

Schenck v. United States / Summary of Decision

Justice Oliver Wendell Holmes delivered the opinion for a unanimous Court in favor of the United States.

Justice Holmes wrote that, “the character of every act depends upon the circumstances in which it is done.” As the U.S. government rallied to enter into World War I, the Espionage Act’s prohibition and criminalization of speech that caused or attempted to cause a disruption of the operation of the military was not a violation of a person’s First Amendment rights. According to Justice Holmes, words spoken when a nation is at war could cause great harm to the safety of the nation.

Justice Holmes held that some speech does not deserve constitutional protection. Statements that “create a clear and present danger” of producing an unacceptable harm are unprotected and Congress may prohibit that speech.

In perhaps the most famous line of the decision, Justice Holmes wrote, just as “free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,” the Constitution does not protect efforts to encourage the criminal act of resisting the draft during a time of war.

Schenck fashioned a new and important rule. It allowed Congress to authorize the punishment of speech based on both its content and viewpoint. The “clear and present danger” test provided the framework for future cases brought against independent and spirited speakers under both the Espionage Act and, in the wake of *Gitlow v. New York* (1925), similar state laws. Under the “clear and present danger” test, the government typically won, and the speakers almost always lost. The Court would eventually abandon this approach and adopt a test that provided greater protection for free expression. In particular, *Brandenburg v. Ohio* (1969) fashioned the rule that now governs any action against a speaker for their speech, requiring that the statements in question be 1) “directed at inciting or producing imminent lawless action” and 2) “likely to incite or produce such action.”