Now I think that view is wrong. There is one idea here, not many, and it represents Brandeis's distinctive contribution to the history of first amendment thought. Bear with me, if you will, while I indulge in a parsing of this pregnant text.

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . ."

It is not simply a stylistic conceit that Brandeis begins by invoking the authority of "those who won our independence." It is, of course, a familiar move to ascribe to the framers one's personal view regarding a point of constitutional interpretation. This hoary tactic is enjoying a resurgence of popularity in our own age.⁸⁰ But is it not apparent as the paragraph progresses that the voice we hear is that of Brandeis the political philosopher, not Brandeis the disinterested historian of eighteenth-century thought? To me, the significance of the choice of rhetoric is in its reference not to drafters, framers, or ratifiers of the first amendment but to the revolutionaries who made the experience of constitution building possible. Perhaps Brandeis wants to remind us that ours is a revolutionary tradition and we ought to keep that in mind when deciding how to treat the Anita Whitneys of the world.⁸¹ It is more likely, I think, that Brandeis wished to emphasize the point that the first amend-

79. Under one interpretation, almost every rationale for free speech that has figured prominently in modern first amendment analysis—individual autonomy, the search for truth, political participation, the need to check government power, the futility of repression—can be found in this paragraph. For critical surveys of the various rationales for free expression, see F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

80. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dissenting). Compare Chief Justice Rehnquist's rendition of establishment clause history with that of T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986).

81. Brandeis may have derived a sympathetic attitude toward revolutionaries from his parents, for whom the 1848 uprisings against the Austro-Hungarian Empire represented an important cause. According to Philippa Strum:

ment represents a break with English theories of absolute sovereignty and with the restrictive English understanding of the freedom of speech, as incorporated in such common-law concepts as seditious libel and constructive contempt of court. Years later, in *Bridges v. California* in 1941⁸² and *New York Times Co. v. Sullivan* in 1964,⁸³ a central question of first amendment interpretation would be whether it is controlling, or at least important, that a certain category of speech traditionally was regulated at English common law. On both occasions, the Court said no.⁸⁴

The opening passage of the paragraph is also significant for its assertion that "the final end of the State" is "to make men free to develop their faculties." Some might see in this an endorsement of the view that freedom of speech is in large part designed to promote self development of a highly personal and subjective sort—what my colleague Henry Monaghan likes to call the feel-good theory of the first amendment. My own inclination is to read Brandeis here as reaffirming the concept of self-government, the point that the state exists for the benefit of its citizens and not vice versa. The focus is still on the relationship between the individual and the state.

Frederika and Adolph became engaged during the Revolution of 1848. Adolph had rushed home as soon as he heard about the uprisings, and only an attack of typhoid prevented him from participating in it. The families were entirely sympathetic to the aims of the revolutionaries, and Adolph spoke of 1848 as the "wonderful year" when "the spirit of the Lord informed the peoples of Europe and His mighty voice overthrew the tyrants."

P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 3-4 (1984). Max Lerner has commented on the importance of this heritage in the shaping of Justice Brandeis's social thought. See Lerner, *The Social Thought of Mr. Justice Brandeis*, in MR. JUSTICE BRANDEIS 11-12 (F. Frankfurter ed. 1932). Brandeis's research for the *Whitney* opinion included a memorandum he asked his law clerk, James Landis, to prepare documenting various abolitionist calls to resistance of the Fugitive Slave Law. See Cover, *supra* note 73, at 385.

82. 314 U.S. 252 (1941).

83. 376 U.S. 254 (1964).

84. "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Bridges*, 314 U.S. at 265. "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations." *Sullivan*, 376 U.S. at 269. As the Court explained five pages later, those limitations derive from a theory of sovereignty "altogether different" from that which informs English law. *Id.* at 274.

"[T]he deliberative forces should prevail over the arbitrary."

This is the first of several passages that might lead one to accuse Brandeis of too rationalistic a view of the process of opinion formation. But in erecting this model of contending forces, Brandeis need not have entertained a naive faith in the wisdom and fairness of collective deliberation to prefer that process to the alternative of unilateral decree by an absolute sovereign. From this perspective, freedom of speech is most important for what it implies about sovereignty. Again, the foundational principle is self-government.

"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."

These sentences embrace what philosophers call a strong theory of the person. A particular kind of citizen is described—one concerned with personal happiness, to be sure, but not the private, self-regarding creature celebrated by some libertarian philosophies. The happiness Brandeis considers the legitimate aspiration of mankind is gained by struggle, by drawing on the demanding virtue of courage. Liberty is valuable as an end because the often difficult experience of exercising a measure of control over one's commitments and paths of development, of choosing what to believe and how to interact with others, is personally fulfilling. Liberty is valuable as a means because persons who have made themselves what they are through the exercise of their own initiative make the best citizens; such persons achieve the most for their societies.⁸⁵

"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"

This is as close as Brandeis gets to the claim that unregulated discussion yields truth. Notice that, in contrast to Holmes, Brandeis never tells us what is "the best test of truth."⁸⁶ He never em-

85. Five years before he wrote his *Whitney* opinion, in an informal talk that he later summarized in a letter, Brandeis had described the "development of the individual" as "both a necessary means and the end sought. For our objective is the making of men and women who shall be free, self-respecting members of a democracy—and who shall be worthy of respect." A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 585 (1956).

86. Compare *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

plays the metaphor of the marketplace. He speaks only of "political truth," and he uses the phrase "means indispensable" to link activities described in highly personal terms—"think as you will," "speak as you think"—with the collective social goal of "political truth." I think his emphasis in this passage is on the attitudes and atmosphere that must prevail if the ideals of self-government and happiness through courage are to be realized. Brandeis is sketching a good society here, but not, I think, an all-conquering dialectic.

"[D]iscussion affords ordinarily adequate protection against the dissemination of noxious doctrine"

This is a thought Brandeis twice repeats within the space of three paragraphs. He says, a few lines after the passage quoted, "the fitting remedy for evil counsels is good ones." And two pages after that: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Did he really believe this? Do we believe it today?

Brandeis was no ingenué on the subject of public opinion. He knew from his sometimes bitterly fought reform battles in Massachusetts how often the triumph of even a very good idea depends on the hard work, money, savvy, and perseverance of its proponents.⁸⁷ He was a close student of Walter Lippmann, who was commenting at the time on how the phenomenon of mass culture was making public opinion dangerously manipulable.⁸⁸

It is noteworthy that Brandeis never speaks of noxious doctrine being refuted or eliminated or defeated. He talks of societal self-protection and the fitting remedy. He warns us not to underestimate the value of discussion, education, good counsels. To me, his point is that noxious doctrine is most likely to flourish when its opponents lack the personal qualities of wisdom, creativity, and confidence. And those qualities, he suggests, are best developed by

87. On Brandeis's systematic efforts to influence public opinion in the cause of reform, see L. BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* 37-38, 57, 61 (1984); A. GAL, *BRANDEIS OF BOSTON* 101-02, 104, 111, 123, 129-30 (1980); A. MASON, *supra* note 85, at 108-11, 117, 158-59, 161-65, 168-70, 187, 202, 204, 281, 303, 328-31, 371-72, 408-12; P. STRUM, *supra* note 81, at 59, 61, 64, 80-85, 89, 101, 104-07, 138-39, 153, 177-78; M. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 15, 24, 30-31, 35, 37 (1981).

88. See Cover, *supra* note 73, at 363-69.

discussion and education, not by lazy and impatient reliance on the coercive authority of the state. To those who would justify censorship on the ground that purveyors of evil ideas can manipulate public opinion, Brandeis almost surely would answer that it is incumbent upon the defenders of good ideas to learn how to influence public opinion even more skillfully.

"[T]he greatest menace to freedom is an inert people . . . public discussion is a political duty . . . They recognized the risks to which all human institutions are subject."

The juxtaposition of these observations is revealing. Brandeis was an idealist, but he was not a perfectionist.⁸⁹ When he speaks of the benefits of political participation, his major concern is with the preservation of freedom. He does not claim that participatory democracy produces the wisest policies on a day-to-day basis. Nor does he assert, though he may well have believed, that regular and active political participation is a necessary feature of a personally fulfilling life. To Brandeis, public discussion is a "duty." It is a duty because political liberty is a fragile condition, easily lost when its institutions and traditions fall into the hands of inert people.

"[T]hey knew that order cannot be secured merely through fear of punishment . . . ; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government"

Here is the counsel of a conservative, addressing the question of how best to secure order and keep government stable.⁹⁰ To some, the passage may sound like the "safety valve" rationale for freedom of speech: dissidents will do less mischief if they are permitted to let off steam. The problem with this argument is that it is too tactical in inspiration, and perhaps too condescending, to serve as the basis for a constitutional principle. Moreover, it seems a crude generalization to say that all or even most dissidents will consider the opportunity to speak a fair substitute for the redress of their substantive discontents.

89. See A. MASON, *supra* note 85, at 6, 120.

90. On Brandeis's conservatism, see P. STRUM, *supra* note 81, at 72; M. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM 53-54 (1971).

Why did Brandeis want to encourage "thought, hope and imagination" in persons whose views are unlikely to win majoritarian approval? If such persons take their thoughts and hopes too seriously, are they not likely to be all the more frustrated when their ideas and their bids for power are rejected?

I do not think Brandeis wanted hopeful, vital, imaginative dissidents because he thought they could be mollified by civil liberties. Rather, I think he believed that in a political community personal qualities such as hope and imagination tend to be contagious and reciprocal. If the marginal, powerless members of the community retain some semblance of spirit, the mainstream is more likely to sustain its own vitality. And when dissidents become gripped by fear and hate, so too does the majority. The phrase "repression breeds hate" can be read as a double entendre; it is not just the hate experienced by the dissidents that concerns Brandeis, but also the hate that is felt by those who possess the power to punish dissent. The passage is not primarily about consequences or tactics; it is about character.

"Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form."

This sentence, more than any other in the *Whitney* opinion, has led many to view Brandeis's argument as dated. Perhaps an Enlightenment figure such as Jefferson could believe in the power of reason. Perhaps a progressive like Brandeis could. But how often today do we hear experienced, observant people proclaim their faith in the power of reason?

There can be little doubt, I think, that Brandeis was sincere in asserting that power, not just wisdom or happiness, attaches to reasoning capacity. In his own life he had parlayed his extraordinary facility at reasoning into a good deal of personal power. He had used that power and drawn on that reasoning facility to help a lot of people. It would be a mistake, however, to read into this passage the naive claim—naive in 1927 as well as 1987—that reason will almost always triumph, at least in the long run. I do not detect in Brandeis's language the echo of John Milton and his famous rhetorical question: "Who ever knew truth put to the worse

in a free and open encounter?"⁹¹ From personal experience, Brandeis knew plenty about vested interests, market distortions, and the siren songs of demagogues.

I think it is essential to read the sentence as a whole. His belief in the power of reason should be seen as a commitment inspired by his emphatic distaste for the alternative: "silence coerced by law—the argument of force in its worst form." How much power reason really exerts is an enduring and intriguing question. I agree with Robert Cover's conclusion that Brandeis did not resolve this question for himself by disinterested observation and reflection,⁹² though I can think of no modern figure whose observations on this point would have been better informed and whose reflections would have been more disciplined. Brandeis resolved the question by saying, in effect, that we simply *have* to believe in the power of reason in order to preserve a system of government in which the coercive power of the state does not swamp the individual. If we abandon the faith that reason matters, we are left with a society governed exclusively by force. The first amendment is meant to serve as a counterweight, Brandeis seems to say, to the natural tendency of all citizens, those in the majority as well as those in the minority, to lose confidence in reason and pursue their goals through force.

"Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Brandeis believed deeply in self-government, in the moral legitimacy of majority rule. He also believed in the active use of the power of the state to improve social conditions.⁹³ He was the antithesis of an anarchist or proponent of the minimal state. How then to reconcile his respect for the majority with his strong view of minority rights in the realm of speech?

Brandeis dissolves the conflict with the concept of "occasional tyrannies of governing majorities." He could not speak of the "tyranny of the majority" in the manner of his lifelong political oppo-

91. See J. MILTON, *Areopagitica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England*, in *THE PORTABLE MILTON* 151, 199 (D. Bush ed. 1949).

92. See Cover, *supra* note 73, at 387-88.

93. See, e.g., A. MASON, *supra* note 85, at 430.

nents, those who exalted the rights of private property and entrepreneurial capital. He did not believe that majority rule was inherently or chronically tyrannical. But he did live through the Red Scare of 1919, and there is every reason to believe that he was impressed by the experience.⁹⁴ Even his relatively dispassionate opinions prior to *Whitney* on the subject of free speech contain references to the phenomenon of mass hysteria.⁹⁵

It is interesting that many persons who aligned themselves with the progressive movement made the idea of freedom of speech far more central to their political thinking after 1919 than had been true prior to that highly charged year. Brandeis was the quintessential progressive. Like a number of his friends, he was more troubled during the 1920s than he had been earlier about the occasional tyrannies of governing majorities.⁹⁶

94. In private correspondence, Brandeis compared the events of 1919 to the Spanish Inquisition and the Know-Nothing movement. He called the Red Scare a "disgraceful exhibition" of "hysterical, unintelligent fear" and opined that a "sense of shame and of sin should endure" as a legacy of the period. Letter from Louis D. Brandeis to Susan Goldmark (Dec. 7, 1919), reprinted in 4 LETTERS OF LOUIS D. BRANDEIS 441 (M. Urofsky and D. Levy eds. 1975). See also *id.* at 395 (letter to Roscoe Pound), 445-46 (letter to Learned Hand), 477 (letter to Dean Acheson), 510 (letter to Felix Frankfurter).

95. See *Pierce v. United States*, 252 U.S. 239, 269 (1920) (Brandeis, J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482-83 (1920) (Brandeis J., dissenting).

96. In addition to the Red Scare, one of the developments that led some progressives to worry about the excesses of majority rule was Prohibition. See D. LEVY, HERBERT CROLY OF THE NEW REPUBLIC: THE LIFE AND THOUGHT OF AN AMERICAN PROGRESSIVE 282 (1985). Brandeis corresponded regularly with Croly during the 1920s. *Id.* at 265, 274, 277, 282. It may not be coincidental that Brandeis's other great civil liberties opinion, his dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting), came in a case involving a prosecution under the Prohibition laws. For a fascinating exchange regarding the rhetorical merits of the Brandeis opinion in *Olmstead*, see White, *Judicial Criticism*, 20 GA. L. REV. 835, 857-70 (1986); Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 893-915 (1986). For a discussion of how political philosophies intersected with public events in the emergence of attitudes toward free expression during this period, see P. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR (1972). On the general apathy of progressives regarding free speech issues prior to World War I, see P. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 35-50 (1979); Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1322 (1983). See generally Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 914 (1981).

The influence of certain of Brandeis's fellow progressives on his choice of theme and language in the *Whitney* opinion is unmistakable. Zechariah Chafee's 1920 book, *Freedom of Speech*, is cited in the opinion, as is Judge Learned Hand's district court opinion in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917). *Whitney v. California*, 274 U.S. 357, 376 n.3, 377 n.4. Probably the person who had the most direct effect on Brandeis's shaping

Much as I am tempted, I shall not engage in a similar talmudic exegesis of the other two paragraphs that make up the core of the *Whitney* opinion. But I do want to call attention to a word that appears over and over again in those paragraphs. That word is "fear."

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men *feared* witches and burnt women. It is the function of speech to free men from the bondage of irrational *fears*. . . .

Those who won our independence by revolution were not *cowards*. They did not *fear* political change. To courageous, self-reliant men, with confidence in the power of free and *fearless* reasoning

These resonant sentences add up to a celebration of the virtue of courage. They are very much in tune with the conclusion that emerges from a close, contextual reading of the earlier paragraph: Brandeis valued a strong doctrine of free speech largely for its con-

of his *Whitney* opinion was the progressive historian Charles Beard. In an article published in 1926, which Brandeis cited in *Whitney*, Beard praised what he called the American tradition of political liberty. *Whitney*, 274 U.S. at 375 n.2. He traced the tradition to Socrates and to Milton:

For the timid, shrinking, frightened cowardice of the persecutor who would impose his little designs on the thought of mankind and keep his country asleep in inherited tradition, Milton offered the daring idea of free inquiry and free argument—an idea that would arouse the nation to greater and greater achievement.

Beard, *The Great American Tradition: A Challenge for the Fourth of July*, THE NATION, July 7, 1926, at 7 [hereinafter Beard, *The Great American Tradition*]. Beard also described "Jefferson's faith":

It did not declare that no alterations might be proposed in our form of government. It did not lay down the rule that in time of war the majority which controls the Government of the United States may exercise the powers and prerogatives of a Caesar. No, the tradition of American political liberty was formulated by fearless and robust men who had the honesty to apply to others the principles they claimed for themselves.

Id. at 8. See also Beard, *The University and Democracy*, 64 DIAL 335 (1918) (advocating unbridled, robust expression of university professors' views about censorship by university trustees). Another possible source of Brandeis's formulation is an unsigned editorial in *The New Republic*: "We have . . . lost vision and courage. . . . The mass of people is inert. The country has lost its passions." *The Gitlow Case*, THE NEW REPUBLIC, July 1, 1925, at 141. See also the references to inertness in the free speech writings of John Dewey. Dewey, *Conscription of Thought*, THE NEW REPUBLIC, Sept. 1, 1917, at 128; Dewey, *In Explanation of Our Lapse*, THE NEW REPUBLIC, Nov. 3, 1917, at 17.

tribution to the character of the political community, particularly the character of those who possess the power to regulate. Brandeis's good friend, the political scientist Harold Laski, sounded this theme in his 1939 Cutler Lecture here at William and Mary: "Democracy is not merely a form of government," said Laski, "it is also a way of life."⁹⁷

Why was Brandeis so concerned with character? Why was he convinced that courage is the paramount virtue in a democracy? In my teaching of *Whitney v. California* over the years, the thought had occurred to me once or twice that Brandeis's rhetoric in this opinion has a bit of a classical ring. I wondered if he had ever displayed any particular affection for the ancient Greeks or Romans, whose political cultures seem to have valued the quality of courage far more than does our own.

Then, in preparing this lecture, I had one of those rare but treasured experiences in academic life when the pieces really start to fit together. During the course of my research, I came upon the following passages in a fine recent biography of Brandeis by Philippa Strum. She describes the intensive reading program Brandeis undertook during the summer of 1914 after the leaders of the Zionist movement had recruited him to their cause. She lists the several books on Judaism that he read, but notes:

The most important book Brandeis read, and one he quoted throughout his life and made certain that all the members of his extended family read, was not about Zionism: it was Alfred Zimmern's *The Greek Commonwealth*.

. . . .

97. Swindler, *Constitutional Retrospect: The First Series of Cutler Lectures Revisited*, 23 WM. & MARY L. REV. 1, 6-7 (1981) (quoting Laski, *The Prospects of Democratic Government*, 33 WM. & MARY BULL. No. 4, at 4 (1939)). In a letter described by Alpheus Thomas Mason as an effort to state his creed, Brandeis said:

[D]emocracy in any sphere is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual. It is possible only where the process of perfecting the individual is pursued. His development is attained mainly in the processes of common living.

A. MASON, *supra* note 85, at 585.

Zimmern's political views paralleled those of Brandeis, and the idea of the Greek city-state matched the possibilities of Palestine. Zimmern may have been the catalyst for the ideas already circulating in Brandeis's mind, or he may have offered Brandeis a new way of looking at Zionism. Whatever the case, the book was one of the few that Brandeis considered central to his life. . . .⁹⁸

Strum reports that Brandeis was so impressed by the book that he arranged for Professor Zimmern to accompany him a few years later on a trip to the Middle East.⁹⁹ She continues:

In order to understand the importance of Zimmern for Brandeis, one must first appreciate the high esteem in which Brandeis held the Greeks of fifth-century Athens. The highest tribute that Brandeis could give his uncle Dembitz was that "he reminded one of the Athenians." Brandeis also compared the Founding Fathers to the Athenians in his most eloquent defense of free speech . . . , [his opinion] in *Whitney v. California*. He wrote, in part, "They believed liberty to be the secret of happiness and courage to be the secret of liberty." Paul Freund, who was first Brandeis's law clerk and then his lifelong friend, has identified the sentence as coming from Pericles' "Funeral Oration." Zimmern shared Brandeis's high regard for the "Funeral Oration"; the premise of his book is that the oration reflects the greatest heights ever reached by democracy.¹⁰⁰

Professor Strum then recounts additional anecdotes that provide further evidence of where Brandeis acquired his regard for the virtues of courage and civic commitment:

Other indications of Brandeis's interest in ancient Greece include the comment of the reporter who followed Brandeis around for two days in 1916 and wrote wryly, "Euripides, I now

98. P. STRUM, *supra* note 81, at 237 (footnote omitted). On the importance of Zimmern's book to Brandeis, see also D. ACHESON, MORNING AND NOON 50 (1965) ("two interacting themes seem to have dominated [Brandeis's] talk—the Greek Genius . . . and the curse of Bigness"); Freund, *Mr. Justice Brandeis*, 70 HARV. L. REV. 769, 789-90 (1957) (Zimmern's *The Greek Commonwealth* "was the book most likely to be recommended by Brandeis to friends in his late years").

99. P. STRUM, *supra* note 81, at 242.

100. *Id.* at 237. Professor Freund's observation regarding the sentence from Pericles in the *Whitney* opinion is contained in Freund, *supra* note 98, at 789.

judge, after having interviewed Brandeis on many subjects, said the last word on most of them." Jacob de Haas noted, "Greek and Roman history are as clear to him as though they were part of the morning's news." His favorite and most often quoted poem was from Euripides' *The Bacchae*; he clearly felt it expressed his view of citizenship and public service. In short, to discover how the model political human being would function in the model political society, Brandeis turned to the Athenians.¹⁰¹

Dreams of Zion, emulation of the glory that was Greece—this is heady stuff for a judge to draw upon in deciding how to interpret the first amendment. Surely idealist thinking has a role to play in the building of a constitutional tradition, but how large a role? A skeptic is entitled to question whether the character ideal of citizenship that so inspired Brandeis has had a major impact on the development of first amendment doctrine, through the force of his opinion in *Whitney* or by some other means.

At the level of rhetoric, the emphasis Brandeis placed on the quality of civic courage has proved to be influential. Most of the Supreme Court justices who have contributed significantly to the modern elaboration of the free speech principle have invoked the civic-courage language of the *Whitney* opinion, sometimes in the first amendment opinions for which they are best known. Justice Black, for example, in one of his classic dissents protesting the investigative excesses of the House Committee on Un-American Activities, stated, citing Brandeis and Jefferson, "This country was not built by men who were afraid and it cannot be preserved by such men."¹⁰² In his powerful dissenting opinion in *Dennis v.*

101. P. STRUM, *supra* note 81, at 237-38. The poem to which Professor Strum refers is apparently that quoted *infra* at text accompanying note 120. See her description of its importance to Brandeis in P. STRUM, *supra* note 81, at 62. Mason confirms that Brandeis "drew enduring inspiration" from these lines. A. MASON, *supra* note 85, at 95. Perhaps misled by an ambiguous reference in Mason, Professor Strum mistakenly attributes the lines to *The Bacchae*. In fact, they are from Euripides's *The Suppliant Women* (ll. 320-30). Gilbert Murray, whose translations of Euripides Brandeis used, says of these lines: "It is Athens as the 'saviour of Hellas' that we have here. It is Athens the champion of Hellenism and true piety, but it is also the Athens of free thought and the Enlightenment." G. MURRAY, EURIPIDES AND HIS AGE 46-47 (1965). On Brandeis's fondness for quoting Euripides, see D. ACHE-SON, *supra* note 98, at 96.

102. *Wilkinson v. United States*, 365 U.S. 399, 422 (1961) (Black J., dissenting). In his first major opinion on free speech, *Bridges v. California*, 314 U.S. 252, 270 (1941), Justice

United States, Justice Douglas quoted in full the two paragraphs of the *Whitney* opinion that expound the renunciation-of-fear theme.¹⁰³ Justice Brennan constructed his famous opinion in *New York Times Co. v. Sullivan* "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."¹⁰⁴ Immediately preceding his reference to such a background, Brennan quoted the complete paragraph in which Brandeis states that "public discussion is a political duty" and "it is hazardous to discourage thought, hope, and imagination. . . ."¹⁰⁵ Justice Harlan's majority opinion in *Cohen v. California* described the philosophy of the first amendment as partly that of "putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry. . . ."¹⁰⁶ For this proposition, Harlan cited the Brandeis opinion in *Whitney*.¹⁰⁷

Black disparaged the use of the contempt power by the judiciary as "enforced silence," a phrase almost certainly drawn from Brandeis's *Whitney* opinion.

103. *Dennis v. United States*, 341 U.S. 494, 585-86 (1951) (Douglas, J., dissenting). See also Douglas, *The Lasting Influence of Mr. Justice Brandeis*, 19 TEMP. L.Q. 361, 369 (1946):

Brandeis said that "the greatest menace to freedom is an inert people." The truth of that statement is underscored in these revolutionary days. For the rate of change is itself a challenge to us to adapt ourselves to the quickened tempo of world affairs and not to be paralyzed by the inertia of prejudice against change.

Id.

104. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

105. *Id.* Interestingly, this is one of the few important points in the Brennan opinion that does not derive from the brief on behalf of the *Times* prepared by Herbert Wechsler. See Brief for the Petitioner, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39). The brief quoted the *Whitney* language of "political duty" and "public discussion," *id.* at 31, 56, but did not link the language explicitly to the ideal of uninhibited, robust, and wide-open public debate.

106. *Cohen v. California*, 403 U.S. 15, 24 (1971).

107. 403 U.S. 15, 24 (1971). The Brandeis language in *Whitney* has been cited, of course, in numerous Supreme Court opinions. Among the more important are *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 582 (1980) (Stevens, J., concurring in judgment); *Herbert v. Lando*, 441 U.S. 153, 183-85 (1979) (Brennan, J., dissenting in part); *Friedman v. Rogers*, 440 U.S. 1, 25 (1979) (Blackmun, J., dissenting in part); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 146 (1977) (Marshall, J., dissenting); *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting); *United States v. United States Dist. Court*, 407 U.S. 297, 332 (1972) (Douglas, J., concurring); *Wood v. Georgia*, 370 U.S. 375, 389 (1962) (Warren, C.J.); *Garner v. Louisiana*, 368 U.S. 157, 201 (1961) (Harlan, J., concurring in judgment); *Communist Party of the United States v. Subversive*

Citations and quotations prove only so much, however. The opinion-writing tradition in the Supreme Court is such that any articulation so commanding as that of Justice Brandeis in *Whitney* was bound to be utilized by subsequent Justices. I do not wish to denigrate the contribution of rhetoric to the building of the first amendment tradition; the Brandeis opinion would have been important had it done no more than provide stirring language to support the undifferentiated proposition that free speech is a good thing. But I think the Brandeis contribution is more specific, and for that reason more interesting. I believe the ideal of civic courage expressed in the *Whitney* opinion constitutes one of the generative ideas of the first amendment tradition. That claim cannot be sustained simply by demonstrating that the passages in the opinion that refer to fear, courage, and citizenship have been cited and quoted repeatedly.

How is it, then, that Brandeis's notion of civic courage has made a distinctive contribution to the modern understanding of the first amendment? The answer does not lie in the emphasis Brandeis placed on the role of public discussion in the proper functioning of democratic institutions. Contemporary doctrine does indeed rely heavily on the political function of speech, but many commentators through the years have stressed that theme, including the principal author of the first amendment, James Madison.¹⁰⁸ Nor

Activities Control Bd., 367 U.S. 1, 147 n.26 (1961) (Black, J., dissenting); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 689 (1959) (Stewart, J.); *Schneiderman v. United States*, 320 U.S. 118, 158, (1943) (Murphy, J.); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (Stone, C.J.).

Although the Brandeis opinion in *Whitney* was a concurrence in the spirit of a dissent, even Justices seeking to evade its strictures have treated the opinion as authoritative. See, e.g., *Dennis v. United States*, 341 U.S. 494, 506-07 (1951) (plurality); *American Communications Ass'n v. Douds*, 339 U.S. 382, 395 & n.10 (1950) (plurality). The majority holding in *Whitney v. California* was expressly overruled in *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

108. See, e.g., Madison's *Report on the Virginia Resolutions*, reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 231 (M. Meyers rev. ed. 1981). Among the more important American writings that emphasize the special importance of free speech in a democratic system of government are Z. CHAFEE, *supra* note 8; 2 T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 876-959 (Boston 1868); A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); T. WORTMAN, *A TREATISE CONCERNING POLITICAL ENQUIRY AND THE LIBERTY OF THE PRESS* (New York 1800); Schofield, *Freedom of the Press in the United States*, 9 AM. SOC. SOC'Y: PAPERS & PROC. 67 (1914), reprinted in 2 H. SCHOFIELD, *ESSAYS ON CONSTITUTIONAL LAW AND EQUITY*

should the influence of Brandeis be ascribed primarily to his deeply felt view that the members of a political community owe a duty to look beyond their private interests and serve the public good. It is true that Alexander Meiklejohn, with a nod toward Brandeis, developed a much noted theory of the first amendment that renounces the ethic of individualism and builds upon a holistic conception of the public good. Meiklejohn went so far as to claim that the first amendment does not recognize individual *rights* but rather establishes the governing *powers* of the people.¹⁰⁹ But Meiklejohn's undeniable impact on the interpretation of the first amendment has emerged in spite of, not because of, his disdain for private interests and individual rights; courts and scholars have transmogrified Meiklejohn's argument into the proposition that political participation is a weighty value in a liberal, rights-oriented constitutional democracy.¹¹⁰ Moreover, it is unlikely that in his *Whitney* opinion or elsewhere Brandeis meant to convey anything like the antipathy to individualism and to commercial endeavor that informs Meiklejohn's thought.¹¹¹

510 (1921). Ten years before Brandeis wrote his opinion in *Whitney*, Judge Learned Hand derived a theory of free speech from the premises of democracy. See *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

109. See A. MEIKLEJOHN, *supra* note 108. His reference to Brandeis is at pp. 48-50. Meiklejohn's critique of individualism is at pp. 51-77. His argument that the first amendment is about powers, not rights, is at pp. 37-38. Meiklejohn was speaking only of the speech, press, assembly, and petition clauses of the first amendment in denying that it creates individual rights.

110. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976); F. SCHAUER, *supra* note 79, at 37-44; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786-87 (2d ed. 1988); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Well aware that they are recasting Meiklejohn's self-government rationale for the free speech principle, Schauer and Tribe give reasons for the move. For a somewhat different but comparably procrustean adaptation of Meiklejohn's theory, see M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 1.02[H] (1984).

111. Meiklejohn's view that commerce corrupts politics is expressed in A. MEIKLEJOHN, *supra* note 108, at 73-74, 87. His attitudes toward individualism, commerce, and the public good would seem to place Meiklejohn within the civic humanist tradition in Western political theory, along with such writers as Aristotle, Machiavelli, and James Harrington. On civic humanism generally, see J. POCOCK, *Civic Humanism and Its Role in Anglo-American Thought*, in *POLITICS, LANGUAGE AND TIME* (1971). For an intelligent discussion of the civic humanist perspective in the context of American constitutional law, see Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). Brandeis was simply too much of an individualist, too dynamic in outlook, too fond

In order to understand what civic courage meant to Brandeis and how that ideal has helped to shape first amendment doctrine, one must appreciate the importance he placed on individual initiative. To Brandeis, as to Jefferson,¹¹² the key to a successful democracy lies in the spirit, the vitality, the daring, the inventiveness of its citizens. It is revealing that among the many books on ancient Greece that Brandeis read, the one that had the most profound

of experimentation, too much a believer in economic enterprise, too optimistic to fit comfortably within the civic humanist tradition.

In my opinion, his kindred spirit among major political thinkers of the past is Thomas Jefferson. I refer to the liberal, entrepreneurial Jefferson described by Joyce Appleby in Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson?*, 39 WM. & MARY Q. 287 (1982), not the civic humanist Jefferson described by Forrest McDonald in F. McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON 19-20* (1976). McDonald has recently revised his view of Jefferson in the direction of placing more emphasis on the liberalism of the Jeffersonian philosophy. See F. McDONALD, *NOVUS ORDO SECLORUM* 159 n.30 (1985). Some of the instances in which Brandeis's thought parallels that of Jefferson are identified in P. STRUM, *supra* note 81, at 59, 62, 64, 94, 103, 108, 145, 185, 193, 226, 257, 273, 275, 400-02. In the *Whitney* opinion, Brandeis quotes two famous statements of Jefferson that extol free speech as a principle of fearlessness. *Whitney v. California*, 274 U.S. 357, 375 n.2. Despite the affinities in their thought, I have uncovered no evidence that during the years when he developed his social and political philosophy Brandeis regarded Jefferson as a mentor. In his later years, however, Brandeis had many kind things to say about Jefferson. A few months after he wrote his opinion in *Whitney*, Brandeis made a trip to Monticello "to pay homage" and opined that Jefferson "would have had no difficulty appreciating S.B.I. [Savings Bank Insurance, Brandeis's favorite reform accomplishment]." Letter to Alice Harriet Grady (Sept. 22, 1927), reprinted in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 94, at 302. He returned home from the visit "with the deepest conviction of T.J.'s greatness". Letter to Alfred Brandeis (Sept. 22, 1927), *id.* In various letters he referred to three different biographies of Jefferson, *id.* at 315, 411, 521, 648, and once described Jefferson as "our most civilized American and true Democrat." Letter to Bernard Flexner (Nov. 16, 1940), *id.* at 648. See also A. LIEF, *BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 478 (1936) ("Brandeis was willing to be called a Jeffersonian"). Like Brandeis, Jefferson read widely in the literature of ancient Greece and Rome and derived much of his political philosophy therefrom. Unlike Brandeis, "great as was his admiration of the Greeks, Jefferson clearly felt more at home with Roman historians and moralists." Wright, *Thomas Jefferson and the Classics*, in THOMAS JEFFERSON: A PROFILE 195, 205-06 (M. Peterson ed. 1967).

For an illuminating effort to identify the psychological origins of Brandeis's regard for individualism, see R. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988). Burt claims that Brandeis's ambiguous and somewhat rootless position as an assimilated Jew in a gentile power elite led him to experience and value the kind of personal detachment that individualist philosophies consider a virtue and communitarian philosophies consider a vice.

112. See Appleby, *supra* note 111.

effect on him was that by Alfred Zimmern.¹¹³ This is a book about government that has as its centerpiece not the writings of Plato and Aristotle but the Funeral Oration of Pericles, as rendered by Thucydides.

The Funeral Oration enumerates the virtues of Athenian citizens that account for the greatness of the city. The virtues mentioned by Pericles have a noteworthy emphasis when viewed in the context of the virtues one commonly associates with the literature and political philosophy of classical Greece.¹¹⁴ In the Funeral Oration there is little talk of discipline, balance, obedience, acceptance of role, respect for the gods, subordination of self, avoidance of pride, or search for the mean. There is instead talk of "free liberality," "exceptional versatility," and "adventurous spirit."¹¹⁵ If Pericles can be said to have a dominant theme, it is that Athenian citizens achieve so much for their city-state because their civic commitment is not coerced but rather flows freely out of the vital and searching quality of life the city makes possible. In pointed contrast to other city-states, says Pericles, "we do not think that there is an incompatibility between words and deeds. . . ."¹¹⁶ To the contrary, Athenian civic courage depends on the cultivation of intellectual independence:

Others are brave out of ignorance; and, when they stop to think, they begin to fear. But the man who can most truly be accounted brave is he who best knows the meaning of what is sweet in life and what is terrible, and then goes out undeterred to meet what is to come.¹¹⁷

Perhaps the passage from Thucydides that best captures what Brandeis esteemed in the Athenians comes not from the Funeral

113. A. ZIMMERN, *THE GREEK COMMONWEALTH: POLITICS AND ECONOMICS IN FIFTH-CENTURY ATHENS* (1911).

114. The Funeral Oration has, of course, been interpreted in a variety of ways. For a bibliography of modern interpretations, see West, *A Bibliography of Scholarship on the Speeches in Thucydides 1873-1970*, in *THE SPEECHES IN THUCYDIDES* (P. Stadter ed. 1973). For a useful reminder of the risk of reductionism when speaking of the Greek virtues, see A. MCINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 123-53 (1981).

115. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 147-48 (II, 40-41) (R. Warner trans. 1954).

116. *Id.* at 147.

117. *Id.*

Oration but from a speech of the Corinthians warning the Spartans "what sort of people these Athenians are against whom you will have to fight":¹¹⁸

An Athenian is always an innovator, quick to form a resolution and quick at carrying it out. You, on the other hand, are good at keeping things as they are; you never originate an idea, and your action tends to stop short of its aim. Then again, Athenian daring will outrun its own resources; they will take risks against their better judgment, and still, in the midst of danger, remain confident. But your nature is always to do less than you could have done, to mistrust your own judgment, however sound it may be, and to assume that dangers will last for ever.¹¹⁹

The sentiment is expressed also in a speech from Euripides that Brandeis was fond of quoting:

Thou hast heard men scorn thy city, call her wild
Of counsel, mad; thou hast seen the fire of morn
Flash from her eyes in answer to their scorn!
Come toil on toil, 'tis this that makes her grand.
Peril on peril! And common states that stand
In caution, twilight cities, dimly wise—
Ye know them, for no light is in their eyes!
*Go forth, my son, and help.*¹²⁰

118. *Id.* at 75 (I, 70).

119. *Id.* at 75-76. Although he knew Thucydides's *History* well and this speech is one of its more famous passages, Brandeis left no record I can find that these lines made a particular impression on him. Moreover, despite his well-documented affection for the book, one must be cautious about ascribing to Brandeis sentiments expressed in the *History* because Thucydides employed the expository technique favored by the Sophists of presenting carefully developed opposing speeches. See J. FINLEY, THUCYDIDES 44, 254-61 (1963). Nevertheless, the Speech of the Corinthians is so consonant with the characterization of the Athenian spirit in the Funeral Oration, and also so consistent with Brandeis's general philosophy of life, that one can be confident the Speech accords with his view of what character traits contributed to the success of Athenian democracy during the Age of Pericles. Another example of reference in Thucydides to the quality of initiative is the allusion in the First Speech of Pericles to the daring strategy of Themistocles at the Battle of Salamis. THUCYDIDES, *supra* note 115, at 123 (I, 144). It has been argued that the efforts by Aeschylus, Herodotus, and Thucydides to account for the victory at Salamis by reference to the innovative character of the Athenian citizen represent the origins of Greek political theory. See Euben, *The Battle of Salamis and the Origins of Political Theory*, 14 POL. THEORY 359 (1986).

120. A. MASON, *supra* note 85, at 95 (emphasis in original) (quoting Euripides, *The Suppliant Women*, 11. 320-30). For discussions of the parallels in the thought of Thucydides and Euripides, see DE ROMILLY, THUCYDIDES AND ATHENIAN IMPERIALISM 133-37 (P. Thody

It is this quality of initiative—the willingness to take chances, to persist against the odds, to embark on novel ventures in the face of scorn and risk, to commit oneself—that provides the essential connection between Brandeis's regard for Athenian democracy, his emphasis in the *Whitney* opinion on the virtue of courage, and his lasting impact on first amendment thought.

The importance Brandeis attached to initiative can hardly be overstated. During his career as a progressive reformer he devised and fought to implement a remarkable number of creative solutions to seemingly entrenched problems.¹²¹ He also made a fortune, and appeared to suffer no guilt about that fact despite his detestation of economic privilege and genuine concern for the common man.¹²² One of his favorite essays was "Self-Reliance" by Ralph

trans. 1963); Finley, *Euripides and Thucydides*, 49 CLASSICAL PHILOLOGY 23 (1938), reprinted in J. FINLEY, THREE ESSAYS ON THUCYDIDES (1967). Brandeis's attitude toward risk is further illustrated by an anecdote relating to his assumption of leadership in the American Zionist movement:

In 1915 a group of young lawyers frankly told Brandeis that they could not understand how he could assume the risk of a struggle the end of which could not be foreseen. Brandeis in response pointed out that he had warned them of that risk. But just because there was risk and doubt as to the outcome of the adventure, he had chosen to take his place in the Jewish ranks.

J. DE HAAS, LOUIS D. BRANDEIS: A BIOGRAPHICAL SKETCH 75 (1929).

121. His reform proposals covered a wide range of activities: municipal transit, employee life insurance, utility rate formulas, competition and efficiency in the railroad and shoe machinery industries, labor relations in the garment trades, scientific management of the retailing business, Alaskan land development, tariff reduction, worker participation in management. The most comprehensive account of Brandeis's efforts as a reformer remains that of A. MASON, *supra* note 85, at 99-464. To the regret of his admirers, myself included, Brandeis's reform initiatives did not cease after he donned his judicial robes. See B. MURPHY, THE BRANDEIS-FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982).

122. In 1940, a year before his death, Brandeis's investments totalled more than \$3 million. By then he also had made gifts of close to \$1.5 million to various charities, causes, and friends. He inherited only about \$70,000 from his parents. See A. MASON, *supra* note 85, at 691-92. On his attitude toward his wealth see P. STRUM, *supra* note 81, at 42-53. Brandeis's antagonism toward economic privilege, as contrasted with economic productivity, was a guiding force in his life. See *id.* at 62, 65, 159-60, 213-14. His respect for persons of modest station in life should not be doubted, despite his own refined tastes and somewhat aloof demeanor. He considered his scheme to make meaningful life insurance available to laborers as perhaps his greatest achievement. See *id.* at 90-91. His interest in Zionism can be traced to the powerful emotions aroused in him when for the first time he commingled over an extended period with working class Jews during his effort to settle a strike in the garment industry. See *id.* at 232. One of his favorite passages of Euripides was these lines from *The Bacchae*:

Waldo Emerson, which consists largely of a plea for individual initiative.¹²³ The political creed for which Brandeis is best known is well encapsulated by the title of one of his books, *The Curse of Bigness*.¹²⁴ All his life he railed against and resisted the modern trend toward larger units of business and governmental organization.¹²⁵ His major concern was that bureaucracy breeds caution and stifles initiative.¹²⁶ It is no wonder he found special meaning in those writings that emphasize the innovative quality of Athenian civic life.

Read against this background, two sentences of the *Whitney* opinion emerge as particularly important: "Those who won our independence by revolution were not cowards. They did not fear political change."¹²⁷ To Brandeis, the measure of courage in the civic realm is the capacity to experience or anticipate change—even rapid and fundamental change—without losing perspective or confidence. Assessments of the benefits and risks of unregulated dis-

And avert thine eyes from the lore of the wise,
That have honor in proud men's sight.
The simple, nameless herd of Humanity
Hath deeds and faith that are true enough for me!

A. MASON, *supra* note 85, at 644.

123. See SELECTIONS FROM RALPH WALDO EMERSON 147 (S. Whicher ed. 1960). On Brandeis's regard for the essay, see A. MASON, *supra* note 85, at 39.

124. L. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (O. Fraenkel ed. 1934).

125. See *id.* at 351-62; P. STRUM, *supra* note 81, at 339-53.

126. His feelings on this point are well summarized in a closing argument he gave during an investigation he led into corruption in the Department of the Interior:

With this great government building up, ever creating new functions, getting an ever-increasing number of employees who are attending to the people's business, the one thing we need is men in subordinate places who will think for themselves and who will think and act in full recognition of their obligations as a part of the governing body. . . . We want men to think. We want every man in the service, of the three or four hundred thousand who are there, to recognize that he is a part of the governing body, and that on him rests responsibility within the limits of his employment just as much as upon the man on top. They cannot escape such responsibility. . . . They cannot be worthy of the respect and admiration of the people unless they add to the virtue of obedience some other virtues—the virtues of manliness, of truth, of courage, of willingness to risk positions, of the willingness to risk criticisms, of the willingness to risk the misunderstandings that so often come when people do the heroic thing.

A. MASON, *supra* note 85, at 281.

127. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

cussion are certain to be affected by what general disposition the decisionmaker has toward the phenomenon of change. The courageous attitude, Brandeis asserts, is that of receptivity to new arrangements and new ways of thinking. Progress, the value literally at the root of the progressive philosophy, depends on receptivity to change. And while speech no doubt contributes directly to change by ventilating grievances and reform proposals, the freedom of speech may be most valuable for its indirect effect, salutary even if subtle, on public attitudes toward change. Those attitudes largely determine how the political community responds to the grievances and reforms that are ventilated. Not just judges but all of us need to be emancipated from "the bondage of irrational fears"¹²⁸ as we encounter unsettling proposals for political change. The essence of civic courage is a healthy mentality regarding change.

Still, the link between the Brandeisian ideal of civic courage and contemporary first amendment doctrine is not obvious. Even if it were, moreover, we could not be certain that Justice Brandeis's articulation of the ideal in *Whitney* is a necessary element of that link. Brandeis was not the first person to think about free speech in terms of its impact on the character traits of the citizenry.¹²⁹ Nor was Brandeis the first person to equate tolerance with courage and censorship with cowardice.¹³⁰ Why then should we consider the *Whitney* opinion one of the turning points in the history of first amendment adjudication?

There are two bases for skepticism here, and I would like to address them one at a time. First, the connection between civic courage and contemporary doctrine is not entirely recondite; surely some probative value attaches to the fact that the Court has invoked the ideal of civic courage at critical junctures in the doctrine-building experience.¹³¹ In addition, the adjudicative significance of the idea of civic courage is partly a function of the

128. *Id.* at 376.

129. See, e.g., Dewey, *Conscription of Thought*, *supra* note 96, at 129-30.

130. See, e.g., Beard, *The Great American Tradition*, *supra* note 96, at 8; *infra* note 140 (John Milton).

131. See *supra* note 107. Probably the four most significant instances of this phenomenon are *Cohen v. California*, 403 U.S. 15, 24 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689 (1959); *Bridges v. California*, 314 U.S. 252, 270, 273 (1941).

inability of other free speech rationales to account fully for the doctrinal pattern that has developed over the past sixty years. I am convinced that several features of contemporary first amendment doctrine could not have evolved as they have without the push they received from the ideal of engaged, confident, innovative citizenship around which Brandeis constructed his opinion in *Whitney*.

Take, for example, the proposition that no idea, whatever its message and whatever its history, can be considered as a general matter to be too evil or too dangerous to be voiced freely in public debate.¹³² It is straining to defend this proposition by claiming that the harms that ensue when receptive listeners are persuaded by certain messages are inevitably outweighed by the benefits those messages bestow. Perhaps the harms caused by predictable abuses of the authority to censor might justify an unqualified principle against prohibitions of ideas, but one wonders if the slope is really so slippery that *all* ideas must be immune from censorship. The ideal of civic courage provides much-needed reinforcement for the principle that no idea can be banished from public debate. As Meiklejohn put it, in language that seems to echo the *Whitney* opinion: "To be afraid of ideas, any idea, is to be unfit for self-government."¹³³ The experience of contending openly against truly evil and dangerous ideas makes us a stronger, more vital political community. The potential benefits of that experience justify the risk, not always negligible, that the evil ideas may for a time cause harm.

Another core proposition of modern first amendment doctrine is that speech on public issues cannot be regulated solely because of its intemperate, misleading, or unfair quality.¹³⁴ The Supreme Court has gone so far as to legitimate exaggeration and vilification.¹³⁵ The arguments for this proposition that rest on a balancing of consequences and a fear of government overreaching are con-

132. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Kingsley Int'l Pictures*, 360 U.S. at 688-89.

133. A. MEIKLEJOHN, *supra* note 108, at 28.

134. See *Papish v. Board of Curators*, 410 U.S. 667-670 (1973) (per curiam); *Mills v. Alabama*, 384 U.S. 214, 218-20 (1966); *Bridges*, 314 U.S. at 270-71; *New York Times*, 376 U.S. at 270-71.

135. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

vincing to a degree, but the ideal of civic courage provides the strongest justification for the principle that individual listeners, not the state, must determine the boundaries of communicative acceptability. That allocation of authority, in the words of Justice Harlan, "will ultimately produce a more capable citizenry."¹³⁶

A third example of the resolving power of the ideal of civic courage is the doctrine of prior restraint.¹³⁷ There are, of course, functional reasons why the regulation of speech prior to its initial dissemination may be viewed as especially problematic.¹³⁸ But the functional argument against prior restraint has been challenged.¹³⁹ The most powerful critique of prior restraint remains that of John Milton, and he emphasized how regulation in advance reflects a cautious, cowardly, unimaginative mentality.¹⁴⁰ It is an affirmation of civic courage to permit a communication to proceed that may eventually be ruled illegal, to accept the risk of its interim consequences until legal sanctions can be applied on the basis of actual events rather than anxious predictions.

The illustrations could be proliferated but the point should be clear. Character provides a benchmark for interpretation that can supplement constitutional analysis based on consequences, histori-

136. *Cohen v. California*, 403 U.S. 15, 24 (1971).

137. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697 (1931).

138. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

139. See, e.g., Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

140.

When a man hath been laboring the hardest labor in the deep mines of knowledge, hath furnished out his findings in all their equipage, drawn forth his reasons as it were a battle ranged, scattered and defeated all objections in his way, calls out his adversary into the plain, offers him the advantage of wind and sun, if he please, only that he may try the matter by dint of argument, for his opponents then to skulk, to lay ambushments, to keep a narrow bridge of licensing where the challenger should pass, though it be valor enough in soldier-ship, is but weakness and cowardice in the wars of truth.

J. MILTON, *supra* note 91, at 199. See *id.* at 167, 177-78, 181-82, 186, 188-89, 200, 202-03.

cal commitments, or notions of conceptual coherence.¹⁴¹ We think differently about free speech issues than we otherwise would because of the ideal of civic courage. The lure of that ideal has proved strong, in part because it represents something all too rare in our modern legal culture: an affirmative vision.

It is not often noticed that most of the ideas that underlie first amendment doctrine are negative in nature. Recall the fatalism of Holmes, expressed in the passage from his *Gitlow* opinion discussed earlier¹⁴² and also in his oft-quoted opinion in *Abrams v. United States*.¹⁴³ "[T]ime has upset many fighting faiths," he said, as he offered a test of truth that borders on the cynical.¹⁴⁴ Apathy, fatalism, skepticism, relativism, noblesse oblige, fear of the slippery slope, distrust of government, the need for countervailing power, the object lessons of McCarthyism—these are the ideas that have dominated the building of our first amendment tradition. The *Whitney* opinion strikes perhaps the most positive note in the entire tradition.

The very fact, however, that the ideal of civic courage occupies a distinctive place in the first amendment tradition underscores the second reservation one might have regarding the significance of the opinion. Is it not likely that an idea with such deep roots in Western political thought would somehow have worked its way into the doctrinal fabric without the contribution of Brandeis? If the character ideal of civic courage was not a novel idea when he wrote, why is Justice Brandeis's opinion so important? The answer, I believe, can be captured in two words: conviction and credibility. As befits the work of a consummate lawyer, it is the opinion's persuasiveness, not its originality, that accounts for its stature.

Others before Brandeis may have expressed the view that fear threatens democracy far more than subversion. Predecessors may have alluded to the notion of civic courage. But no one, not even Milton, had managed to convey so forcefully the conviction that

141. For a view of the first amendment that emphasizes the role of character, see L. BOLLINGER, *THE TOLERANT SOCIETY* (1986). The character ideal that informs Bollinger's theory is, however, quite different from Brandeis's ideal of civic courage.

142. See *supra* text accompanying note 65.

143. 250 U.S. 616 (1919).

144. *Id.* at 630 ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

the essential character of a political community is both revealed and defined by how it responds to the challenge of threatening ideas. And no one previously had expounded the ideal of civic courage in a way that integrates such seemingly divergent virtues as confidence, humility, ingenuity, historical perspective, love of country, distrust of government, concern for the common good, and self-reliance. That Brandeis was able to do so convincingly in a short space is a tribute not only to his eloquence but also to the fact that civic courage meant so much to him.

The eloquence of the *Whitney* opinion is of a special sort. In the apt characterization of one experienced observer, the opinion contains "what may well be the most powerful judicial rhetoric of this century, emanating from a Justice not given to flights of eloquence."¹⁴⁵ Brandeis's prose does not display the lyrical grace that Holmes commanded, or the dazzling word selection that Cardozo employed. "Men feared witches and burnt women"¹⁴⁶ is a sentence that speaks volumes and certainly sticks in the mind, but not because of the flow or lilt of its language. What makes Brandeis's writing eloquent is its simplicity. His crisp, unadorned cadence bespeaks a depth of conviction seldom encountered in legal discourse. The *Whitney* opinion is not so much an argument as a testament.

It is a credible testament because it comes from a man whose idealism had nothing whatever to do with escapism, ignorance, or inexperience. Here was a man who had spent most of his long professional life in the trench warfare of reform politics, a man who had read voraciously and with a critical intelligence that was legendary. And still, in an opinion that can only be described as a profoundly personal statement, he affirms a belief in the possibility of democracy and in the positive value of the freedom of speech. He considers civic courage an ideal worth pursuing even in the modern age.

That is a judgment that remains controversial. However much we may admire the ancient Greeks, why should we believe that the character traits most important to the success of Athenian polis in the decades preceding the Peloponnesian War are the traits most needed in a bureaucratic society of over 250 million people? It is

145. Pollak, *supra* note 34, at 8-9.

146. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

possible to argue that the continuing demographic and technological developments triggered by the industrial revolution make Brandeis's overriding concern for individual initiative quixotic.¹⁴⁷ Should not our view of the freedom of speech now focus on groups, institutional dynamics, aggregate incentive structures, and control of the channels of mass communication? One could even turn the idea of civic courage against Brandeis: a healthy mentality regarding change should lead us to adjust our understanding of the first amendment to take account of the collective nature of modern life.

The point is intriguing but to me not convincing. Plainly first amendment theory cannot afford to ignore the size, interdependence, and impersonality of the modern political community. But this realization hardly means that the individual must now occupy a subordinate position in the constitutional order. Adaptation has a crucial role to play in constitutional law but so too does preservation. The American constitutional tradition is a liberal tradition in the sense that one of its foundational principles has always been the conceptual separation of the individual and the state. To remain vital, that conceptual separation must have a basis in social reality. I believe constitutional theory and doctrine should do more, not less, to promote respect for the individual the more other forces threaten to erode that respect. A society that ceases to value individual initiative is likely to become a society that ceases to be receptive to change. Under any set of social conditions that I can foresee, American democracy will be the poorer to the degree its citizens lack the qualities of confidence, initiative, and openness to change that define the ideal of civic courage. One of the attractive features of the use of a character ideal as a constitutional norm is that the values encompassed tend to be among the most enduring, the least contingent on changing social facts, of the various values that might inform constitutional interpretation.

Whatever its significance in the long run, the ideal of civic courage made a difference in 1927. A month after the Supreme Court decision was announced, Governor C.C. Young of California granted Anita Whitney an executive pardon. In a paper explaining his decision, the Governor said it would be unthinkable to punish

147. For a thoughtful criticism in this vein directed to Brandeis's economic and social philosophy, see T. McCRAW, *PROPHETS OF REGULATION* 80-142 (1984).

Ms. Whitney as a criminal for the political activities in which she had engaged.¹⁴⁸ He characterized the freedom of speech as the "indispensable birthright of every free American."¹⁴⁹ He then invoked the reasoning of the Brandeis opinion and quoted at length several of its memorable passages.

148. The Governor's report is reprinted in *The Pardon of Anita Whitney*, *supra* note 16, at 310-11. Her eight-year battle with the Criminal Syndicalism Act apparently had no adverse effect on Anita Whitney's indomitable political spirit. In July 1929 she was arrested for violation of a California law making it a felony to display a red flag as a symbol of opposition to government. *Ten Arrested in Outburst Directed at Chinese Consul*, San Francisco Chron., July 28, 1929, at 1, col. 1. The Supreme Court subsequently held California's red-flag law unconstitutional in *Stromberg v. California*, 283 U.S. 359 (1931). In 1935 Ms. Whitney was convicted of having "certified signatures to election petitions of persons who had not signed them in her presence." *Nephew Saves Anita Whitney From Jail Cell*, San Francisco Chron., Dec. 11, 1935, at 9, col. 4. She had planned, at age 68, to serve 300 days in prison rather than accede to the \$600 fine imposed, but was spared the experience when her nephew prevailed on the authorities to let him pay the fine. *Id.*

149. *The Pardon of Anita Whitney*, *supra* note 16, at 312.