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The Latitude and Limits of Free Speech

Schenck v. United States (1919)

Abrams v. United States (1919)

The First Amendment to the U.S. Constitution says, “Congress shall make no law . . . abridging the freedom of speech.” It expresses an absolute prohibition of legislation that would deny this freedom. Constitutional protection of this fundamental civil liberty, however, has not been absolute. Congress has enacted laws limiting freedom of speech under certain conditions, and the federal courts, in certain cases, have endorsed these restrictive acts.

It took a very long time, more than 125 years after ratification of the First Amendment in 1791, for the first cases about federal laws limiting free speech to arrive at the U.S. Supreme Court. During the years that America participated in World War I, from April 6, 1917, until November 11, 1918, Congress enacted laws limiting freedom of speech in order to protect national security against spies, saboteurs, and obstructers of the national war effort.

Government leaders and many in the general public also believed that the Communist Party that came to power in Russia during the 1917 Russian Revolution, one year before the end of World War I, posed a threat to America. Russia’s Communist rulers advocated subversion and the overthrow of non-communist governments throughout the world, which led many Americans to suspect that Socialists and Communists in the United States would collaborate with the international communist movement against the interests of the United States. Thus, laws enacted to protect national security during World War I were also used during and after the war to curtail activities of American supporters of communism and socialism.

In June 1917, barely two months after the nation’s entry into World War I, Congress passed the Espionage Act, which enabled the federal government to punish certain kinds of dissent against its wartime policies. The Espionage Act provided that

whoever . . . shall willfully make or convey reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever . . . shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States... shall be punished by a fine of not more than \$10,000 or imprisonment for not more than 20 years or both.”

In May 1918, Congress passed the Sedition Act, which augmented the already strong powers provided in the Espionage Act of 1917, by outlawing any speech or writing that in any way might impugn and undermine the

U.S. government, flag, military forces, or Constitution or intend to pro-

Schenck v. United States

- 249 U.S. 47 (1919)
- Decided: March 3, 1919
- Vote: 9–0
- Opinion of the Court: Oliver Wendell Holmes Jr.

Abrams v. United States

- 250 U.S. 616 (1919)
- Decided: November 10, 1919
- Vote: 7–2
- Opinion of the Court: John H. Clarke
- Dissenting Opinion: Oliver Wendell Holmes Jr. (Louis D. Brandeis)

mote resistance against federal government policies, such as the drafting of able-bodied men into the armed forces.

Many Americans believed the Espionage and Sedition Acts violated the Constitution's First Amendment guarantees of free speech and press. But from June 1917 until the middle of 1921, more than two thousand people were prosecuted for violating these restrictive federal laws, and more than one thousand were convicted. Among the several convictions appealed to the U.S. Supreme Court, those of Charles Schenck and Jacob Abrams became significant cases in the development of the Court's doctrine on the latitude and limits of free speech. Schenck's case originated with his August 1917 arrest for violating the Espionage Act. Abrams's case began one year later, in August 1918, when police arrested and jailed him and his associates for breaking the law under the Espionage and Sedition Acts.

Charles Schenck, general secretary of the Socialist Party in the United States, was an outspoken critic of America's participation in World War I. To express opposition to the war, Schenck and his Socialist Party associates printed and mailed about 1,500 leaflets to men eligible for the draft. The leaflets denounced the draft as involuntary servitude and therefore a violation of the Thirteenth Amendment to the Constitution. The pamphlet also argued that participation in World War I did not serve the best interests of the American people. It claimed that conscripting men into the armed forces to fight in the war was a "monstrous wrong against humanity in the interest of Wall Street's chosen few."

Schenck was arrested and convicted of violating the Espionage Act. At his trial, Schenck claimed that his First Amendment right to free speech had been violated. For the first time, the U.S. Supreme Court directly faced the question of whether the federal government might limit speech under special circumstances.

The Court unanimously decided against Schenck, upholding his conviction and ruling that the Espionage Act did not unconstitutionally limit his First Amendment rights of free speech and press. Writing for the Court, Justice Oliver Wendell Holmes Jr. presented a novel test to determine when and how the government might limit free speech. When spoken or written words "create a clear and present danger" of bringing about evils that Congress has the authority to prevent, said Holmes, then the government has an obligation to stop them. Holmes argued that Schenck's actions had created the kind of circumstance that the federal government could constitutionally prevent through the Espionage Act.

Holmes next provided one of the most memorable examples ever used in a Supreme Court opinion to clarify an argument. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Thus, Holmes linked the latitude or limits of political speech to the "circumstances in which it is done."

Holmes argued that Schenck and his associates intended to influence others from compliance with the federal draft law. If enough men had responded favorably to Schenck's message, then the federal government would have been prevented from carrying out the will of the people, endorsed by their representatives in Congress, who had voted overwhelmingly to participate in the war in order to defend critical national interests. Schenck's attempt to severely obstruct the war effort was certainly among "the kind of substantive evils that Congress had a right to prevent," wrote Holmes.

Under different circumstances, such as those in peacetime, Schenck's ideas

would have been protected by the Constitution's First Amendment, said Holmes. But urging men to resist the draft during a time of war presents a "clear and present danger" to the nation. Thus Holmes declared, "When a nation is at war, many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be protected by any constitutional right."

Before the *Schenck* case, both state and federal courts had relied only upon a doctrine called "the bad tendency" test to adjudicate freedom of speech cases. If speech tended to have bad effects, then it might be constitutionally restricted. For example, speech that threatened public order, subverted established standards of morality, or obstructed national defense in wartime could be legislatively restricted. Further, there was a presumption of constitutionality for laws limiting speech according to the "bad tendency" test, if the restrictive legislation clearly reflected traditional community standards.

In two cases decided only a few days after *Schenck*, Court watchers were surprised by Justice Holmes' opinions. In *Frohwerk v. United States* (1919) and *Debs v. United States* (1919), Holmes based the Court's decisions only on the conventional "bad tendency" test and did not mention the "clear and present danger" doctrine.

The Court unanimously upheld the conviction of Jacob Frohwerk, who had written articles for a German-language newspaper that urged resistance to the military draft. Holmes said that Frohwerk's words violated the Espionage Act, because they might "be enough to kindle a flame of resistance." Indeed, this was a "bad tendency" but Holmes did not make a causal connection to a particular circumstance, as his "clear and present danger" test made necessary.

The Court also unanimously upheld the conviction of Eugene Debs, the leader of the American Socialist Party. Debs had delivered a speech filled with socialist ideology in Canton, Ohio. He criticized the very idea of war and advocated resistance to the government's World War I policies. Debs said, "I would oppose war if I stood alone." Further, he argued that the war benefited wealthy capitalists while harming everyone else. Holmes concluded that Debs's words "had as their natural tendency and reasonable probable effect to obstruct the [military] recruitment service." But Holmes did not seem to care that no direct causal connection could be made between Debs' theoretical expressions of socialist ideology and behavior that might practically obstruct the government's military operations. Because the "bad tendency" test did not require evidence of a direct link between particular speech and unlawful behavior, prosecutors and judges used it to facilely and unsubstantially impose rather strict limitations on First Amendment freedoms.

Leading legal scholars and commentators who had praised Holmes for his promising new "clear and present danger" doctrine in *Schenck* criticized him and the Supreme Court for eschewing it in the *Frohwerk* and *Debs* decisions. For example, Harvard professor Zechariah Chafee wrote in the June 1919 issue of the *Harvard Law Review* that Holmes's "clear and present danger" doctrine had the potential through application and refinement in future cases to make "the punishment of words for their bad tendency impossible." Chafee was disappointed that Holmes and the Court relied only on the "bad tendency" test in *Frohwerk* and *Debs*.

Ernst Freund, a law professor at the University of Chicago, wrote an article for *The New Republic* to emphatically express disappointment in the Court's *Debs* opinion. Freund criticized Holmes's opinion for the Court because it upheld Debs's conviction merely on an assumption, but without hard evidence,

that his speech was somehow connected to the “bad tendency” of obstructing the draft. Freund charged there was “nothing to show actual obstruction or an attempt to interfere with any of the recruitment process.” Thus, those who had used the “bad tendency” test against Debs had decided against him by merely “guessing” about “the tendency and possible effect” of Debs’s speech. This manner of decision making offered flimsy and whimsical protection, instead of solid security, for the individual’s First Amendment rights. Freund urged the Court to return to the “clear and present danger” doctrine so that it might be improved and developed into a just test for determining the breadth and limits of free speech.

Holmes heeded the critical responses of scholars to the Court’s March 1919 free speech decisions. For example, he read carefully what Zechariah Chafee and Ernst Freund wrote in the *Harvard Law Review* and *The New Republic*, and he met with Professor Chafee and other legal experts and scholars to discuss free speech issues during the summer of 1919. In particular, Holmes paid close attention to Chafee’s advice about developing the “clear and present danger” doctrine to establish more clearly the line between speech that is protected by the First Amendment and that which is not. Chafee also urged Holmes to emphasize the social and political importance of a broader scope for freedom of speech. Thus, in November 1919, when the Supreme Court considered its next free speech case, *Abrams v. United States*, Justice Holmes was prepared to think and write anew about constitutional issues of freedom of speech.

The case of Jacob Abrams began with his arrest in New York City on August 23, 1918. Abrams and several friends had written, printed, and distributed copies of leaflets that severely criticized President Woodrow Wilson and the U.S. government. The leaflets opposed Wilson’s decision to send a small American military force to Russia during the civil war there, which followed the communist revolution of 1917. The Communists, led by Vladimir Lenin, were fighting against anticommunist Russians and various foreign military forces to retain control of the government. Abrams’s leaflets urged American workers to walk off their jobs in protest against President Wilson and the U.S. government and in support of the new communist government in Russia.

Abrams and his friends were arrested and convicted for violating the Espionage Act of 1917 and the Sedition Act of 1918. They claimed, however, that their First Amendment rights had been violated because both the Espionage and Sedition Acts were unconstitutional infringements of free speech. By a vote of 7–2, the Court upheld the conviction of Abrams and his friends.

Writing for the Court, Justice John H. Clarke cited the *Schenck* decision as precedent and invoked the “bad tendency” test to support the ruling against Abrams. Justice Clarke wrote that “men must be held to have intended and to be accountable for the effects which their acts were likely to produce.” In particular, Clarke used the “bad tendency” test to argue that if workers had followed the call of Abrams’s leaflets to walk away from their jobs in a general strike, then the production of munitions would have been interrupted, thereby impairing the U.S. government’s ability to defend the country in wartime. Clarke’s opinion ignored the fact that Abrams’s message did not influence workers, and there was no strike in protest of American government policies. The mere possibility of such a bad effect was sufficient, according to Justice Clarke, to justify strict limitation of a person’s constitutional right to free speech.

Justice Holmes, joined by Justice Louis D. Brandeis, wrote a strong dissent, in which he developed his “clear and present danger” doctrine as Zechariah

Chafee and others had urged him to do. He completely repudiated the “bad tendency” test and refined his “clear and present danger” doctrine to require an immediate or “imminent” harmful effect as the only justification for restricting the content of speech.

Holmes recognized that the government had the right to protect itself against speech that immediately and directly threatened the security and safety of the country and its people. He argued that the First Amendment protects the expression of all opinions “unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” Holmes emphasized that a “clear and present danger” sufficient to restrict free speech could not exist unless there was an impending lawless action connected directly to the words of a speaker or writer. Holmes concluded that Abrams’s actions and intentions were not an imminent danger sufficient to justify limitation of his constitutional right to free speech.

Justice Holmes concluded his dissent with a compelling theory of free speech in a constitutional democracy. Arguing for a “free trade in ideas,” is the theory of our Constitution. It is an experiment, as all life is an experiment.”

The Court’s opinion in *Abrams* prevailed in the short run, but Holmes’s dissent eventually influenced the Court. Today, it is recognized as the foundation for contemporary constitutional doctrine on the individual’s right to free speech.

The fate of those victimized by the Espionage and Sedition Acts varied. Most served their sentences, but Eugene Debs, a national celebrity of sorts, was pardoned by President Warren G. Harding in 1921. Jacob Abrams and his associates were less fortunate. Upon completion of their prison sentences, they were deported, at their own expense, to Soviet Russia. However, the land they had imagined as a “paradise for workers” turned out to be more like hell for them. They had little latitude for freedom of expression or any other kind of civil liberty under the totalitarian regime of the Soviet Union, which also eventually deported them.

From 1919 until his retirement from the Court in 1932, Justice Holmes continued to argue for the refined version of the “clear and present danger” doctrine expressed in his *Abrams* dissent. However, the Court did not use this doctrine to uphold a freedom of speech claim until 1937, in *Herndon v. Lowry*, when by a narrow vote of 5–4 the free speech rights of an American Communist Party member were protected. In the 1969 case *Brandenburg v. Ohio*, the Court again applied the ideas about free speech first expressed by Holmes in the 1919 *Abrams* case. The Court unanimously upheld the free speech rights of a Ku Klux Klan leader and struck down a state of Ohio law restricting speech that had a tendency to cause public harm. Free speech rights had become broad enough to protect even a despicable racist message, which was constitutionally permissible unless it could be demonstrably and immediately linked to lawless behavior.

Based on everything we know about Holmes, it is certain that he would have rejected the contemptible racist speech of a Ku Klux Klan leader, but he would have hailed the latitude for civil liberty afforded even such a person. Holmes, at the peak of his legal career, came to believe that the best way to fight a flawed message was to refute it with superior ideas in a constitutionally protected public arena of free-flowing opinion. And it seems beyond doubt that Holmes would have been pleased that his dissent in the 1919 *Abrams* case was the foundation of the Court’s 1969 opinion in *Brandenburg*. Today’s constitutional law broadly protecting free speech can be linked to the fertile mind of Justice Oliver Wendell Holmes Jr.

“Free Trade in Ideas”



Oliver Wendell Holmes Jr. is among the most remarkable people ever to serve on the Supreme Court. A heroic medal-winning soldier in the U.S. Army, three times wounded during the Civil War, he served as a highly respected associate justice of the Supreme Court from 1902 until his retirement in 1932. Born in 1841 in Boston, Massachusetts, Holmes died in 1935 in Washington, D.C., and was buried with other military veterans in the national cemetery at Arlington, Virginia.

*Holmes was an avid reader of books about literature and philosophy and had a keen intellect and a memorable style of speaking and writing. Many of his Supreme Court opinions, both for the Court and in dissent, are exemplars of a literary style that both informs and inspires the reader. In his later years on the Court, Holmes became known as a champion of the constitutional right to free speech, and he wrote many quotable phrases about it in dissents against the Court's majority, such as this one in *United States v. Schwimmer* (1929): “If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought— not free thought for those who agree with us but freedom for the thought that we hate.”*

*Many experts in constitutional law consider Holmes's dissent, below, in *Abrams v. United States* to be the best legal defense of free speech ever written by an American. A sterling example of profound constitutional thought and eloquent literary style, Holmes's dissent in *Abrams* set a constitutional standard that eventually won enduring endorsement from the Supreme Court.*



I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Froherk* and *Debs* . . . were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of gress certainly cannot forbid all effort to change the mind of the country. 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. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt.... But it seems pretty clear to me that nothing less than that would bring these papers within the scope of the law....

I do not see how anyone can find the intent required by the statute in any of the defendants' words....

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent. As when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ulti-

mate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression or opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an im-

mediate check is required to save the country....Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law. . . abridging the freedom of speech.” Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Mr. Justice Brandeis concurs with the foregoing opinion.