

# FREEDOM AND DIGNITY PROJECT

(Christopher Barrie and Tom Drnek; Wappingers School District)

**Topic:** Schenck v. United States

**Grade Level:** 11

**NY State Learning Standard(s) assessed :**

**History of the United States**

1. Important ideas, social and cultural values, beliefs, and traditions from New York State and United States history illustrate the connections and interactions of people and events across time and from a variety of perspectives. This activity illustrates how free speech is both highly valued and a source of divisiveness among the American people.
2. Study about the major social, political, economic, cultural, and religious developments in New York State and United States history involves learning about the important roles and contributions of individuals and groups. This activity focuses on how the actions of Schenck illustrate the issue of restriction of freedom of speech during wartime.
3. The skills of historical analysis include the ability to: explain the significance of historical evidence; weigh the importance, reliability, and validity of evidence; understand the concept of multiple causation; understand the importance of changing and competing interpretations of different historical developments. Students will be asked to use documents that focus on how the court case affected society.

**Core Curriculum Unit:** Unit IV – THE PROGRESSIVE MOVEMENT: RESPONSES TO THE CHALLENGES BROUGHT ABOUT BY INDUSTRIALIZATION AND URBANIZATION - Section 2 - THE RISE OF AMERICAN POWER

**Learning Objectives:**

Students will be able to:

1. Identify the political and social motives leading to different view points in the Supreme Court case of the Schenck v. US when the use of speech is likely to incite illegal action.
2. Analyze and successfully comprehend primary documents.
3. Evaluate how the court case impacted society.
4. Evaluate how the court case impacted future cases and legislation.

**Essential Questions:**

1. What was the impact of Schenck v. U.S. on the Hudson Valley?
2. How does Schenck impact the right of free speech?
3. Have attitudes about limitation on speech changed in the last 90 years?

**Time Allotment (classroom time): 2 class periods (84 minutes)**

**Vocabulary (key terms):**

anarchy	decrees	espionage	jurisdiction	liberties	sabotage
servitude	syndicalism	clergyman	conscription	pacifistanalogy	
doctrine	dissident	pacifism			

**Materials/Resources:**

- Pens

- Paper
- Primary sources
- Overhead projector
- Ball or Bean Bag

**Web sites used:**

[http://bb.ucbores.org/courses/1/TAHWK2-05/content/175101/Espionage\\_Act\\_Sentences\\_Stand.pdf](http://bb.ucbores.org/courses/1/TAHWK2-05/content/175101/Espionage_Act_Sentences_Stand.pdf)

[http://bb.ucbores.org/courses/1/TAHWK2-05/content/175111/Supreme\\_Court\\_Rules\\_against\\_Pacifists.pdf](http://bb.ucbores.org/courses/1/TAHWK2-05/content/175111/Supreme_Court_Rules_against_Pacifists.pdf)

[http://bb.ucbores.org/courses/1/TAHWK2-05/content/176031/Free\\_Speech\\_PDF.pdf](http://bb.ucbores.org/courses/1/TAHWK2-05/content/176031/Free_Speech_PDF.pdf)

<http://faculty-web.at.northwestern.edu/commstud/freespeech/cont/cases/schenck/pamphlet.html>

<http://www.answers.com/topic/schenck-v-united-states>

<http://www.answers.com/debs%20v.%20united%20states>

<http://www.answers.com/espionage%20act%20of%201917>

[http://cyberspacei.com/jesusi/peace/human\\_right/civil\\_right/Schenck\\_v\\_United%20States.htm](http://cyberspacei.com/jesusi/peace/human_right/civil_right/Schenck_v_United%20States.htm)

**\*\*\*Note to teacher....we have the Supreme Court's opinion copied for you here as well.\*\*\***

**Procedure:**

**DAY ONE**

**BRAINSTORM ACTIVITY- WARM UP**

- Ask the class to individually write down in their notebooks what rights can be limited by the government and when these rights can be limited. *For example freedom of speech during the time of war.* After a couple of minutes the class as a whole will accumulate a list on the blackboard/smartboard/overhead projector.

**ACTIVITY 1- Discussion**

- Have the students answer the following question, "Can you shout fire in a crowded theater?" You can either list the arguments on the board or just have it has a discussion. Next, ask the question, "Can you shout bomb on a plane?" Are there any differences between the two scenarios?
- Discuss with the class what type of changes typically happen during war times. In the discussion, give historical examples such as suspension of habeas corpus and the Patriot Act.

- Remind the students that during WWI, there were fears of anarchism and socialism seeping into the United States and this led to the passage of the Espionage and Sedition Acts. People were protesting the war; one such person was Schenck.

#### ACTIVITY 2: Background – Case Reading

- Introduce Schenck and discuss his background with the class. Be sure to describe what organizations he was involved in and his stance on WWI and the draft. Next explain how he was arrested under the Espionage Act for distributing an anti-draft pamphlet. Read the pamphlet as a class and discuss whether they think he was breaking the Espionage Act? Is there a reason why his freedom of speech was limited because of this?

(see handout of the Schenck pamphlet attached below)

- Now have the students read the article on Schenck v. U.S.. Have the students answer the questions. Once all the students have completed, discuss the questions as a class. If it is not completed, they can answer the questions as homework.

(see summary article attached below)

#### HOMEWORK – Primary Documents- Prepare for debates.

- The students will receive primary documents about the Schenck Case and its outcomes which they will have to analyze. While analyzing the documents each student is to make a list of 3 reasons to support Schenck’s freedom of speech and 3 reasons limiting. Tell the students that these reasons will be used in a class debate tomorrow.

(see documents attached below)

### Day 2

#### WARM UP- Review

- The class will spend a couple of minutes reviewing the facts of the case. This should be done through a short question and answer session.

#### ACTIVITY 1 - Debate

- Divide the class into two groups. One group will prosecute Schenck while the other group will defend him. The questions to be debated are-

1. Is the Espionage Act constitutional?
2. Did Schenck’s pamphlet pose a “clear and present danger” to America?

3. Was his imprisonment justified?
4. Is what Schenck did comparable to “falsely shouting fire in a crowded theater”?

The teacher will moderate the debate and lay the ground rules for the discussion. Only one person is to speak at a time and that will be the person who has the ball or bean bag (or any passable object). When that person is done speaking they are to give the ball back to the teacher and the teacher will then give the ball to someone from the opposing side. Let the students go back and forth but make sure that all questions are discussed and students stay on task. The teacher may have to direct the students to certain questions throughout the debate. When the debate is over take a vote on how the class really feels about the case. Tell them that they are a Supreme Court Justice from the time, would they have voted to uphold Schenck’s conviction. Would they have voted to limit his speech during wartime? Tell them to think about the arguments they heard during the debate before they vote. Finally, have a discussion of limitations on free speech today and whether or not the students feel their freedoms are being limited during the current War on Terrorism. Discuss and make comparisons between today and the Schenck Case.

#### CLOSURE- Case Summary Sheet

- Have the students fill out the attached case summary sheet. They can do this with a partner and the teacher should go around the room and make sure they get all important information. After each Supreme Court Case is studied throughout the year you should have the students fill out a case summary sheet which they can use to study for tests and the Regents at the end of the year.

#### **Assessment:**

- They will be assessed on the answers they provide to the reading.
- Primary document questions.
- They will be assessed on the information they provide to the class debate.
- There will a test on the material.
- At the end of the unit students will be asked to complete the attached Regents Thematic Essay where they can use the Schenck Case.

Name \_\_\_\_\_

## **CASE SUMMARY**

Title and Date of Case: \_\_\_\_\_

**FACTS (What were the actions of the parties, and on what did they base their legal arguments?)**

**ISSUE(S) (What was the court called upon to decide?)**

**DECISION (What did the court decide?)**

**MAJORITY OPINION (What was the reasoning of the court majority?)**

**DISSENTING OPINION(S) (If any)**

**\*\*HISTORICAL SIGNIFICANCE OF THE CASE\*\***

Answers to the essay questions are to be written in the separate essay booklet. In developing your answers to Parts II and III, be sure to keep these general definitions in mind:

- (a) discuss means “to make observations about something using facts, reasoning, and argument; to present in some detail”
- (b) explain means “to make plain or understandable; to give reasons for or causes of; to show the logical development or relationships of”

## Part II

### THEMATIC ESSAY QUESTION

*Directions:* Write a well-organized essay that includes an introduction, several paragraphs addressing the task below, and a conclusion.

#### Theme: Constitutional Principles

United States Supreme Court cases have dealt with a variety of important issues that have affected American society.

#### Task:

Select *two* Supreme Court cases that have affected American society.

For *each* case selected:

- Discuss the historical circumstances of the case
- Explain the Court’s decision in the case
- Discuss the impact of the decision on American society

You may use any example from your study of United States history. Some suggestions you might wish to consider include:

*McCulloch v. Maryland* (1819) — federal supremacy

*Schenck v. United States* (1919) — freedom of speech

*Korematsu v. United States* (1944) — equal protection under the law

*Brown v. Board of Education of Topeka* (1954) — equal protection under the law

*Engel v. Vitale* (1962) — separation of church and state

*Miranda v. Arizona* (1966) — rights of the accused

*Roe v. Wade* (1973) — right to privacy

*Vernonia School District v. Acton* (1995) — search and seizure

**You are *not* limited to these suggestions.**

#### Guidelines:

**In your essay, be sure to:**

- Address all aspects of the *Task*
- Support the theme with relevant facts, examples, and details
- Use a logical and clear plan of organization
- Introduce the theme by establishing a framework that is beyond a simple restatement of the *Task* and conclude with a summation of the theme

Reprint of the text in Schenck's pamphlet:

### ***Assert Your Rights***

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.

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.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether knowingly 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?

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.

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 crazy 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"?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy can not 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.

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?

(<http://faculty-web.at.northwestern.edu/commstud/freespeech/cont/cases/schenck/pamphlet.html>,  
accessed 01/08/07)

*U.S. Supreme Court*  
**SCHENCK v. U.S. , 249 U.S. 47 (1919)**

**249 U.S. 47**

**SCHENCK**

**v.**

**UNITED STATES.**

**BAER**

**v.**

**SAME.**

**Nos. 437, 438.**

**Argued Jan. 9 and 10, 1919.**

**Decided March 3, 1919.**

[249 U.S. 47, 48] Messrs. Henry John Nelson and Henry Johns Gibbons, both of Philadelphia, Pa., for plaintiffs in error.

Mr. John Lord O'Brian, of Buffalo, N. Y., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, tit. 1, 3, 40 Stat. 217, 219 (Comp. St. 1918, 10212c), by causing and attempting [249 U.S. 47, 49] to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendant wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, 2044a-2044k), a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offense

against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by title 12, 2, of the Act of June 15, 1917 (Comp. St. 1918, 10401b), to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On [249 U.S. 47, 50] August 20 the general secretary's report said 'Obtained new leaflets from printer and started work addressing envelopes' &c.; and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer there was evidence that she was a member of the Executive Board and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, [192 U.S. 585](#), 24 Sup. Ct. 372; *Weeks v. United States*, [232 U.S. 383, 395](#), 396

S., 34 Sup. Ct. 341, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch street and it would seem that the documents technically were not even in the defendants' possession. See Johnson v. United States, [228 U.S. 457](#) , 33 Sup. Ct. 572, 47 L. R. A. ( N. S.) 263. Notwithstanding some protest in argument the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. Holt v. United States, [218 U.S. 245, 252](#) , 253 S., 31 Sup. Ct. 2

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 [\[249 U.S. 47, 51\]](#) 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 any one 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 , &c., &c., 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 [249 U.S. 47, 52] main purpose, as intimated in *Patterson v. Colorado*, [205 U.S. 454, 462](#), 27 S. Sup. Ct. 556, 51 L. ed. 879, 10 Ann. Cas. 689. 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. *Aikens v. Wisconsin*, [195 U.S. 194, 205](#), 206 S., 25 Sup. Ct. 3. 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. *Gompers v. Buck's Stove & Range Co.*, [221 U.S. 418, 439](#), 31 S. Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (N. S.) 874. 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 (Comp. St. 1918, 10212d) 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. *Goldman v. United States*, [245 U.S. 474](#), 477 38 Sup. Ct. 166, 62 L. ed. 410. 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 [249 U.S. 47, 53] 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. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment and would not, even if the former act had been repealed. Rev. St. 13 (Comp. St. 14).

Judgments affirmed.

**ESPIONAGE ACT SENTENCES STAND**

*Christian Science Monitor (1908-Current file); Mar 4, 1919; ProQuest Historical Newspapers Christian Science Monitor*  
pg. 5

# **ESPIONAGE ACT SENTENCES STAND**

## **Supreme Court of United States, in Three Cases, in Effect Sustains Law's Provisions**

**WASHINGTON, District of Columbia** -- Constitutionality of the so-called enlistment section of the Espionage Act was, in effect, upheld on Monday by the Supreme Court of the United States in sustaining conviction, under the act, of Charles T. Schneck and Elizabeth Baer of Philadelphia, on charges of sending non-mailable circulars regarding the war to men within draft ages.

Conviction in North Dakota of Kate Richards O'Hare because of a speech, was also, in effect, sustained by the Supreme Court, which denied her petition for a review. The lower court gave her a five-year sentence.

Without passing specifically on the constitutionality of the Espionage Act, the Supreme Court on Monday, in effect, sustained federal court decrees convicting Abraham L. Sugerma of Minneapolis, under the act. Sugerma was sentenced to three years' imprisonment because of statements made in a speech. In dismissing the proceedings, Justice Brandeis, who rendered the opinion, held that no constitutional questions were involved in the appeal and for that reason the court had no jurisdiction.

## **SUPREME COURT RULES AGAINST PACIFISTS**

### ***Holds Enlistment Section of Espionage Act No Interference with "Free Speech."***

WASHINGTON, March 3.—While not passing directly upon the question of the constitutionality of the Espionage act, the Supreme Court in disposing of proceedings involving an interpretation of that statute today in effect held that the so-called enlistment section was not an interference with the right of free speech provided by the Constitution.

"When a nation is at war," the court held in an opinion rendered by Justice Holmes, "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 no court could regard them as protected by any constitutional right."

The opinion was rendered in sustaining convictions of Charles T. Schenk and Elizabeth Baer of Philadelphia, who were charged with attempting to interfere with army enlistments by sending through the mails to men of draft ages circulars discussing subjects relative to the war.

The court also, in effect, sustained the convictions of Kate Richards O'Hare in North Dakota, under the Espionage Act, by refusing to review her case, and also the conviction of Abraham L. Sugerman of Minneapolis.

Appeals from convictions under the Espionage Act of Eugene V. Debs and Jacob Frohwerk of Kansas City were argued in the court prior to the February recess, but were not disposed of by the court today.

## Summary article on the case

### I. INTRODUCTION

*Schenck v. United States*, court case of 1919 in which the Supreme Court of the United States first determined the meaning of the freedom of speech protection of the First Amendment to the Constitution of the United States. In a unanimous decision, the Court ruled that there are certain limits to the First Amendment's guarantees of this freedom.

### II. BACKGROUND

The *Schenck* case grew out of opposition to U.S. involvement in World War I (1914-1918). Antiwar sentiment in the United States was particularly strong among socialists, German Americans, and religious groups that traditionally advocated pacifism. In response to this sentiment, Congress passed the Espionage Act of 1917. This law provided heavy fines and jail terms for interfering with U.S. military operations or for causing or attempting to cause insubordination or disloyalty in the military. In addition, the act made it illegal to obstruct recruitment efforts of the U.S. armed forces.

Among the many Americans convicted of violating the Espionage Act was Charles Schenck, general secretary of the Socialist Party of the United States. In 1917 Schenck sent copies of a letter urging resistance to the military draft to 15,000 men who had been drafted but not yet inducted into the U.S. military. Schenck's letter claimed that the draft violated the 13th Amendment to the Constitution, which abolished slavery and prohibited involuntary servitude. Schenck argued that conscription (forced enrollment) into the military was a form of involuntary servitude and thus should be prohibited. The letters also claimed that businesses had conspired to lead the United States to war, against the interests of average Americans. Schenck urged readers to assert their individual rights by opposing the draft, but he did not directly advocate violence or evasion of the conscription laws.

### III. THE COURT'S DECISION

Writing for a unanimous Court, Justice Oliver Wendell Holmes, Jr., delivered an *opinion* (a legal decision) that established guidelines for assessing the limits of free speech. In considering the case, the Court had to decide whether Schenck's language was

protected by the First Amendment, even though it might have had the power to cause opposition to the draft. The First Amendment states that "Congress shall make no law...abridging the freedom of speech." The Court concluded that because Schenck's speech was intended to create opposition to the draft, it was not protected by the First Amendment.

#### *A "Clear and Present Danger"*

Holmes considered the context of Schenck's speech as well as its intent. In his opinion, he created a new legal test—the *clear and present danger* test—that was designed to identify when certain forms of speech were not protected by the First Amendment. He asserted that 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 had a right to prevent."

The clear and present danger test effectively established a doctrine that allowed the government to suppress political speech under certain circumstances. For example, Holmes admitted that in peacetime Schenck's words would have been protected by the Constitution. But in times of war, "no Court could regard them as protected by any constitutional right."

#### *B "Fire in a Theater"*

As a way of explaining the doctrine of clear and present danger, Holmes used what has become one of the most famous analogies in American law. He wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." The analogy was meant to capture the sense of what a "clear and present danger" might be. However, some legal commentators have argued that the analogy may have been inappropriately applied to the *Schenck* case. They point out that Schenck did not "shout" anything, but merely sent a letter, which many recipients no doubt never opened or read. In addition, there was no "panic." No recipient of the letter actually acted on it, by protesting the draft or by refusing military service. There was no evidence that the letter elicited any reaction, except from those men who turned it over to government officials.

Holmes's "fire in a theater" analogy also contained the idea that speech could be suppressed if it was false. However, commentators have claimed that Schenck's arguments could not be proved to be either true or false. Rather, they were opinions about the war, held not only by Schenck and other socialists, but also by many leading American politicians, including those in the Senate and the House of Representatives who had voted against the declaration of war in 1917.

Commentators have also argued that the "clear and present danger" test, even if only applied in wartime, undermined the free speech protected by the Constitution. They claim that the Court should not have considered whether Schenck was right or wrong about the cause of the war, or about the constitutionality of the draft. These commentators assert that by prosecuting Schenck for his ideas and beliefs, the Court was closing off debate and stifling the free speech necessary for a democracy.

#### **IV. AFTERMATH**

For fifty years after the *Schenck* case the Supreme Court applied the clear and present danger doctrine to cases involving freedom of speech. In the 1950s the Court expanded the scope of the doctrine so that it could be used in peacetime to allow for the incarceration of Communists who expressed ideas that most other Americans opposed. Ironically, Holmes and his colleague Justice Louis D. Brandeis modified their interpretation of the clear and present danger standard just six months after the *Schenck* case, in *Abrams v. United States* (1919). In his dissent of the Court's decision in *Abrams*, Holmes argued that only "immediate" danger could serve as a precondition to suppress free speech. But Holmes did not convince the rest of the Court. In fact, the Supreme Court did not adopt this concept until a half century later in *Brandenburg v. Ohio* (1969).

Contributed By: Paul Finkelman

([http://cyberspacei.com/jesusi/peace/human\\_right/civil\\_right/Schenck\\_v\\_United%20States.htm](http://cyberspacei.com/jesusi/peace/human_right/civil_right/Schenck_v_United%20States.htm))

## Worksheet on Summary Article

1. What does the term “clear and present danger” mean within the context of the case?
2. Do you consider Schenck a “clear and present danger?”
3. Do you think the U.S. Congress acted constitutionally when it enacted the Espionage Act of 1917?
4. Do you agree with Justice Holmes’ assertion that there is a difference in how the rights afforded by the first amendment should be interpreted in times of war and peace? Explain
5. What is the clear and present danger test?
6. Is Justice Holmes’ analogy comparing Schenck’s pamphlet to “shouting fire in a crowded theater” fair? Explain your opinion?
7. In the 1950’s, how did the Supreme Court expand the scope of the doctrine? Why?
8. Which other Socialist leader that we discussing in class earlier this year (hint: he was also the leader of the Industrial Workers of the World (Wobblies) was also arrested based partly on what he said publicly about US involvement in WWI? (He received roughly a million votes for president when he ran from prison in 1920.)

Espionage Act

18 U.S.C. § 792 et seq. (1917), served to suppress opposition to the United States entry into World War I by making criticism of U.S. policy a "treasonable" offense. In combination with the Sedition Act of 1918, which amended it, the act was used as the basis for launching an unprecedented campaign against political radicals, suspected dissidents, left-wing organizations, and aliens. The disregard of basic civil liberties during these "Palmer raids," as they came to be known (because of the prominence of Attorney General A. Mitchell Palmer), drew widespread protest and ultimately discredited some high government officials. Once war opposition waned and the so-called Red Scare (i.e., fear of a perceived Bolshevik conspiracy to overthrow the U.S. government) passed, the law was allowed to expire (1921).

This act made it a crime, punishable by a \$10,000 fine and 20 years in jail, for a person to 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.

The laws were ruled constitutional in the United States Supreme Court case *Schenck v. United States*, 249 U.S. 47 (1919).

The law was later extended by the Sedition Act of 1918, which made it illegal even to speak out against the government.

During and after World War I the Espionage Act and the Sedition Act were used in prosecutions that would be considered constitutionally unacceptable in the U.S. even in the political climate after the September 11, 2001 Terrorist Attack on New York's World Trade Center. While much of the laws were repealed in 1921, major portions of the Espionage Act remain part of U.S. law (18 USC 793, 794) and form the legal basis for most classified information.

Washington Post 5/20/27



Drawing the Line Made Indelible by the Supreme Court.

Debs v. United States

### Summary

Argued January 27, 28, 1919 and March 10, 1919. A Supreme Court case against Eugene V. Debs surrounding a speech in Canton, Ohio against World War I given by him publicly. Evidence against Debs was a document entitled "Anti-War Proclamation and Program" showing that Debs' original intent was to openly protest against the war. The argument of the Federal Government was that Debs was attempting to arouse mutiny and treason by preventing the drafting of soldiers into the United States Army. This sort of sentiment and speech was outlawed in United States with the Espionage Act of June 15th, 1917. The argument in favor of Debs is that he was entitled to the rights of free speech provided for in the first amendment of the Bill of Rights.

In its ruling on Debs v. United States, the Court examined several statements Debs had made regarding WWI. While Debs had carefully guarded his speeches in attempt to comply with the Espionage Act, the Court found he still had the intention and effect of obstructing the draft and recruitment for the war. Among other things, the Court cited Debs's praise for those imprisoned for obstructing the draft. In his opinion, Justice Holmes stated that little attention was needed since Debs's case was essentially the same as Schenk v. United States, where the Court upheld a similar conviction. The Supreme Court decided against Debs, and maintained the power of the Espionage Act, sentencing Debs to ten years imprisonment, and a loss of citizenship.

Debs went to prison on April 13, 1919. While in prison in Atlanta, he ran for president in the 1920 election. He received 913,664 votes (3.4%), the most ever for a Socialist Party presidential candidate in the U.S. and slightly more than he had won in 1912, when he obtained six percent of the vote.

On December 25, 1921 President Warren G. Harding released Debs from prison, commuting his sentence to time served. Debs never recovered his health from his time in prison. In 1976 Debs's citizenship was restored posthumously.

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## ESPIONAGE ACT SENTENCES STAND

Supreme Court of United States,  
in Three Cases, in Effect  
Sustains Law's Provisions

WASHINGTON, District of Columbia -- Constitutionality of the so-called enlistment section of the Espionage Act was, in effect, upheld on Monday by the Supreme Court of the United States in sustaining conviction, under the act, of Charles T. Schneck and Elizabeth Baer of Philadelphia, on charges of sending non-mailable circulars regarding the war to men within draft ages.

Conviction in North Dakota of Kate Richards O'Hare because of a speech, was also, in effect, sustained by the Supreme Court, which denied her petition for a review. The lower court gave her a five-year sentence.

Without passing specifically on the constitutionality of the Espionage Act, the Supreme Court on Monday, in effect, sustained federal court decrees convicting Abraham L. Sugerman of Minneapolis, under the act. Sugerman was sentenced to three years' imprisonment because of statements made in a speech. In dismissing the proceedings, Justice Brandeis, who rendered the opinion, held that no constitutional questions were involved in the appeal and for that reason the court had no jurisdiction.

## SUPREME COURT RULES AGAINST PACIFISTS

*Holds Enlistment Section of Espionage Act No Interference with "Free Speech."*

WASHINGTON, March 3.—While not passing directly upon the question of the constitutionality of the Espionage act, the Supreme Court in disposing of proceedings involving an interpretation of that statute today in effect held that the so-called enlistment section was not an interference with the right of free speech provided by the Constitution.

"When a nation is at war," the court held in an opinion rendered by Justice Holmes, "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 no court could regard them as protected by any constitutional right."

The opinion was rendered in sustaining convictions of Charles T. Schenk and Elizabeth Baer of Philadelphia, who were charged with attempting to interfere with army enlistments by sending through the mails to men of draft ages circulars discussing subjects relative to the war.

The court also, in effect, sustained the convictions of Kate Richards O'Hare in North Dakota, under the Espionage Act, by refusing to review her case, and also the conviction of Abraham L. Sugerman of Minneapolis.

Appeals from convictions under the Espionage Act of Eugene V. Debs and Jacob Frohwerk of Kansas City were argued in the court prior to the February recess, but were not disposed of by the court today.

MARCH 4, 1919