



Schenck v. U.S. (1919)

In *Schenck v. United States* (1919), the Supreme Court invented the famous "clear and present danger" test to determine when a state could constitutionally limit an individual's free speech rights under the First Amendment. In reviewing the conviction of a man charged with distributing provocative flyers to draftees of World War I, the Court asserted that, in certain contexts, words can create a "clear and present danger" that Congress may constitutionally prohibit. While the ruling has since been overturned, *Schenck* is still significant for creating the context-based balancing tests used in reviewing freedom of speech challenges.

The case involved a prominent socialist, Charles Schenck, who attempted to distribute thousands of flyers to American servicemen recently drafted to fight in World War I. Schenck's flyers asserted that the draft amounted to "involuntary servitude" proscribed by the Constitution's Thirteenth Amendment (outlawing slavery) and that the war itself was motivated by capitalist greed, and urged draftees to petition for repeal of the draft. Schenck was charged by the U.S. government with violating the recently enacted Espionage Act. The government alleged that Schenck violated the act by conspiring "to cause insubordination ... in the military and naval forces of the United States." Schenck responded that the Espionage Act violated the First Amendment of the Constitution, which forbids Congress from making any law abridging the freedom of speech. He was found guilty on all charges. The U.S. Supreme Court reviewed Schenck's conviction on appeal.

The Supreme Court, in a pioneering opinion written by Justice Oliver Wendell Holmes, upheld Schenck's conviction and ruled that the Espionage Act did not violate the First Amendment. The Court maintained that Schenck had fully intended to undermine the draft because his flyers were designed to have precisely that effect. The Court then argued that "the character of every act depends upon the circumstances in which it is done." While in peacetime such flyers could be construed as harmless speech, in times of war they could be construed as acts of national insubordination. The Court famously analogized to a man who cries "Fire!" in a crowded theater. In a quiet park or home, such a cry would be protected by the First Amendment, but "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

In sum, free speech rights afforded by the First Amendment, while generous, are not limitless, and context determines the limits. "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." Against this test, the Court upheld the Espionage Act and affirmed Schenck's conviction, finding that his speech had created a clear and present danger of insubordination in wartime.

The decision, in addition to sending Charles Schenck to jail for six months, resulted in a pragmatic "balancing test" allowing the Supreme Court to assess free speech challenges against the state's interests on a case-by-case basis. (Justice Holmes, the test's creator, however, would attempt to refine the standard less than a year later, when he famously reversed himself and dissented in a similar free speech case, *Abrams v. United States*.) However, the "clear and present danger" test would only last for 50 years. In 1969, the Court in *Brandenburg v. Ohio* replaced it with the "imminent lawless action" test, one that protects a broader range of speech. This test states that the government may only limit speech that incites unlawful action sooner than the police can arrive to prevent that action. As of 2006, the "imminent lawless action" test is still used.