tive restrictions on unpopular speech. His dissent represents one of the finest expressions of pragmatism in free speech doctrine with his fear that the Sedition Act would inhibit free speech and the search for the truth. Few American judicial figures have aroused as much interest and controversy in both popular and legal circles as Justice Holmes. His theories continue to influence discourse decades after he first articulated them, and they still form the basis of many contemporary legal debates.

Related Cases

Lochner v. New York, 198 U.S. 45 (1905)

Debs v. United States, 249 U.S. 211 (1919)

Schenck v. United States, 249 U.S. 47 (1919)

Whitney v. California, 274 U.S. 357 (1927)

Dennis v United States, 341 U.S. 494 (1951)

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

Recommended Reading

Zechariah Chafee, *Freedom of Speech in Wartime,* 32 Harvard Law Review 932 (1919).

Kalven, Harry, Jr. *A Worthy Tradition: Freedom of Speech in America.* New York: Harper, 1988.

Mill, J. "Essay on Liberty." In *On Liberty and Considerations on Representative Government, 1859,* edited by R. McCallum, 13–48. New York: Macmillan, 1946.

Polenberg, R. *Fighting Faiths: The* Abrams *Case, the Supreme Court, and Free Speech.* New York: Viking, 1987.

S. F. Pollock, Abrams v. United States, 36 Law Quarterly Review 334 (1920).

Case Title: *Charles T. Schenck v. United States*

Alternate Case Titles: Clear and Present Danger Case, Shouting Fire in a Crowded Theater Case

Legal Citation: 249 U.S. 47

Year of Decision: 1919

Key Issue

May freedom of speech be restricted during wartime?

History of the Case

Charles T. Schenck was the general secretary of the Socialist Party. When the United States entered World War I against Germany, Congress passed the Espionage Act of 1917, which made it illegal to cause insubordination in the military forces of the United States, to obstruct recruiting and enlistment into the armed services of the United States, or to convey false information that would interfere with U.S. military operations. The Socialist Party met in Philadelphia in August 1917 and voted to send 15,000 leaflets to men who had recently been drafted. Schenck had personally attended to the printing of the pamphlets and was involved in addressing envelopes. The pamphlet in question contained the idea that conscription was little better than forced servitude. It compared those conscripted to those convicted of crimes in violation of the Thirteenth Amendment to the U.S. Constitution, which outlawed slavery. It further urged that those conscripted assert their rights and refuse to be drafted. The pamphlet went on to state that the Socialist Party believed the draft interfered with the citizen's individual rights as well as his or her freedom of religion. It urged people to stop by the Socialist Party offices and sign a petition. Several people complained. The Philadelphia postal inspectors raided the Socialist Party offices on August 28, 1917, and seized records and files, all without a search warrant.

Summary of Arguments

The attorneys Henry John Nelson and Henry J. Gibbons argued for Schenck that unless citizens were able to have a full and free discussion about whether a war were just or unjust, they could not reach an informed decision. They argued that

Schenck and the Socialist Party were guaranteed the constitutional right of free speech and had the sincere purpose to communicate their honest opinions and beliefs, whether or not that masked an intent to incite action against the government. Schenck's attorneys further argued that the issue of conspiracy and the seizure of the Socialist Party papers violated other constitutional protections. Finally, they argued that the case was political.

John O'Brian, special assistant to the attorney general for war work, and Alfred Bettman, special assistant to the attorney general, responded for the United States. They argued that there was ample evidence that Schenck had conspired to violate the Espionage Act, a federal law that punished spying and other crimes, and that there was a clear basis during wartime for the U.S. Congress to pass such a law as a way of dealing with wartime fears.

Decision

In a unanimous ruling, Justice Oliver Wendell Holmes, Jr., quickly dismissed any concerns raised by Schenck regarding the legality of the evidence seized. Further, Justice Holmes found that the pamphlet had the intent and certainly had a tendency to obstruct the draft. Whether or not it did so was not important. Justice Holmes further stated that obstructing the draft transcended interference with conscripted soldiers because it also affected voluntary efforts to recruit fresh troops. In the most important portion of the opinion, Justice Holmes spoke of the protection of free speech and the appropriate legal restraints during wartime: "The most stringent protection of free speech would not protect a man in falsely shouting 'Fire!' in a theater, and causing a panic." Justice Holmes stated that the question in every case was whether Congress had a right to protect words of such a nature as to create a "clear and present danger." Clearly, wartime circumstances differ from peaceful settings, and Congress had the right to prevent and punish obstructions and conspiracies to obstruct the raising of troops during war.

Aftermath

Justice Holmes's decision upheld the Espionage Act and the large number of cases generated under it.

Significance

Justice Holmes's "clear and present danger" test became the line between legal and illegal free speech. Holmes's decision found that as long as there was an intent to break the law, it did not matter whether there were a successful result. In *Abrams v. United States* (1919), Holmes had occasion to refine the test, stating that "only the present danger of immediate evil or the intent to bring it about warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."

Related Cases

Abrams v. United States, 250 U.S. 616 (1919)

Debs v. United States, 249 U.S. 211 (1919)

Whitney v. California, 274 U.S. 357 (1927)

Dennis v. United States, 341 U.S. 494 (1951)

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

Recommended Reading

Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment,* 74 Cornell Law Review 1116 (1989).

Chamberlin, Bill F., and Charlene J. Brown, eds. *The First Amendment Reconsidered: New Perspectives on the Meaning of Speech and Press.* New York: Longman, 1982.

Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger,* 70 California Law Review 1159 (1982).

Worton, Stanley N. *Freedom of Speech and Press.* Rochelle Park, N.J.: Hayden Book, 1975.

Case Title: *Meyer v. Nebraska*

Legal Citation: 262 U.S. 390

Year of Decision: 1923