SCHENCK V. UNITED STATES:
A CLEAR AND PRESENT DANGER TO THE FIRST AMENDMENT

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ABSTRACT: *In 1919 when the Supreme Court decided* Schenck v. United States*, it was the first case in which a federal law was challenged on free speech grounds. For this monumental first ruling about free speech Justice Oliver Wendell Holmes, Jr. wrote the decision, in which he affirmed the Espionage Act of 1917 and established the "clear and present danger" test for determining whether an individual's actions are protected under the free speech clause of the first amendment. The cases that followed extended this rule beyond the original intent, creating restrictive boundaries on the freedom of speech. Schenck serves as a cautionary tale of how exceptions made to important freedoms can swallow the overall rule.*

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The freedom of speech, as protected by the First Amendment, is one of the most foundational rights recognized by the Bill of Rights.[2] For over a hundred years this right was not examined in the nation's highest court until 1919 when the Supreme Court decided *Schenck v. United States*, the first case in which a federal law was challenged on free speech grounds.[3] Justice Oliver Wendell Holmes, Jr. wrote the decision, in which he affirmed the Espionage Act of 1917 and established the "clear and present danger" test for determining whether an individual's actions are protected under the free speech clause of the First Amendment.[4] Through examining the history leading up to the case, the facts of *Schenck* itself, and the results of the case and following cases, one can develop a clear picture of the devastatingly limiting effect this decision had on America's most valued freedom: the freedom of speech. Holmes's "clear and present danger" restraint was an improper infringement on the first amendment right to free speech.

Before one can examine the case itself and examine its effects, it is necessary to paint the picture of the setting and historical background of the 1919 *Schenck* decision. After the ratification of the Constitution in July 1788, the Federalists, a group of founders led by James Madison, pushed for a bill of rights to protect citizens from dangerous expansion of the federal government.[5] Several states, including Virginia, only agreed to ratify the

2 U.S. Const. amend. I.

3 9 West's Encyclopedia of American Law 13-14 (Jeffery Lehman & Shirelle Phelps eds., Thompson Gale 2005).

4 Schenck v. United States, 249 U.S. 47, 52(1919).

5 George Anastaplo, Reflections on Freedom of Speech and the First Amendment 64 (The University Press of Kentucky, 2007).

Constitution if their representatives would push for a bill of rights to be added. The states ratified the first amendment in 1791 as a part of the Bill of Rights.[6] Clearly, the right to freedom of speech was important to the founders and the citizens of the newly formed United States. As such, it is the duty of the courts to strike down any legislation which violates the freedom of speech.

Over 120 years after the adoption of the Bill of Rights, the next step leading to the *Schenck* case occurred. On April 6, 1917, Congress declared war against Germany and entered World War I.[7] On May 18 of the same year it enacted the Military Conscription Act which raised a national army, establishing the draft.[8] There were serious reservations in the United States about the war. Woodrow Wilson had won re-election in November 1916 on a platform which assured that "He kept us out of the war," but within a year of his re-election he asked Congress for a declaration of war.[9] Although the threat was not significant, some Americans were concerned about insurrection and resistance to the draft. This fear was not entirely unfounded. More than one-fifth of the American population was of German descent, and 300,000 (the equivalent of one million men in the American population today) evaded the draft.[10]

The government had already enacted several criminal

6 *Id.*

7 *Clear and Present Danger, in* Landmark Decisions of The United States Supreme Court III 19 (Maureen Harrison & Steve Gilbert eds., Excellent Books, 2007).

8 Zechariah Chafee Jr., Free Speech in the United States 26 (Antheneum, 1969).

9 Anastaplo, *supra* note 4, at 102.

10 *Id.*

statutes during the Civil War, under which it could prosecute individuals resisting recruitment by invoking riots, giving speeches, and releasing publications to evade the draft.[11] The Department of Justice felt these statures were insufficient, however, and proceeded to enact the Espionage Act of 1917,[12] the federal law in question in the *Schenck* case.[13] This act was a major effort to promote national unity at the expense of individual freedom. It prohibited individuals from obstructing military recruiting, hindering enlistment, or promoting insubordination among the armed forces of the United States.[14] The Espionage Act was quickly followed by an amendment (sometimes called the Sedition Act) on May 16, 1918. This amendment added additional offenses, making it a crime to interfere with the sale of war bonds. The Sedition Act also prohibited saying or publishing anything disrespectful to the government of the United States.[15]

Next, one must examine the defendants and the details of the *Schenck* case. Charles Schenck was the General Secretary of the Socialist Party of America, which was opposed to America's entry into the war and to the instatement of the draft.[16] He, along with the other defendants, sent 15,000 leaflets to men in Philadelphia, encouraging draftees to "assert their rights" by resisting

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11 Chafee, *supra* note 8, at 37.

12 *Id.*

13 249 U.S. at 48.

14 Espionage Act of 1917, 18 U.S.C. §3 (1917).

15 Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918), repealed by Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359 (1921); See 60 CONG. REC. 293-94, 4207-08 (1921).

16 Landmark Decisions, *supra* at 19.

the draft.[17] Schenck was arrested and charged under the Espionage Act of 1917. He was convicted in federal district court on December 20, 1917. He subsequently appealed his conviction to the Supreme Court, which granted review.[18] Oral arguments were heard by the Court on January 9-10, 1919.[19] Schenck's lawyers made three arguments: the evidence was not sufficient to prove that Schenck was responsible for sending the pamphlets, the information was not admissible because it was obtained without a search warrant, and finally, the pamphlets were covered under the First Amendment free speech clause which prohibits Congress from creating legislation to abridge the freedom of speech.[20] The Court quickly dismissed the first two objections and confronted the third.[21]

The Supreme Court's main decision was whether or not the Espionage Act was actually constitutional. The Court decided that the Espionage Act of 1917 was legitimate. The Court announced the unanimous opinion on March 3, 1919, which was written by Justice Oliver Wendell Holmes Jr.[22] He admitted 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."[23] However, he also noted that the constitutionality of all speech depends on the circumstances in which it is spoken.

17 249 U.S. at 51.
18 West's Encyclopedia, *supra* note 2 at 13.
19 Landmark Decisions, *supra* note 6 at 19.
20 249 U.S. at 48-50.
21 *Id.*
22 Landmark Decisions, *supra* note 6 at 19.
23 249 U.S. at 51.

For example, the freedom of speech does not permit a person to falsely yell fire in a crowded theatre. Holmes noted that in every case one must consider "whether the words are used in such circumstances that are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent."[24] By writing this opinion, Holmes established the influential, and now idiomatic, expression – "clear and present danger" as a test for what kind of speech is covered under the First Amendment free speech clause.

Schenck v. United States created a drastic and unnecessary limitation to the previously expansive rights of free speech. Sending political dissenters to jail simply for voicing their opinions is something one associates with tyranny, not with a constitutional republic. Moreover, the *Schenck* opinion lacks any indication to why Americans should value freedom of speech. Holmes admits that in other places and times the defendants would have been within their political rights, but this statement only adds insult to injury. Holmes tells the defendants they have a constitutional right to dissent only some of the time. In fact, the ideas expressed in the leaflets disseminated by Schenck could have been published at that time in any of the country's larger newspapers without any risk.[25] The attempt by the administration to have a press censorship provision included in the Espionage Act had failed.[26] Thus, vigorous criticism of the government by media organizations continued. The only real effect of the *Schenck* decision was to set an

24 *Id.*

25 Anastaplo, *supra* note 4, at 104.

26 *Id.*

unfortunate precedent in First Amendment law at the expense of individual dissenters.

Proponents of the decision in *Schenck v. United States* argue that Holmes's "clear and present danger" restraint on the freedom of speech was necessary to ensure national security. They would agree with Harvard Law Professor Zechariah Chafee, Jr. who wrote in reference to the decision in *Schenck* that "the concept of freedom of speech received for the first time an authoritative judicial interpretation in accord with the purpose of the framers of the Constitution."[27] However, this opinion is difficult to support considering the history of free speech, as well as the events which followed the case. As previously mentioned, freedom of speech was very important to the founders. Many forefathers were afraid the new government would transform into a monarchy and wanted to prevent individuals in power from stifling the freedoms of citizens.

The *Schenck* decision set a precedent that led to further Court decisions which continued to deteriorate Americans' right to free speech. Two of these cases occurred in 1919, the same year the *Schenck* case was decided. The restrictive nature of the "clear and present danger" clause was first expanded in *Debs v. United States,* decided only one week after *Schenck*. In *Debs,* the defendant, Eugene V. Debs, a famous Socialist leader and five-time candidate for the U.S. presidency, gave a speech to a crowd in which he advocated socialism and expressed anti-war beliefs.[28]

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27 Chafee, *supra* note 8, at 82.

28 Debs v. United States, 249 U.S. 211, 212-213 (1919).

The defendant was indicted under the Espionage Act. The Court upheld the conviction, further restricting free speech based merely upon the presumed purpose of the speech.[29]

Later that same year, the Court uncovered the difficulty in applying the "clear and present danger test" when it decided *Abrams v. United States.*[30] In *Abrams,* the defendants were charged with publishing disloyal materials while the United States was at war with Germany, intending to cause resistance to the war in the United States.[31] The Court affirmed the defendants' convictions.[32] In this case, however, Holmes famously dissented because the court extended his "clear and present danger" test too far.[33] He tried to salvage this misuse of the Constitution by stating "the ultimate good desired is better reached by free trade in ideas… That at any rate is the theory of our Constitution." He continued with "we should be eternally vigilant against attempts to check the expression of opinions that we loathe" unless "an immediate check is required to save the country."[34] Thus, even Holmes recognized that this limitation of free speech as established by the *Abrams* case had been extended beyond its original purpose.

Gitlow v. New York (1925) further complicated the freedom of speech precedent. The defendants in this case were convicted in violation of N.Y. Penal Law §§ 160 and 161 for helping

29 *Id.* at 217.
30 Abrams et al. v. United States, 250 U.S. 616, 616 (1919).
31 *Id.* at 616-617.
32 *Id.* at 624.
33 *Id.* at 627-629.
34 *Id.* at 630.

publish a manifesto for the Socialist party.[35] In this decision, Justice Sanford wrote that the "clear and present danger" test could be applied only to a statute prohibiting a particular type of action, rather than prohibiting a particular type of utterance.[36] Thus, if a legislative body determined that a specific type of speech threatened to cause enough harm to justify legislative action, then the Court would defer to its judgment.[37] If the law was determined not to be arbitrary, and if a specific utterance actually fell within the type prohibited by law, then the courts could not intervene further. Holmes dissented in this case as well, because "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."[38] The test Holmes created had become a tool for expansive restrictions on the free speech clause against his own wishes.

The freedom of speech was also addressed in *Whitney v. California,* in which Anita Whitney appealed a judgment of the District Court of Appeal of California that affirmed her conviction under the California Criminal Syndicalism Act, based on her membership in and organization of the Communist Labor Party of California.[39] The Court further affirmed her conviction, and it found that the Act was not an unreasonable or arbitrary exercise of police power or unwarrantably infringing any right of free speech,

35 Gitlow v. New York, 268 U.S. 652, 654 (1925).
36 *Clear and Present Danger Re-Examined*, 51Colum. L. Rev. 102 (1951).
37 *Id.*
38 1925 U.S. at 673.
39 Whitney v. California, 274 U.S. 357, 359 (1927).

assembly, or association.[40] Justice Sanford, who wrote the majority opinion, relied on *Schenck* for this decision, stating "the necessity which is essential to a valid restriction does not exist 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."[41] Hence, once again, the court used *Schenck* to further restrict freedom of speech in America.

Eventually, the Court recognized that the "clear and present danger" test was not sufficient. In fact, the old test was replaced with the "not improbable" test via the decision in *Dennis v. United States* (1951). In *Dennis,* the defendants, members of the Communist Party, were convicted of violating the Smith Act (18 U.S.C.S. § 11) by conspiring to advocate the overthrow of the United States.[42] Judge Learned Hand renounced the majority opinion's distinction in the *Gitlow* decision, but achieved its result by a more radical approach. He wrote: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[43] Hence, he eliminated the independent requirement of imminence and indicated the importance of probability in calculating the severity of the evil. Thus, he concluded it is unnecessary that a danger be imminent for it to be a highly probable effect of an utterance. Although the Supreme Court adopted this new "not improbable" test, it would not remain in use for long.

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40 *Id.* at 371.
41 *Id.* at 373.
42 Dennis v United States, 341 U.S. 494, 295 (1951).
43 *Id.* at 510.

In *Brandenburg v. Ohio* (1969), the Court was once again faced with a case concerning the First Amendment, and its decision created a new test, the "imminent lawless action" test. Brandenburg, the petitioner, was a leader of the Ku Klux Klan. After a television news report aired, which broadcasted speeches made by Brandenburg, he was charged with violating Ohio's criminal syndicalism statute, Ohio Rev. Code Ann. § 2923.13.[44] The code made it illegal to advocate crime or terrorism or to assemble with any group to teach or to advocate doctrines of syndicalism.[45] Thus, the Ohio courts arrested and convicted Brandenburg. After the conviction was upheld by the Ohio Supreme Court, the case was heard on appeal by the Supreme Court. The Court found that Ohio's criminal syndicalism statute unconstitutionally intruded on the rights guaranteed by the First Amendment, made applicable to the states by the Fourteenth Amendment, because the statute did not draw a distinction between teaching the need for force or violence and preparing a group for violent action. Thus, the Court reversed the petitioner's conviction because the statute upon which his conviction was based was unconstitutional. The author of the *per curiam* decision wrote "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action" (emphasis added).[46] Additionally, Justice Douglas writes

44 Brandenburg v Ohio, 395 U.S. 444, 445 (1969).

45 *Id.*

46 *Id.* at 447.

in the concurring opinion, "I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it."[47] Hence, the "clear and present danger" test and the "not improbable" test were discredited and replaced with the "imminent lawless action" test.

The Supreme Court sometimes arrives at the wrong conclusion in a case. In this event, the country must live with the consequences. Based on the rights granted by the First Amendment of the United States Constitution, Holmes and the rest of the Supreme Court wrongly decided *Schenck v. United States.* The "clear and present danger" test which Holmes created was used as a tool to violate the Founders' original intention for the freedom of speech. Holmes quickly discovered the difficulties of his test in cases such as *Abrams* and *Gitlow.* As time passed after the *Schenck* decision, the Court recognized the problems with Holmes's original test. Thus, the Supreme Court as a whole rejected and replaced the test in *Dennis v. United States* and *Brandenburg v. Ohio*. In retrospect, it appears the *Schenck* decision and the decisions that followed closely after it were a result of the distress caused by war. Even today, the consequences of *Schenck* are being played out with the expansion of government power in the wake of the War on Terror, as seen through the Patriot Act and the alleged electronic eavesdropping by the United States government.

The many freedoms which Americans enjoy constitute America's greatness. The freedom of speech is a precious right

47 *Id.* at 454.

granted to the American people through the Constitution. Restrictions of this right should be established only when it is absolutely necessary, and *Schenck v. United States* resulted in an unnecessary and dangerous restriction. *Schenck* serves as a cautionary tale for the next generation of political figures and judges that exceptions made to important freedoms can eventually swallow the overall rule. Justices, legislators, and citizens of the United States need to work within their power to prevent similar unnecessary restrictions and to remove needless limitations already established.