

ABRAMS V. UNITED STATES

250 U.S. 616 (1919)

Jacob Abrams and four other Russian immigrants distributed in New York City two leaflets, one in English and the other in Yiddish, condemning the United States for sending troops to Russia. The Yiddish leaflet also urged a strike by munitions workers to protest the government's intervention in Russia. Abrams and his comrades were prosecuted under the Sedition Act of 1918, which punished speech critical of the government and subversive of the war effort. Sentenced to prison terms of fifteen to twenty years, the defendants appealed on grounds that their free speech rights had been violated. The Supreme Court sustained their convictions. For the first time in a seditious speech case, however, the Court split, with Justice Holmes, joined by Justice Brandeis, in dissent.

Writing for the majority, Justice Clarke held that the leaflets indeed created a clear and present danger. Holmes, who had set forth the clear-and-present-danger test eight months earlier in *Schenck v. United States*, replied in his dissent that they did not. Holmes (and Brandeis) obviously understood the test to mean more than the majority did. "It is only the present danger of immediate evil or an intent to bring it about," Holmes wrote, adding to what he had said in *Schenck*, "that warrants Congress in setting a limit to the expression of opinion." Holmes observed that "the surreptitious publishing of a silly leaflet by an unknown man [Abrams]" hardly presented any such immediate danger, and that Abrams lacked the necessary intent, since his leaflet sought only to stop U.S. intervention in Russia.

Holmes sought to ground his clear-and-present-danger doctrine in the Constitution. Its "theory," he wrote in a famous passage, is that the public interest is best served 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." Because this marketplace is the best means for discovering truth, government should not suppress speech unless it imminently or intentionally threatens harm.

In subsequent free speech cases, Holmes and Brandeis continued to argue for a more rigorous clear-and-present-danger test. Not until 1937, in *Herndon v. Lowry*, did the Court actually use the test in sustaining a free speech claim.

Opinion of the Court: **Clarke**, White, Van Devanter, Pitney, McReynolds, Day, McKenna. Dissenting opinion: **Holmes**, Brandeis.

Abrams v. United States was decided on November 10, 1919.

OPINIONS

JUSTICE CLARKE DELIVERED THE OPINION OF THE COURT . . .

It will not do to say . . . that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians. . . .

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war. . . .

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. . . .

. . . [W]hile the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe. . . . [T]he language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, . . . and the defendants . . . plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war. . . . Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged . . . and . . . the judgment of the District Court must be

AFFIRMED.

JUSTICE HOLMES, DISSENTING . . .

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck* [1919], *Frohwerk* [1919], and *Debs* [1919] 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 opinion where private rights are not concerned. Congress 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. So I assume that the second leaflet if published for the purposes alleged . . . might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime. . . . It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. . . .

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. . . .

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 a 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 ultimate 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 of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate in-

terference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . by repaying fines that it imposed. 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.

RESPONSE

FROM *THE NEW REPUBLIC*, NOVEMBER 26, 1919, "THE CALL TO TOLERATION"

At the present time American public opinion in relation to freedom of speech, as expressed by the Supreme Court itself, is in danger of sacrificing the benefits of liberty to a headstrong impulse to cure its abuses. We are seeking a remedy not in a temper of mind which is too self-possessed to be stampeded and which is willing to stand or fall by the facts, but in repression and in impatient denunciation. Administrative officers and the courts, instead of patiently estimating whether or not the expression of an opinion which as patriotic Americans they may loathe is or is not an imminent and actual source of danger to social order, prefer to repress all suspicious utterances and to inflict savage punishments on their perpetrators. We are acting on the supposition that every utterance which expresses hostility to the social establishment and which may possess a tendency or be prompted by a purpose to undermine it, is actually accomplishing all that it may tend or purpose to accomplish. The patriotic American seems to have lost all his former imperturbability, all his confidence in the stability of the American political and social fabric. He is panic-stricken lest a few hundred agitators can rend it to pieces by repeating the phrases of the Communist manifesto—phrases which the less tolerant and less stable governments of Europe have rarely considered it necessary to suppress, even when accompanied by direct provocation to acts of violence. . . .

If we in America ever suffer the awful affliction of a class revolution, it will come about not because of the indirect appeals to violence on the part of an insignificant minority of revolutionists, but as a consequence of the intolerance, the inflammation of spirit, the stupidity, and the faith in force rather than in the justice of the existing majority of educated and well-to-do Americans. They are adopting a course which, if pursued to the end, will do far more to provoke revolutionary violence than vague and empty appeals to the proletarians for union and rebellion. Educated and responsible Americans are allowing irresponsible agitators to mold their psychology and their ethics. The suicidal error of the Bolsheviks consists in their attempt to force on society by means of a class military dictatorship what they believe to be a program of economic and social liberation for the workers. The suicidal error of American

counter-Bolshevism consists in its attempts to protect the safety of a free democracy by a feverish outbreak of moral and physical violence which will in the long run destroy the moral self-control and the intellectual candor and integrity which the operation of democratic institutions requires. Democracy is capable of curing the ills it generates by means of peaceful discussion and unhesitating acquiescence in the verdict of honestly conducted elections, but its self-curative properties are not unconditional. They are the creation of a body of public opinion which has access to the facts, which can estimate their credibility and significance, and which is in effective measure open to conviction. The most articulate public opinion in America is temporarily indifferent to the facts and impervious to conviction. Its fear of revolutionary agitation betrays it into an impotent and feverish devotion to symbols and phrases which do not permit the candid consideration of social evils and abuses and the adoption of thoroughgoing remedies. American educators and lawyers no longer act as if the government and Constitution of the United States is, as Justice Holmes says, an experiment which needs for its own safety an agency of self-adjustment and which seeks it in the utmost possible freedom of opinion. They act as good Catholics formerly acted in relation to the government and creed of the Catholic church—as if the government and Constitution were the embodiment of ultimate political and social truth, which is to be perpetuated by persecuting and exterminating its enemies rather than by vindicating its own qualifications to carry on under new conditions the difficult job of supplying political salvation to mankind. If they begin by sacrificing freedom of speech to what is supposed to be the safety of constitutional government they will end by sacrificing constitutional government to the dictatorship of one class.