

**BRANDENBURG V. STATE OF OHIO:  
AN “ACCIDENTAL,” “TOO EASY,” AND “INCOMPLETE”  
LANDMARK CASE**  
SUSAN M. GILLES\*

I. BACKGROUND

*A. The Meeting and the Conviction*

On June 28, 1964, Clarence Brandenburg held a Ku Klux Klan rally on a farm in rural Hamilton County, Ohio.<sup>1</sup> He invited a Cincinnati television reporter, whose film of the Klan meeting was televised both locally and nationally.<sup>2</sup> The film showed twelve hooded figures, some carrying firearms, gathered around a burning cross, muttering words of racial hatred and veiled threats.<sup>3</sup> Then Brandenburg, in Klan robes, spoke to the group of armed Klansmen.<sup>4</sup> Brandenburg announced that it was “an organizers’ meeting,” and asserted that “[t]he Klan has more members in the State of Ohio than does any other organization.”<sup>5</sup> Then he uttered his threat: “We’re not a revengent organization, but if our President, our Congress,

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<sup>1</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969); Brief for Appellant at 4, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (No. 492) (“The events upon which the conviction was based were depicted at trial in two films that were offered into evidence by the state. The announcer-reporter who helped make the film testified that he had received a telephone invitation from an unknown party to appear at a rally, identified to him as a Ku Klux Klan meeting to be held on private property. He testified that on June 28, 1964 he helped make a sound film of portions of the meeting for showing on television with the consent and cooperation of the persons participating.”) (internal citations omitted).

<sup>2</sup> *Brandenburg*, 395 U.S. at 445.

<sup>3</sup> *See id.* at 445–46 & n.1. The film recorded muttered racist threats including: “This is what we are going to do to the niggers”; “Send the Jews back to Israel”; “Bury the niggers”; “Freedom for the whites”; and “Nigger will have to fight for every inch he gets from now on.” *Id.* at 446 n.1.

<sup>4</sup> *Id.* at 445–46.

<sup>5</sup> *Id.* at 446.

our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."<sup>6</sup> He added that the group was planning a large march ("four hundred thousand strong") on July 4th, some six days later, on Congress, and from thence to Florida and Mississippi.<sup>7</sup>

The State of Ohio indicted Brandenburg under Ohio's Criminal Syndicalism Act and charged him with advocating the propriety of violence "as a means of accomplishing . . . political reform."<sup>8</sup> The prosecution's case seemed airtight. The State introduced the film of the meeting, testimony identifying Brandenburg as the hooded speaker, several guns, and the red Klan hood worn by Brandenburg.<sup>9</sup> Brandenburg was convicted by a jury, fined \$1000, and sentenced to one to ten years in prison.<sup>10</sup> Brandenburg appealed, arguing that Ohio's Criminal Syndicalism Act violated the First and Fourteenth Amendments, but the Ohio courts rejected his challenge.<sup>11</sup>

#### *B. The Supreme Court's Opinion*

The United States Supreme Court reversed, and in a unanimous, per curiam opinion, held Ohio's statute unconstitutional: "[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy . . . . Such a statute falls within the condemnation of the First and Fourteenth Amendments."<sup>12</sup>

The Court distinguished between "advocacy," which was constitutionally protected, and "incitement to imminent lawless action,"

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* A second film segment showed Brandenburg making the same speech, although this time he omitted the call for revenge, and instead closed with: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." *Id.* at 447.

<sup>8</sup> *Id.* at 444–45 (quoting OHIO REV. CODE ANN. § 2923.13 (West 1964) (repealed 1974)). The first count charged that Brandenburg "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform." *Id.* at 449 n.3. "The second count charged that [Brandenburg] 'did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism.'" *Id.*

<sup>9</sup> *Id.* at 445.

<sup>10</sup> *Id.* at 444–45.

<sup>11</sup> *Id.* at 445. The Ohio Supreme Court dismissed *sua sponte*, concluding that "no substantial constitutional question exists herein." *Id.*

<sup>12</sup> *Id.* at 449.

which was not.<sup>13</sup> In the Court's view, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."<sup>14</sup> The First Amendment barred states from punishing "advocacy of the use of force or of law violation except where such advocacy [1] is directed to inciting or producing imminent lawless action and [2] is likely to incite or produce such action."<sup>15</sup>

Applying this new test, the Court easily struck down Ohio's statute on its face because the statute did not require a showing of *intent* to incite imminent lawless action, nor a showing that imminent lawless action was *likely to result*.<sup>16</sup> It was equally obvious that Brandenburg's conduct did not constitute incitement.<sup>17</sup> Although Brandenburg did state that "there might have to be some revengeance taken" against the President, Congress, and the Supreme Court,<sup>18</sup> his advocacy failed both prongs of the newly announced test. It is far from clear that Brandenburg intended to incite imminent lawless action; he only talked of "possible" revenge and advocated a march on Washington some six days later.<sup>19</sup> His intent seemed to be to gain television coverage for his group's hateful belief, rather than to advocate for any violent crimes that night. Equally, the record revealed almost no evidence of likely effect. Although some of the group had guns,<sup>20</sup> to paraphrase a famous quote from Justice Holmes, nobody can suppose that a silly hateful speech by an unknown man would present any immediate danger to the President, Congress, or the Supreme Court.<sup>21</sup> Brandenburg's conviction was reversed.<sup>22</sup>

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<sup>13</sup> *Id.* at 447–49.

<sup>14</sup> *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

<sup>15</sup> *Id.* at 447.

<sup>16</sup> *See id.* at 448–49.

<sup>17</sup> *Id.* (holding that the statute was unconstitutional on its face and "as applied").

<sup>18</sup> *Id.* at 446.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* at 445.

<sup>21</sup> *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.").

<sup>22</sup> *Brandenburg*, 395 U.S. at 449.

## II. WHY IS *BRANDENBURG* A “LANDMARK” CASE?

I suggest three reasons why *Brandenburg* is seen as a landmark case and then discuss if that status is fully deserved. *Brandenburg* is a celebrated case, first and foremost, because of its startling commitment to free speech. In *Brandenburg*, the Court declared that the state may not punish those who advocate the end of the state, even those who advocate its violent end.<sup>23</sup> As scholar Anthony Lewis put it, “*Brandenburg v. Ohio* gave the greatest protection to what could be called subversive speech that it has ever had in the United States, and almost certainly greater than such speech has in any other country.”<sup>24</sup>

Secondly, *Brandenburg* is famous for abandoning the “clear and present danger” test, a test so famous that it has the dubious honor of having a bad movie named after it.<sup>25</sup> First coined by Justice Holmes in *Schenck v. United States*,<sup>26</sup> the clear and present danger test is rightly famous. The early opinions in which the justices struggled to formulate this test heralded the beginnings of First Amendment protection and contained some of the most eloquent defenses of free speech.<sup>27</sup> Yet, as is

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<sup>23</sup> *Id.* at 447–49. See Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 682–704 (2009); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1161–1166 (1982), for succinct discussions of whether advocacy of unlawful conduct is worthy of constitutional protection.

<sup>24</sup> ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 236 (1991). See also Lyrissa Barnett Lidsky, *Brandenburg and the United States’ War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1010 (2002) (“*Brandenburg* thus spreads a broad mantle of protection over the speech of radical political dissidents from even the most despised groups in society.”); Marc Rohr, *Grand Illusion? The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 3 (2002) (labeling the *Brandenburg* test as “so extraordinarily speech-protective”).

<sup>25</sup> CLEAR AND PRESENT DANGER (Paramount Pictures 1994).

<sup>26</sup> 249 U.S. 47, 52 (1919). Writing for the Court, Justice Holmes declared that not all words advocating the overthrow of government were unprotected speech; rather, “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” *Id.*

<sup>27</sup> Numerous works trace this history. Classic accounts include: ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920); SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* (1956); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN L. REV. 719 (1975); and David  
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widely acknowledged, the clear and present danger test proved remarkably ineffective at protecting speakers.<sup>28</sup> At its weakest, in the hands of Chief Justice Vinson in *Dennis v. United States*,<sup>29</sup> the Court used the test to uphold convictions for reading and discussing the works of Stalin, Marx, Engels, and Lenin,<sup>30</sup> “books that are now a regular part of many college courses.”<sup>31</sup> Even at its strongest, in *Whitney v. California*<sup>32</sup> (where Justice Brandeis, joined by Justice Holmes, concurred), the test justified the conviction of Anna Whitney, who spoke at a meeting to organize a branch of the Communist Labor Party, even though she advocated a moderate position.<sup>33</sup> Part of *Brandenburg*’s claim to fame then, is that it ended the reign of the clear and present danger test.<sup>34</sup>

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M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983). See Redish, *supra* note 23, at 1166–73, for a shorter summary of the Court’s evolution of the clear and present danger test.

<sup>28</sup> See Lidsky, *supra* note 24, at 1026 (“The clear and present danger test, upon which the *Brandenburg* incitement standard is based, was used to suppress the speech of communists, socialists, and other radicals more often than it was used to protect them.”); Redish, *supra* note 23, at 1166 (“[T]he test was originally used to justify results highly restrictive of free speech interests.”); Rohr, *supra* note 24, at 5 (noting that the clear and present danger test “enjoyed a checked career” and was never “employed by a majority of the Court in favor of a radical speaker being prosecuted for seditious advocacy”); Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 24 (2000) (“Holmes continued his willingness to send protestors to jail for the mere bad tendencies of their speech . . . before undergoing something in the nature of a legal conversion experience in *Abrams v. United States*.”).

<sup>29</sup> 341 U.S. 494 (1951). As phrased by Chief Justice Vinson, the test asked if the “‘gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.’” *Id.* at 510 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)). Even those who support the clear and present danger test, condemn this deferential version. See, e.g., Redish, *supra* note 23, at 1173.

<sup>30</sup> See *Dennis*, 341 U.S. at 516–17, 582.

<sup>31</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 997 (3d ed. 2006).

<sup>32</sup> 274 U.S. 357 (1972).

<sup>33</sup> *Id.* at 373, 380 (Brandeis, J., concurring). See Vincent Blasi, *The First Amendment and the Idea of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988), for a wonderful essay on the background of this case and an analysis of Brandeis’ famous opinion.

<sup>34</sup> Some scholars characterize *Brandenburg* as rejecting the clear and present danger test, while others argue that it was merely a refinement. See, e.g., Healy, *supra* note 23, at 711 (“*Brandenburg*, of course, is the modern version of the clear and present danger test.”);

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Finally, *Brandenburg* is famous for the test it created—one remarkably protective of speech. There are three core components to the *Brandenburg* test: intent, likelihood, and imminence.<sup>35</sup>

#### A. Intent Requirement

Under *Brandenburg*, the state must show *both* wrongful intent and likely resulting harm.<sup>36</sup> Although the opinion uses the language “advocacy is *directed to* inciting or producing imminent lawless action,”<sup>37</sup> this has

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Lidsky, *supra* note 24, at 1019 (viewing the clear and present danger test as the linguistic antecedent of *Brandenburg*); Redish, *supra* note 23, at 1185 (arguing that *Brandenburg* is “simply a protectionist version of clear and present danger”); Bernard Schwartz, *Justice Brennan and the Brandenburg Decision—A Lawgiver in Action*, 79 JUDICATURE 24, 29 (1996) (concluding that *Brandenburg* substitutes an “entirely new test”); Smolla, *supra* note 28, at 12 (“*Brandenburg* is the capstone of the evolution . . . of the ‘clear and present danger’ test . . .”).

<sup>35</sup> Different authors delineate these requirements differently. See, e.g., CHEMERINSKY, *supra* note 31, at 999 (listing the requirements as “imminent harm, a likelihood of producing illegal action, and an intent to cause imminent illegality”); Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, & Free Speech*, 80 NOTRE DAME L. REV. 1287, 1329 (2005); Daniel T. Kobil, *Advocacy on Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 235–36 (2000) (reading *Brandenburg* as requiring “three things: (1) Did the speaker advocate unlawful conduct? (2) Did the speaker urge that violation of the law occur immediately? and, (3) Was the immediate law violation likely to occur?”); Lidsky, *supra* note 24, at 1018 (concluding that the state must prove “(1) intent to incite another; (2) to imminent violence; and (3) in a context that makes it highly likely that such violence will occur”); Rohr, *supra* note 24, at 14–25 (listing several other scholars’ versions of the test); Elisa Kantor, Note, *New Threats, Old Problems: Adhering to Brandenburg’s Imminence Requirement in Terrorism Prosecutions*, 76 GEO. WASH. L. REV. 752, 763 (2008) (summarizing *Brandenburg* as allowing punishment of advocacy only “if the defendant (1) expressly advocated illegal action, (2) called for immediate illegal action, and (3) such immediate action was likely to occur”). The version used here is closest to that of Professor Smolla, who posits that:

The Court’s statement . . . appeared to contain three constituent elements: (1) intent (embodied in the requirement that such speech to be ‘directed to inciting or producing’ lawless action); (2) imminence (embodied in the phrase ‘imminent lawless action’); and (3) likelihood (embodied in the phrase ‘and is likely to incite or produce such action’).

Smolla, *supra* note 28, at 10.

<sup>36</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>37</sup> *Id.* (emphasis added).

been read as stating an *intent* to incite requirement.<sup>38</sup> As Professor Chemerinsky noted, “None of the earlier tests had contained an intent requirement.”<sup>39</sup> Thus, *Brandenburg* protects the “accidental” inciter—the speaker whose language triggers a riot, but who had no intent to incite such lawlessness.<sup>40</sup>

### B. Likelihood Requirement

*Brandenburg* also demands that the state show the speaker’s advocacy is “likely to incite or produce such action.”<sup>41</sup> As Judge Posner has pointed out, this language requires that the advocacy *must bring about*, rather than *merely try to stir up*, unlawful conduct.<sup>42</sup> Under this requirement, the “ineffective” inciter is protected—no matter how much the speaker desires to trigger imminent lawless action, if the speech is unlikely to produce such a result, the speech is protected.<sup>43</sup>

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<sup>38</sup> See Healy, *supra* note 23, at 711 (“[M]ost courts and scholars have interpreted ‘directed’ to mean ‘intended . . .’”); see also Smolla, *supra* note 28, at 10.

<sup>39</sup> CHEMERINSKY, *supra* note 31, at 999; see also Healy, *supra* note 23, at 665; Redish, *supra* note 23, at 1178. Even at its strongest, (in the hands of Justice Brandeis in his *Whitney* concurrence or Justice Holmes in his *Abrams* dissent), the clear and present danger test allowed recovery if the state could show *either* present danger *or* intent. See *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (opining speech was protected “unless speech would produce, *or* is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent”) (emphasis added); and *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (arguing that the state could constitutionally punish speech if the state could show *either* “the present danger of immediate evil *or* an intent to bring it about”) (emphasis added).

<sup>40</sup> Healy, *supra* note 23, at 701–02 (noting that *Brandenburg*’s requirement of intent protects speakers who are only negligent or reckless).

<sup>41</sup> *Brandenburg*, 395 U.S. at 447. See CHEMERINSKY, *supra* note 31, at 999 (commenting that none of the prior decisions “ever had so clearly stated a requirement for a likelihood of imminent harm”); Healy, *supra* note 23, at 665. The meaning of “likely” has been the subject of scholarly debate. See sources cited *infra* note 74 and accompanying text.

<sup>42</sup> Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 516 (1994); see also Schwartz, *supra* note 34, at 28 (quoting Posner and making the distinction between bringing about and stirring up unlawful conduct).

<sup>43</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 849 (2d ed. 1988) (noting that *Brandenburg* protects the “harmless inciter”); Redish, *supra* note 23, at 1178.

### C. Imminence Standard

Finally, although Justices Holmes and Brandeis had previously used the terms “imminent” and “immediate,”<sup>44</sup> *Brandenburg* makes imminence a key component.<sup>45</sup> The test demands “temporal imminence.”<sup>46</sup> Four years after the *Brandenburg* decision, in *Hess v. Indiana*,<sup>47</sup> the Court reversed the conviction of an anti-Vietnam war protestor who, after police had cleared demonstrators to the sidewalk, shouted, “We’ll take the fucking street later.”<sup>48</sup> The Court, again per curiam, held that Hess’s words “amounted to nothing more than advocacy of illegal action at *some indefinite future time*.”<sup>49</sup> Most commentators reasoned that, post-*Hess*, a delay of mere hours was insufficient to meet the imminence requirement.<sup>50</sup>

These three requirements (i.e., intent, likelihood, and imminence) make the *Brandenburg* test in Professor Gunther’s words “the most speech-protective standard yet evolved by the Supreme Court.”<sup>51</sup> The strength of the test is proven by its results: In each and every case in which the Court applied the *Brandenburg* test (*Brandenburg*, *Hess*, and *NAACP v. Clairborne Hardware Co.*<sup>52</sup>), the Court reversed the speaker’s

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<sup>44</sup> See *Whitney*, 274 U.S. at 376, 379 (Brandeis, J., concurring) (referring to “immediate” unlawful action and asking if the danger was “imminent”); *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting) (asking if the speech was “intended to produce a clear and imminent danger”). See also Smolla, *supra* note 28, at 22–28 (tracing the evolution of *Brandenburg*’s imminence requirement and opining that it was present only as a “nominal” element in these early cases).

<sup>45</sup> S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1194 (2000) (arguing that imminence is the “central focus of the test”); Smolla, *supra* note 28, at 22 (“The imminence requirement is by far the most imposing component of *Brandenburg*.”); Kantor, *supra* note 35, at 766 (“Under *Brandenburg*, the imminence requirement is key to the robust protection of free speech.”).

<sup>46</sup> Redish, *supra* note 23, at 1176.

<sup>47</sup> 414 U.S. 105 (1973).

<sup>48</sup> *Id.* at 106–09.

<sup>49</sup> *Id.* at 108 (emphasis added).

<sup>50</sup> See Healy, *supra* note 23, at 667, 681 (summarizing the view that imminence in *Hess* means “a few hours”); Rohr, *supra* note 24, at 12 (noting that *Hess* has been read as requiring a delay of “several hours (at most)”). The meaning of “likely” has been the subject of scholarly debate. See sources cited *infra* note 74 and accompanying text.

<sup>51</sup> Gunther, *supra* note 27, at 755. See also *supra* note 24 and accompanying text.

<sup>52</sup> 458 U.S. 886 (1982). Here, the Court overturned a conviction of Charles Evers, the leader of a black boycott of white businesses in Mississippi. *Id.* at 888–90, 934. Although  
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conviction.<sup>53</sup> Thus, *Brandenburg* is justly seen as a landmark case because it demands we protect subversive speech, it abandons the *infamous* clear and present danger test, and it adopts a highly, speech-protective test.

### III. AN “ACCIDENTAL,” “TOO EASY,” AND “INCOMPLETE” LANDMARK CASE?

Although *Brandenburg* is a landmark case, it is an accidental, too easy, and incomplete landmark. These flaws demand our attention, as much as *Brandenburg*'s strengths.

#### A. An “Accidental” Landmark Case

When you read the *Brandenburg* opinion, it seems a very “odd” landmark case. It is a *per curiam* opinion—an opinion to which no justice lent his name.<sup>54</sup> The opinion also lacks any of the eloquent rhetoric seen in many of the Court’s iconic free speech cases. But, most remarkably, the *Brandenburg* opinion fails to offer any explanation of why subversive advocacy should be protected.<sup>55</sup> It is devoid of any argument from text, history, or policy.<sup>56</sup> *Brandenburg* may have crafted a standard that

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his speeches had indeed been followed by later acts of violence, the Court held the impassioned speech was protected. *Id.* As the Court put it: “An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause.” *Id.* at 928. Scholars have opined that a different result would have been likely under the Court’s prior clear and present danger test. *See, e.g.*, Schwartz, *supra* note 34, at 29.

<sup>53</sup> *Clairborne Hardware*, 458 U.S. at 929, 934; *Hess*, 414 U.S. at 105, 109; *Brandenburg v. Ohio*, 395 U.S. 444, 444, 449 (1969). However, as Professor Healy noted, the Court failed to decide any case under *Brandenburg* for decades, Healy, *supra* note 23, at 668, and “[m]any courts have been willing to limit its protections to abstract advocacy, and many others have misunderstood its requirements.” *Id.* at 674. *See also* Rohr, *supra* note 24, at 3 (observing that the test “received little clarification in the few subsequent Supreme Court cases,” and that “[l]ower courts, meanwhile, have, to a very considerable extent, applied and interpreted it very narrowly”).

<sup>54</sup> *Brandenburg*, 395 U.S. at 444.

<sup>55</sup> Lidsky, *supra* note 24, at 1025 (noting the *Brandenburg* opinion “does not really discuss” any First Amendment theory).

<sup>56</sup> The Court does seem to offer precedent as support for its rule. *Brandenburg*, 395 U.S. at 447–48. But, as scholars have noted, this argument seems peculiarly weak with the Court citing to *Dennis*, a case that seems entirely contrary to the Court’s new standard. *See* CHEMERINSKY, *supra* note 31, at 999 (calling the Court’s citation to *Dennis* “puzzling”); Healy, *supra* note 24, at 666 (arguing that the opinion’s favorable citation to *Dennis* was “either disingenuous or written by someone who had” not read *Dennis*); Redish, *supra* note (continued)

protected speakers, but it failed to ground that standard in any articulated vision of the First Amendment.

The *Brandenburg* opinion lacks both lofty language and a theoretical basis because it is an “accidental” landmark. As Professor Bernard Schwartz has revealed, the *Brandenburg* opinion was originally drafted by Justice Fortas, but, during the editing process, Justice Fortas stepped down.<sup>57</sup> Justice Brennan stepped in at the last moment, redrafted parts of the opinion, and the Court issued it per curiam.<sup>58</sup> So, the reason no justice’s name is on the opinion is because two justices wrote it. Equally, the reason the opinion lacks either the rhetoric or the reasoning one would expect in a landmark case is because, as originally drafted by Justice Fortas, the *Brandenburg* opinion was not a landmark case.<sup>59</sup> As Professor Schwartz’s research reveals, Justice Fortas’s draft opinion continued to refer favorably to the clear and present danger test.<sup>60</sup> As originally written, *Brandenburg* would have been just one in a long line of cases seeking to apply the clear and present danger test.<sup>61</sup> It was only when Justice Brennan edited the draft that the opinion abandoned all positive references to the clear and present danger test.<sup>62</sup> Equally, Justice Brennan added strength to the *Brandenburg* test itself—demanding a showing that the advocacy be “likely to incite” imminent lawless action.<sup>63</sup> Professor Schwartz concluded that:

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23, at 1175 (characterizing the Court’s citation to *Dennis* as mysterious); Rohr, *supra* note 24, at 7–8 (describing the Court’s use of precedent as “questionable” and “seriously askew”); *cf.* Kobil, *supra* note 35, at 237 n.55 (positing that the Court cited to *Dennis* “for the narrow proposition that earlier decisions of the court utilizing tests less protective of speech—particularly the *Whitney* approach—have been ‘thoroughly discredited’”).

<sup>57</sup> Schwartz, *supra* note 34, at 27–28.

<sup>58</sup> *Id.* at 28.

<sup>59</sup> *Id.* at 27–28 (noting that Justice Fortas’s opinion “would have virtually returned the law to the clear and present danger test as stated by Justice Holmes”).

<sup>60</sup> *Id.* at 28.

<sup>61</sup> Indeed, Justice Fortas’s favorable references to the clear and present danger test had drawn a note from Justice Black refusing to join any opinion that referenced the test. *Id.* (quoting Justice Black’s note to Justice Fortas).

<sup>62</sup> *Id.* But see *supra* note 56 (discussing the Court’s citation to *Dennis*). Justice Black only concurred in the *Brandenburg* opinion on the understanding that it “simply cites *Dennis* . . . , but does not indicate any agreement on the Court’s part with the ‘clear and present danger’ doctrine.” *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969) (Black, J., concurring) (citation omitted).

<sup>63</sup> Schwartz, *supra* note 34, at 28. Fortas had asked if the “advocacy is directed to inciting or producing imminent lawless action and is attended by present danger that such

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It is true that [Brennan's] redraft changed only a small portion of what Justice Fortas had written, but the changes completely altered the nature of the *Brandenburg* opinion, converting it from one that confirmed the clear and present danger test to one that virtually did away with the test as the governing standard in First Amendment cases.<sup>64</sup>

In short, Justice Fortas never saw, and so did not write, *Brandenburg* as a breaking with old law; it was only Justice Brennan's last-minute, subtle changes which made *Brandenburg* a landmark opinion.<sup>65</sup>

#### B. *Brandenburg as an "Easy" Case*

There are two senses in which *Brandenburg* was an "easy" case for the Court. First, as other scholars have noted, the case was easy because Clarence Brandenburg's speech so clearly did not advocate imminent lawless action or present any real threat to government.<sup>66</sup> The Court did not need to explore the issues of "imminence" or "likely" result because Brandenburg's call for "possible revengeance"<sup>67</sup> did not advocate any action at all.<sup>68</sup> The case tells us little about how the standard will work when the Court faces harder facts.

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action may in fact be provoked." *Id.* 27. Thus, Fortas asked if the social conditions existed for lawless action, while Brennan's formulation asked if the advocacy itself would produce or stir up the lawless action. *See id.* at 28.

<sup>64</sup> *Id.* at 28.

<sup>65</sup> Perhaps we should also label the decision a "stealth" opinion. As Professor Schwartz noted, "So far as is known, none of the other justices had any comment on Brennan's changes; perhaps they did not even realize what he had done in the seemingly slight alterations he made." *Id.* at 29. *See also* Rohr, *supra* note 24, at 6 (questioning if the conservative justices "would have knowingly signed on to an opinion that was understood as dramatically changing the law of freedom of speech").

<sup>66</sup> *See* Healy, *supra* note 23, at 666 ("[T]he defendant in *Brandenburg* did not even clearly advocate unlawful conduct . . . the Court could have reversed his conviction on the ground that he had not urged unlawful conduct either now *or* in the future."); Redish, *supra* note 23, at 1175–76 (arguing that in both *Brandenburg* and *Hess*, the defendants' statements were "so clearly not 'advocacy' of anything" that the Court did not need to address imminence); Rohr, *supra* note 24, at 9 ("[T]he *Brandenburg* test was unnecessary to the decision of the *Brandenburg* case.").

<sup>67</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

<sup>68</sup> *See* Healy, *supra* note 23, at 666; Redish, *supra* note 23, at 1176.

The case was too easy in another sense. *Brandenburg* was not decided in a time of national fear, but rather at a “relatively placid point in the nation’s history.”<sup>69</sup> As Judge Posner has put it:

[W]hen the country feels very safe the Justices of the Supreme Court can without paying a large political cost plume themselves on their fearless devotion to freedom of speech and professors can deride the cowardice of the *Dennis* decision. But they are likely to change their tune when next the country feels endangered.<sup>70</sup>

Whether *Brandenburg* is truly a landmark case will surely turn on how well it stands up when faced with tougher facts and tougher times. Many doubt that *Brandenburg* will fare well in current “war on terror,”<sup>71</sup> or even if it applies at all in times of war.<sup>72</sup>

### C. An “Incomplete” Landmark

*Brandenburg* is incomplete in numerous ways. As many have noted, it fails to define the key terms of its test. The opinion lacks any definition of “imminence”: Does it mean a few hours as the Court implied in *Hess*?<sup>73</sup>

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<sup>69</sup> Kantor, *supra* note 35, at 765. See also CHEMERINSKY, *supra* note 31, at 1000; Healy, *supra* note 23, at 660.

<sup>70</sup> Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741 (2002). See generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

<sup>71</sup> Kantor, *supra* note 35, at 765 (“The ‘war on terror’ is the first time the Court’s protective *Brandenburg* standard truly will be tested, and it remains to be seen whether *Brandenburg* will be able to guard free speech during this new period of national insecurity.”); see also, e.g., Healy, *supra* note 23, at 657–60 (questioning if *Brandenburg* “can—or even should—survive” post-9/11 and discussing recent terrorism cases); Lidsky, *supra* note 24, at 1012 (arguing that *Brandenburg* is “unfit for export to many other countries”).

<sup>72</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting) (“The [government’s] power undoubtedly is greater in time of war than in time of peace . . . .”); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 252–54 (2004); Ronald K.L. Collins & David M. Skover, *What is War?: Reflections on Free Speech in “Wartime,”* 36 RUTGERS L.J. 833, 848–53 (2005); Healy, *supra* note 23, at 726–29 (questioning if *Brandenburg* even applies in time of war).

<sup>73</sup> See Redish, *supra* note 23, at 1175 (“The most important question left open by *Brandenburg* is exactly what the Court meant by requiring ‘imminent’ lawless action.”). Redish also advocated a more relaxed standard than that seemingly adopted by the Court.

(continued)

Equally, just how “likely” does “likely to” require?<sup>74</sup> Do these twin requirements of imminence and likelihood vary with the gravity of danger?<sup>75</sup>

*Brandenburg* is also incomplete because it does not tell us what types of speech its test applies to. Scholars have questioned whether *Brandenburg* applies to only public speech (such as town-square advocacy) or also secret meetings.<sup>76</sup> Does it apply when the speaker advocates ordinary crimes (such as tax evasion or murder), or only ideological speech where the speaker advocates the overthrow of government?<sup>77</sup> Does it apply in time of war or terror?<sup>78</sup> What about the so-called “instruction” cases (where the speaker “teaches how to” commit a crime), or the conspiracy cases (where the speaker is charged with conspiring to commit a crime), rather than simply “advocating” for crime?<sup>79</sup> Should *Brandenburg* control tort claims for media inspired

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*Id.* at 1180–81; *see also* Healy, *supra* note 23, at 681, 715–18 (discussing possible meanings of imminent); Rohr, *supra* note 24, at 17.

<sup>74</sup> *See* Healy, *supra* note 23, at 681, 713–15; Smolla, *supra* note 28, at 10 (arguing that “likely” means “more probable than not”).

<sup>75</sup> *See* Healy, *supra* note 23, at 681, 718–22 (discussing whether the gravity of the threatened evil should alter *Brandenburg*’s requirements); Redish, *supra* note 23, at 1179–80.

<sup>76</sup> *See, e.g.,* Healy, *supra* note 23, at 681, 722–26 (discussing *Brandenburg*’s application to private and public speech); Kantor, *supra* note 35, 782 (debating whether *Brandenburg* should apply to “private” speech).

<sup>77</sup> *See* Healy, *supra* note 23, at 722–26 (discussing *Brandenburg*’s application to ideological and non-ideological speech); Redish, *supra* note 23, at 1176 (asking if *Brandenburg* applies to only ideological speech); Rohr, *supra* note 24, at 17 (pointing out that it is unclear whether *Brandenburg* protects solicitations of murder); Smolla, *supra* note 28, at 12–13 (stating that *Brandenburg* attempts “to draw a line between abstract advocacy of violence in the advancement of political and social causes” and “actual incitement”).

<sup>78</sup> *See supra* text accompanying notes 71–72.

<sup>79</sup> Gey, *supra* note 35, 1363–69 (instruction cases); Healy, *supra* note 23, at 669–72 (conspiracy cases); Rohr, *supra* note 24, at 26–29, 32–46 (summarizing lower court cases on solicitation and conspiracy, tax fraud advocacy, and criminal instruction); Smolla, *supra* note 28, at 39–41 (discussing instruction cases); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1107–1108, 1214 (2005) (differentiating crime advocacy and crime facilitating speech and arguing that a different constitutional test should apply). The Supreme Court has declined certiorari in a case raising the instructional speech issue. *See Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., concurring in denial of certiorari).

violence?<sup>80</sup> As one scholar has pointed out, these are all “questions that go to the heart of the *Brandenburg* test . . . [and] must be answered before *Brandenburg* can fulfill its promise . . . .”<sup>81</sup>

I suggest that *Brandenburg* feels incomplete for a different reason—it seemingly focuses on the wrong speech. When reading the facts of *Brandenburg*, the troubling speech is not Brandenburg’s silly call for revenge on Congress; rather, it is the speech of a burning, fiery cross and the Klan’s racist threats to “[b]ury the niggers.”<sup>82</sup> The *Brandenburg* decision feels incomplete because it never addresses this hateful, threatening speech.

My criticism is in many ways unfair. This threatening speech was not before the Court because Brandenburg was only prosecuted for his advocacy of a violent overthrow of government, not his threats to attack others.<sup>83</sup> Additionally, the facts did not present the issue of intimidating threats towards others: The cross burning and muttered threats occurred on a private farm, and the only persons present were apparently the TV reporters and a dozen Klansmen, none of whom were threatened or intimidated.<sup>84</sup>

However, in 2003, in *Virginia v. Black*,<sup>85</sup> a fractured Court returned to the issue that hovered in the background in *Brandenburg*: the

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<sup>80</sup> See David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002) (arguing tort law, and not incitement, should be the starting point for analyzing media inspired violence cases); Malloy & Krotoszynski, *supra* note 45, at 1201–26 (arguing the *Brandenburg* test’s dangers and inadequacy as applied to tort claims for media inspired violence); Smolla, *supra* note 28, at 1–9, 12–13 (discussing five media inspired violence cases and whether *Brandenburg* should apply).

<sup>81</sup> Healy, *supra* note 23, at 681. Professor Healy argued that these questions can best be answered by viewing *Brandenburg* as a form of strict scrutiny. *Id.* at 712. See also Rohr, *supra* note 24, at 91 (“The meaning, and the reach, of the *Brandenburg* test remain a mystery, more than three decades after its articulation.”); *but see* Kobil, *supra* note 35, at 235–36 (arguing that *Brandenburg* is relatively easy to apply and “is remarkable for its clarity.”).

<sup>82</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 445–46 & n.1 (1969).

<sup>83</sup> See *id.* at 449 n.3 (setting out the language of the indictment).

<sup>84</sup> *Id.* at 445–46 (“No one was present other than the participants and the newsmen who made the film.”). See also Smolla, *supra* note 28, at 10 (“Nothing in the record indicated that the racist messages of the Klansman at the rally posed any immediate physical threat to anyone.”).

<sup>85</sup> 538 U.S. 343 (2003).

government's power to punish racist threats of violence.<sup>86</sup> In *Black*, the majority upheld a Virginia statute that prohibited the burning of a cross when "carried out with the intent to intimidate."<sup>87</sup> The Court concluded that "true threats," that is, "where a speaker directs a threat to a person or group with the intent of placing the victim in fear of bodily harm or death," do not merit First Amendment protection.<sup>88</sup> Thus, the lesson of *Brandenburg* (as completed by *Black*) is that a state may prohibit

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<sup>86</sup> *Id.* at 359 ("[T]he First Amendment also permits a State to ban a 'true threat.'"). *Black*'s recognition of the "true threats" exception was foreshadowed in *Watts v. United States*, 394 U.S. 705 (1969), decided a few months before *Brandenburg* in 1969. *See id.* In *Watts*, the Court indicated that threats were not constitutionally protected, *see id.* at 707, but held that a war protestor's joking comment during a political rally that he would shoot LBJ was a "political hyperbole," and not a "true" threat. *Id.* at 706, 708. *See* Paul T. Crane, "True Threats" and the Issue of Intent, 92 VA. L. REV. 1225 (2006); Gey, *supra* note 35, for articles discussing the evolution of the true threat exception in the years before and after *Black*.

<sup>87</sup> *Black*, 538 U.S. at 347–348 (announcing the First Amendment permits Virginia to outlaw cross burnings done with intent to intimidate an individual). Although the Court upheld the statute, the Court reversed the conviction of one perpetrator and remanded for retrial the convictions of two others because it found an evidentiary provision which made the burning of a cross a "prima facie evidence of an intent to intimidate" facially unconstitutional. *Id.* at 363–67 (quoting VA. CODE ANN. § 18.2–423 (1996)).

<sup>88</sup> *Id.* at 359–60. It is not my contention that, on the facts that can be gleaned from the opinion, the threats uttered in *Brandenburg* would have constituted true threats against individuals under *Black*'s definition. Indeed, as discussed below, I think they would not. Rather, what has always struck me as odd about the *Brandenburg* decision is that although the Court set out this racist speech word for word in a lengthy footnote, *Brandenburg*, 395 U.S. at 446 n.1, the Court never addressed the speech's legal significance.

As suggested above, the threats uttered by the Klansmen in *Brandenburg* (specifically the burning cross, and muttered threats to "[b]ury the niggers" and "[t]his is what we are going to do to the niggers," *id.*) probably do not fit within the *Black* Court's narrow definition of true threats because they were uttered as part of a political rally, intermingled with other political comments (such as "[g]ive us our states rights," *id.*) and seemed directed at no particular individual. *See Watts*, 394 U.S. at 705–06 (holding that an anti-draft protestor's statement at a political rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was "political hyperbole" and not a true threat when uttered during a political debate to resulting laughter); *Black*, 538 U.S. at 348, 365 (holding "[t]he act of burning a cross" during a Klan meeting did not constitute a true threat in the absence of proof of an intent to intimidate). *Cf. Gey*, *supra* note 35, 1347–48 (questioning whether, under the broad definition offered by the Court in *Black*, the facts in *Brandenburg* could qualify as a true threat).

intimidating threats of violent harm to an *individual*, but not threats of violent harm to the *state*.<sup>89</sup>

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<sup>89</sup> The Court treats the “incitement” exception of *Brandenburg* and the “true threats” exception of *Watts* and *Black* as distinct. See *Black*, 538 U.S. at 359–60. First, in incitement, the speaker urges others to commit acts of violence, whereas for “true threats” the speaker himself threatens to do violence to a particular individual. *Id.* More importantly, the Court sees different harms flowing from the speech. *Id.* The wrong in *Brandenburg* is not the words themselves, but rather that the words increase the chance of resulting violence. Thus, the focus of the constitutional test in *Brandenburg* is on whether violence by others (those who heard the speaker) is likely and imminent. *Brandenburg*, 395 U.S. at 447. For “true threats,” the *Black* Court explained, the wrong is not simply the possibility that the violence will occur. *Black*, 538 U.S. at 360. Indeed the speaker does not need to carry out the threat, or even intend to carry out the threat. *Id.* Rather, the primary harm the Court identifies is the fear that the threat creates in the victim. See *id.* As the *Black* Court puts it: “a prohibition on true threats ‘protects individuals from the fear of violence’ and ‘from the disruption that fear engenders.’” *Id.* at 360 (citation omitted). Thus, for the Court, the wrong of true threats is not that it encourages future violence, but rather that the threat itself inflicts fear. Hence, the constitutional test focuses on intent, rather than on the likelihood of imminent harm. *Id.* at 360. But, see Crane, *supra* note 86, at 1228–1229 & nn.11–12, for a discussion of how lower courts in true threat cases have treated issues of intent, specificity, and immediacy, and Gey, *supra* note 35, 1331–1345, for a discussion of the variety of tests for true threats adopted by the lower courts from those that have only a minimal intent requirement, to those which have “effectively crafted a kind of weak *Brandenburg* surrogate.” *Id.* at 1334.

When combined, what *Brandenburg*, *Watts*, and *Black* stand for is that when words threaten physical harm to an *individual*, the First Amendment allows a remedy upon proof of an intent to intimidate, even in the absence of proof of likely imminent violence. *Black*, 538 U.S. at 359. In contrast, when the words threaten harm to the *state*, *Brandenburg* applies, and the First Amendment demands not simply a showing of intent, but also a showing of likely imminent harm. *Black*’s lower “intent-only” standard makes sense for threats directed to individuals, but it will endanger freedom of speech unless the Court ensures that is a “well defined and narrowly limited” exception. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942). In this light, there are two troubling trends. First, *Black* seems to allow threats against *groups* to qualify as true threats. If read broadly, this may allow threats to the government or society in general to be characterized as true threats. Gey, *supra* note 35, at 1332, 1348–50 (noting the risk to freedom of speech if the exception is expanded beyond speech “targeting particular, identifiable victims”). Second, so far the lower courts, further confused by the language of *Black*, have been prone to adopt very low intent standards, which most scholars agree are under-protective of speech. See generally Crane, *supra* note 86 (reviewing intent standards post-*Black*); Gey, *supra* note 35, 1345–1356 (discussing the ambiguities in *Black*, and proposing a narrow construction of its test for true threats).

I have suggested why *Brandenburg* is a landmark case, even if an accidental, too easy, and incomplete landmark case. What I have failed to discuss, and indeed what *Brandenburg* failed to discuss, is *why* the Court should recognize a constitutional right of Americans to criticize their government, and even to advocate its violent overthrow. For that I refer you to Professor Akil Amar, whose essay, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, reviews the established arguments in support of a robust right of free expression, and adds a new one, an argument from enactment history.<sup>90</sup>

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<sup>90</sup> Akil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 CAP. U. L. REV. 503 (2010).