

■ The Sedition Act of 1918

Date: May 16, 1918

Author: Sixty-fifth U.S. Congress

Genre: Legislation

Summary Overview

When World War I broke out in Europe in 1914, the United States attempted to maintain its neutrality, but as the growing conflict threatened U.S. interests, President Woodrow Wilson petitioned Congress to strengthen the laws designed to protect national security. In 1917, Congress passed the Espionage Act, which enumerated a broad list of prohibited activities and imposed fines, imprisonment, and even death for individuals who willfully violated its provisions. Then in 1918, the legislature extended the Espionage Act by passing the Sedition Act, which further restricted speech and press in matters deemed related to national security and allowed the postmaster general to refuse delivery of any mail believed to violate the act's provisions. By the early 1920s, Congress had repealed many of the provisions within both acts, but not before the government prosecuted, jailed, or deported hundreds of individuals under those provisions.

Defining Moment

Shortly after the United States declared war on Germany in April 1917, the legislature passed the Espionage Act, authorizing harsh punishments for any actions, speech, or writings that willfully jeopardized national security or endangered the war effort. But as the war unfolded and fear of socialist and communist influence grew, the government felt growing pressure to further control any public expressions of antiwar sentiment. Passed in May 1918, the Sedition Act greatly expanded the prohibitions established by the Espionage Act, seemingly to include any speech or writing even vaguely antipatriotic.

The federal government prosecuted numerous leaders and antiwar activists under provisions of the Espionage Act and Sedition Act. Eugene V. Debs, a member of the Socialist Party who ran for U.S. president in 1904, 1908, and 1912, was arrested and prosecuted for the antiwar sentiments expressed in his June 16, 1918, speech in Canton, Ohio. He was convicted on the grounds that the speech obstructed

military recruiting, and he was then sentenced to ten years in prison. He served nearly three of those years before President Warren G. Harding intervened to reduce his sentence and secure his release in December 1921. Additionally, a key provision of the Sedition Act allowed the postmaster general to refuse delivery of any mail believed to violate any provision of the act. This not only prevented antiwar and antidraft activists from sharing their message via mailed newsletters and pamphlets, but it also placed the creators of these messages in danger of prosecution and imprisonment.

Debate ensued over the sweeping provisions of both the Espionage Act and the Sedition Act, particularly those provisions that appeared to contradict the First Amendment's guarantee of free speech. However, the U.S. Supreme Court upheld the Sedition Act in the 1919 case *Abrams v. United States*. The defendants in *Abrams* had distributed leaflets criticizing the war and U.S. interference in the Russian Revolution, and they advocated a general strike among workers producing military goods. They were convicted under the Sedition Act for advocating "curtailment of production" of materials necessary for the war effort. Writing for the court, Justice John Hessin Clarke held that the conviction did not violate the defendants' First Amendment rights to free speech, because Congress deemed such activity to pose imminent danger to the United States. He cited Justice Oliver Wendall Holmes's opinion in the earlier *Schenck v. United States* to support this conclusion; however, Justice Holmes dissented in *Abrams*, arguing that the actions of the defendants in *Abrams* did not pose the same "clear and present danger" as did the *Schenck* defendants, and thus the conviction should not stand.

By March 1919, U.S. Attorney General Thomas Watt Gregory recommended that President Wilson pardon nearly two hundred prisoners who had been convicted under both the Espionage Act and the Sedition Act. Congress officially repealed the Sedition Act and



On July 20, 1917, Secretary of War Newton D. Baker, blindfolded, drew the first draft number in the lottery to be called up: Number 258. Those drafted were to serve in the American forces during World War I.

parts of the Espionage Act on December 13, 1920; other parts of the Espionage Act still exist in modified form, and the U.S. government continues to prosecute individuals under its provisions nearly one hundred years after its initial passing.

Author Biography

The Sixty-fifth U.S. Congress passed the Sedition Act on May 16, 1918. This Congress sat from March 4, 1917 until March 4, 1919, and oversaw significant legislation, including declaring war against Germany, establishing Liberty Bonds to finance the war, and passing both the Espionage Act and the Sedition Act.

Even before the United States joined World War I, President Woodrow Wilson encouraged the legislature to strengthen laws designed to protect national security. Shortly after the country declared war on Germany, the Sixty-fifth Congress passed the Espionage Act on June 15, 1917. Eleven months later, on May 16, 1918, it passed the Sedition Act, which amended the Espionage Act to prohibit an even broader array of activities that could jeopardize national security.

The Sedition Act was repealed in 1921, more than two years after the end of World War I and after numerous antiwar activists and suspected communist sympathizers were convicted, imprisoned, and sometimes deported under its provisions.

HISTORICAL DOCUMENT

Be it enacted, That section three of the [Espionage] Act ... approved June 15, 1917, be ... amended so as to read as follows:

Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false 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, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, and whoever when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment services of the United States, and whoever, when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge,

incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or the imprisonment for not more than twenty years, or both: Provided, That any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States shall be at once dismissed from the service....

Sec. 4. When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this Act, instruct the postmaster at any post office at which mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed, with the words "Mail to this address undeliverable under Espionage" plainly written or stamped upon the outside thereof, and all such letters or other matter so returned to such postmasters shall be by them returned to the senders thereof under such regulations as the Postmaster General may prescribe.

Document Analysis

Section 3 of the Sedition Act expands the prohibitions defined in Section 3 of the Espionage Act of 1917. Like the Espionage Act, the Sedition Act authorizes fines of up to \$10,000 and imprisonment for up to twenty years for individuals who during times of war make

false reports with intent to interfere with U.S. military operations, cause (or attempt to cause) insubordination within the military, or obstruct (or attempt to obstruct) military recruitment activity.

The Sedition Act also expanded the list of provisions to punish those who make false statements to obstruct

the sale of U.S. bonds or securities; speak or print any “disloyal” language about the U.S. government, Constitution, military, military uniforms, or flag; display the flag of any foreign enemy; speak or print anything advocating the curtailment, with intent to hinder the U.S. success in the war, of the production of war materials; or advocate, teach, defend, or suggest that others do any of these prohibited acts. Even more broadly, this section allows for punishment of individuals who, by word or act, “support or favor the cause of any country with which the United States is at war” or who “oppose the cause of the United States therein.”

Finally, Section 3 provides that any employee or official of the U.S. government who commits “any disloyal act or utters any unpatriotic or disloyal language,” including criticizing the Army, Navy, or the U.S. flag, will be immediately dismissed from service.

Section 4 grants the postmaster general authority to refuse postal service access to anyone suspected of violating the Sedition Act. In conjunction with the local postmasters, the postmaster general can return any mail to its sender conspicuously marked with “Mail to this address undeliverable under the Espionage Act” if there is suspicion that its contents or its recipient might be in violation of any provision of the Sedition Act or its predecessor, the Espionage Act.

Essential Themes

Passed in April 1917, shortly after the United States declared war on Germany, the Espionage Act authorized harsh punishments for actions, speech, and writings deemed a threat to U.S. interests or national security. However, as fear of socialist and communist influences grew in the general public, vigilante citizen groups reacted to perceived threats and insufficient patriotism with increasing violence. To maintain control over the rapidly escalating situation, the federal government sought to expand its authority to intervene in matters it believed could pose a threat not just to national security, but also to public calm and welfare.

As a result, the following year, the legislature passed the Sedition Act, which greatly extended the prohibitions of the Espionage Act to include nearly any act,

utterance, or writing that even vaguely criticized the U.S. government or the war efforts. Expressing one’s opinion about the unfairness of the draft could result in a decade-long prison sentence; even criticizing the U.S. military’s uniforms could result in prosecution under the Sedition Act. These amendments did successfully extend the government’s reach to prosecute any undesirable behavior or critical sentiments, but they also further fueled public fear and the persecution of suspected socialist and communist sympathizers—the first episode to become known as the Red Scare.

Additionally, Postmaster General Albert S. Burleson applied with gusto the new authority granted by Section 4: Working with the postmasters of several major cities, he blocked the mailing of several major socialist publications and facilitated the prosecution of their editors and writers. Initially, the Wilson administration encouraged his enthusiasm, as he successfully prevented dissemination of ideas that were critical of the war and used his nationwide network of postmasters to track and pursue dissenters. However, Burleson’s enthusiastic efforts fell out of favor with President Wilson when Burleson began targeting some of the administration’s supporters.

Despite the enthusiasm with which the federal government incarcerated and deported antiwar advocates and suspected communist sympathizers under its provisions, the Sedition Act was repealed on December 13, 1920.

—Tracey M. DiLascio

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■ ***Schenck v. United States***

Date: 1919

Author: Oliver Wendell Holmes Jr.

Genre: Court opinion

Summary Overview

Oliver Wendell Holmes Jr., remains one of the most influential of American legal philosophers. His formulation of the “clear and present danger” test regarding the right to free speech in his opinion in *Schenck v. United States*, which was further refined in his dissent in *Abrams v. United States*, set the stage for the development of free speech law in America. Charles Schenck, secretary-general of the Socialist Party of America, had been charged with printing and distributing antidraft literature, thus violating the Espionage Act of 1917. He appealed his conviction on First Amendment grounds, but the court upheld the constitutionality of the Espionage Act and rejected the First Amendment protection of free speech—judging the legality of speech according to its tendency to provoke illegal acts.

Defining Moment

Because the First Amendment to the Constitution guarantees free speech rights to all people who are either born or become American citizens, the court’s opinion in the Schenck case was applicable to all U.S. citizens. The ruling in this case would become the law of the land, and had the potential to impact free speech issues for many years following the decision. The court’s “clear and present danger” test used in the Schenck case would ultimately be replaced in the court’s decision-making process, but the ruling would nonetheless effectively place limits on an individual’s First Amendment rights in the early 1900s. The right of free speech has long been regarded as one of the most valued rights citizens are granted, and the decision to either limit or extend speech rights has always been of significant interest to people throughout America. In more current times, the ruling in this case is significant to those who are interested in tracking the evolution of free speech rights in America and how that evolution, including the ruling in *Schenck v. United States*, plays a part in current free speech rights.

Author Biography

Oliver Wendell Holmes Jr., like many before him, believed John Marshall, the “Great Chief Justice,” to

be the one person who best embodied American law. But Holmes, for his part, so profoundly influenced American law during his own lifetime that many others, like the noted court historian Bernard Schwartz, believe that “it was Holmes, more than any other legal thinker, who set the agenda for modern Supreme Court jurisprudence.”

Born in 1841 into what Oliver Wendell Holmes Sr.—himself a celebrated physician and writer—called “the Brahmin caste of New England,” the younger Holmes spent much of his life struggling to free himself from the large shadow cast by his father. The Civil War presented him with an opportunity both to leave home and to distinguish himself in an endeavor outside his father’s sphere. Holmes served with great distinction in the Union army. Seriously wounded three times, he was discharged after three years with the rank of brevet lieutenant colonel. He then returned to his father’s home and, against the elder Holmes’s wishes, enrolled in law school at Harvard University.

Holmes continued to live under his father’s roof even after marrying at the relatively advanced age of thirty-one. During that period, Holmes assiduously applied himself to gaining distinction in the legal field, practicing as a litigator while at the same time pursuing legal scholarship as coeditor of the *American Law Review*. With the successful publication of his newly edited twelfth edition of James Kent’s *Commentaries on American Law* in 1873, Holmes and his wife, Fanny, were finally able to move into a home of their own. Invited to deliver the prestigious Lowell Institute lectures in 1880, Holmes published them to great acclaim the following year as *The Common Law*, earning him such renown that he was soon invited to teach at Harvard Law School.

Holmes had been lecturing at Harvard for less than a year when he abruptly tendered his resignation. He had been appointed to the Supreme Judicial Court of Massachusetts a month earlier, but his university colleagues and students learned of his new position only upon reading about it in the newspapers. Holmes served as an associate justice of the state’s highest tribunal for

ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution shall be the supreme law of the Land."

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unwittingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. *You are a citizen, not a subject!* You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government which you pay. Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped; so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article 1, Section 8, Paragraph 15.)

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

The people of this country did not vote in favor of war. At the last election they voted against war.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazed nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy cannot be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers. To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

"There are the times that try men's souls."

"Eternal vigilance is the price of liberty."

You are responsible. You must do your share to maintain, support and uphold the rights of the people of this country.

In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

(OVER)

LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of military rule, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.

Remember, "eternal vigilance is the price of liberty."

Down with autocracy!

Long live the Constitution of the United States!—Long live the Republic!

Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

the next sixteen years. During much of that period he found the work trivial and repetitive, but he used the time to hone his style into the taut, epigrammatic form that would eventually earn him a place in the American legal pantheon. He also delivered a number of important public speeches, the most significant of which, “The Path of the Law” (1897) and “Law in Science and Science in Law” (1899), cemented his position as a pathbreaking legal realist who believed that law should be based on experience rather than on abstract principles and logic. In July 1899, when the chief justice of the Massachusetts Supreme Court died, Holmes was tapped to be his successor.

Holmes was not universally popular. His personal style was often characterized as combative, and in 1896 he had issued a notorious dissenting opinion in *Vegeahn v. Guntner*, arguing that furniture workers had a right to strike for better wages and hours, even at the expense of their employer, so long as they did so peacefully and without malice. Holmes’s “actual malice” standard would later become a cornerstone of First Amendment law, but in 1902 his *Vegeahn* dissent threatened to derail a possible appointment to the U.S. Supreme Court. Finally, however, President Theodore Roosevelt overcame his qualms, and in August of that year, Holmes was nominated to succeed Horace Gray (who, like Holmes, had previously served on the Massachusetts Supreme Court) in occupying the court’s “Massachusetts seat.” Once again, Holmes declined to resign his previous post until the eleventh hour.

Holmes would serve on the court for thirty years, during which he authored 873 opinions—more than any other Supreme Court justice has written to date. The number of Holmes’s dissents was proportionately

low, but they were so eloquently and powerfully written that they have led to his being dubbed the “Great Dissenter.” In what is perhaps his most celebrated opinion, his dissent in *Lochner v. New York* (1905), Holmes, joined by the maverick John Marshall Harlan, voted against the court’s long-standing deference to the doctrine of substantive due process, arguing for New York State’s right to enact legislation limiting work hours and against unbridled freedom of contract. Writing for the majority in *Schenck v. United States* (1919), Holmes declared that the right of free speech was not absolute, but that same year he refined his restrictive “clear and present danger” standard in his dissenting opinion in *Abrams v. United States*, excluding most political dissent from government suppression.

Holmes’s reputation is not unblemished. He was farsighted, to be sure, but he was also very much a creature of his times. A disciple of social Darwinism—a theory adapted to human society from Charles Darwin’s “survival of the fittest” theory of evolution—he also absorbed principles of eugenics, popular in his day. He may have believed that jurists were obliged to set personal prejudices aside when deciding cases, but all indications are that Holmes contentedly upheld, in *Buck v. Bell* (1927), the Virginia statute mandating the sterilization of “feeble-minded” individuals.

In April 1929, Holmes’s wife of fifty-seven years died. Holmes stayed on the court, publicly celebrating his ninetieth birthday two years later, but then began to fail. Colleagues and friends hinted that it was time for him to leave, and on January 11, 1932, he did so, announcing only, “I won’t be in tomorrow;” he submitted his resignation the following day. In 1935, two days before his ninety-fourth birthday, Holmes died of pneumonia in his home.

HISTORICAL DOCUMENT

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."

It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves,... winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints,

although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*.... We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.... The 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. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 ... punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.... Indeed that case might be said to dispose of the present contention if the precedent covers all media concludendi. But as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers, the word is apt to call

up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft

as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act.

GLOSSARY

media concludendi: grounds for asserting a right

Wall Street: a street in New York City where the New York Stock Exchange is located; more generally, the investment industry as a whole

Document Analysis

Charles Schenck, secretary-general of the Socialist Party of America, was charged with printing and distributing literature urging American men to resist the draft during World War I. A federal district court found Schenck guilty of having violated the 1917 Espionage Act, which outlawed interference with conscription. Schenck appealed his criminal conviction to the U.S. Supreme Court, questioning the constitutionality of the Espionage Act on First Amendment grounds. There was, he argued, a tradition in Anglo-American law of distinguishing between opinion and incitement to illegal action. His leaflet was a reflection of the debate then raging in American society about the justness of the war and, as such, was an expression of opinion. Rather than violence, it urged that those subject to the draft assert their rights by signing an anticonscription petition that would be forwarded to Congress.

Writing for a unanimous court, Justice Holmes upheld the constitutionality of the Espionage Act and Schenck's conviction. In considering First Amendment protection for any speech, he states, the court must consider not only the content of the speech but also its context. Whereas in some circumstances banning speech such as Schenck's leaflet might amount to prohibited prior restraint, in the context of wartime, such speech is akin to shouting "fire" in a crowded theater. In distributing his leaflets Schenck plainly intended to interfere with the draft, and such interference plainly violates the nation's settled right to draft citizens during time of war. Furthermore, the Espionage Act plainly applies to conspiracies as well as to actual obstruction of military activities; the intended action need not have actually succeeded to be prohibited. The test, Holmes memorably declares, is whether the words at issue

present a "clear and present danger" of provoking "substantive evils" that Congress is empowered to prevent.

Decided in 1919, *Schenck* was the court's first significant attempt to define what constitutes free speech under the First Amendment. Two schools of thought about the subject grew directly out of this case: Absolutists hold that the framers meant, literally, that "Congress shall make no law ... abridging the freedom of speech," while others believe that an individual's right to be left alone must be balanced against compelling public necessity. For his part, Holmes's subsequent refinement of the "clear and present danger" test seems to indicate that his use of the phrase in *Schenck* had been casual. In two companion unanimous decisions to *Schenck*, *Frohwerk v. United States*, and *Debs v. United States*, Holmes used the same traditional "bad tendency" test—judging the legality of speech according to its tendency to provoke illegal acts—that he had employed in earlier free speech cases. It is arguable, then, that in *Schenck* he intended to equate the "clear and present danger" test with the "bad tendency" test. Within a few months, however, Holmes, together with Justice Louis D. Brandeis, would begin the process of refining the "clear and present danger" test in *Abrams v. United States* so that it would reflect his intention of providing greater legal latitude for dissident speech.

Essential Themes

In the early 1900s, there was significant opposition to efforts made by the government to draft soldiers for war efforts. Some people simply did not want to involuntarily fight in a war, but the government was committed to enforcing not only the draft, but the efforts created to enforce the draft and promote loyalty and obedience among American soldiers. This widespread opposition

to the draft led Congress to create the Espionage Act, designed to punish those who were successful in their efforts to evade the draft. Over 2,000 individuals were charged with violating tenants of the act, and around 900 citizens served jail time for disobeying the law. The sentiments Schenck was promoting in his flier were not uncommon among the population at the time, as many felt the draft was a violation of their rights. Regardless of this, the government felt the promotion of the idea to protest the draft were a threat to the law established in the Espionage Act. Perhaps in a time of peace the government's response would have been different, and while Schenck's document was not a violent call to action it was the fact that America was in the middle of a war that made Schenck's actions so inflammatory.

For most citizens at the time, there was an assumption that because of the right to free speech outlined in the First Amendment a person had the ability to say anything they felt like saying. This case would challenge that misconception and introduce serious parameters to what is actually meant by a person's inherent right to free speech. Schenck's actions and the court's decision in the case firmly established that if a person's actions violated a law, the speech was not permissible regardless of what is stated in the Bill of Rights. Because Schenck's call to action, albeit peaceful, challenged the Espionage Act, Schenck's right to speak freely about his opposition to the draft was limited. The "clear and present danger" test used to make the decision in this case was later replaced by the language "imminent lawless action", meaning speech could be restricted if it was likely to result in actions violating laws.

As American citizens, we often assume we have an inherent right to say whatever we want to say, whenever we want to say it. The ruling in this case proves that is

not necessarily so, and there are times when parameters may be placed on free speech rights. The Supreme Court's ruling in the Schenck case clearly places limitations on the right of free speech as guaranteed in the First Amendment to the Constitution. In this specific instance, the court found that Schenck's actions were not permissible because they took place during wartime. Had Schenck's ideas been presented during a time of peace, perhaps the tenants of the Espionage Act would not have been violated and therefore the information in the flier would not have been as inflammatory as the court found it to be. The court's ruling determined that a citizen's speech is not limitless, and the context of the times and the circumstances surrounding a person's speech may come into play when determining if certain types of speech will be allowed. This court ruling, and similar rulings that would follow, have established the precedent that while free speech is still a highly regarded and fiercely protected right, American citizens are subject to certain speech limitations.

—Amber R. Dickinson, Lisa Paddock

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