

Landmarks

Historic U.S. Supreme Court Decisions

Teacher's Guide & Reading



Lesson 7

Schenck v. U.S. (1919)

Overview

This lesson looks at *Schenck v. U.S.*, a U.S. Supreme Court case on the limits of free speech in wartime. First, students read about and discuss the case of *Schenck v. U.S.*. Then students debate three additional free speech cases arising from World War I.

Objectives

Students will be able to:

- Identify the “clear and present danger” rule.
- Compare the circumstances of the *Schenck* and *Abrams* cases.
- Express a reasoned opinion on whether the Espionage Acts were needed during World War I and whether similar acts are needed today.
- Express a reasoned opinion on what limits could be justified in peacetime on free speech.
- Prepare arguments based on *Schenck* and *Abrams* to debate one side of a free speech case.

Preparation

Reading in the student text: “*Schenck v. U.S.* (1919),” pp. 34–37

Activity in the student text: “When Is Free Speech a ‘Clear and Present Danger?’” p. 37

In advance of the lesson, choose three students to dramatically read the following handouts:

“President Woodrow Wilson’s Speech to Congress on April 2, 1917”

“Do Your Bit For America”

“Notice of Call and to Appear for Physical Examination”

Optional: Show students posters to help them get a sense of the times. Check *Landmarks* Links to find posters.

Standards Addressed

National High School U.S. History Standard 21: Understands the changing role of the United States in world affairs through World War I. (3) Understands how the home front influenced and was influenced by U.S. involvement in World War I (e.g., the impact of public opinion and government policies on constitutional interpretation and civil liberties . . .).

National High School Civics Standard 25: Understands issues regarding personal, political, and economic rights. (1) Understands the importance to individuals and to society of personal rights such as freedom of thought and conscience

California History-Social Science Content Standard 11.4: Students trace the rise of the United States to its role as a world power in the twentieth century. (5) Analyze the political, economic, and social ramifications of World War I on the home front.

California History-Social Science Content Standard 11.5: Students analyze the major political, social, economic, technological, and cultural developments of the 1920s. (2) Analyze the international and domestic events, interests, and philosophies that prompted attacks on civil liberties

California History-Social Science Content Standard 12.1: Students explain the fundamental principles and moral values of American democracy as expressed in the U.S. Constitution and other essential documents of American democracy. (6) Understand that the Bill of Rights limits the powers of the federal government and state governments.

California History-Social Science Content Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments. (1) Understand the changing interpretations of the Bill of Rights over time, including interpretations of the basic freedoms (religion, speech, press, petition, and assembly) articulated in the First Amendment

Vocabulary

Below are vocabulary words from this lesson. Their pronunciations and definitions can be found in the Glossary, which begins on page 91 of the student text.

appeal
majority opinion

defendant
prosecute

dissenting opinion

Procedure

I. Focus Activity

- A. Call preselected students to the front of the room to dramatically read the three handouts in this order:
 1. “President Woodrow Wilson’s Speech to Congress on April 2, 1917”
 2. “Do Your Bit For America”
 3. “Notice of Call and to Appear for Physical Examination”
- B. When the students finish, hold a brief discussion by asking students:
 - What was going on during this period in history?
America was preparing to go to war with Germany.
 - How do you think most Americans felt?
Accept reasonable answers. Among them might be: Patriotic, fearful of the war, united against Germany.
- C. Explain that students are going to read about two U.S. Supreme Court cases that arose during the First World War.

II. Reading and Discussion—*Schenck v. U.S. (1919)*

- A. Ask students to read “*Schenck v. U.S. (1919)*,” pages 34–37. Ask them to look for:
 - What the *Schenck* and *Abrams* cases were about.
 - How the cases were decided and the reasoning of the court opinions and the dissent.
- B. When students finish reading, hold a discussion using the questions on page 37.
 1. What were the *Schenck* and *Abrams* cases about? How did Justice Holmes think the two cases should be decided? What difference in the *circumstances* of the two cases might have caused Justice Holmes to believe they should have been decided differently?
The *Schenck* case: Schenck distributed leaflets calling on drafted men to recognize their “right to assert . . . opposition to the draft.” Schenck was convicted of violating the Espionage Act, which prohibited interfering with the draft. Schenck appealed claiming his conviction violated his right to free speech under the First Amendment.
Holmes: He wrote the court’s unanimous decision upholding Schenck’s conviction. Holmes declared that Schenck’s actions were a “clear and present danger” to the national security of the United States and therefore the government could curtail Schenck’s First Amendment rights.
The *Abrams* case: Abrams distributed leaflets, most of them were thrown out of a window in New York City. The leaflets had two articles. One called for workers to overthrow the government; the other called for a general strike so that America would bring its troops home. Abrams was convicted under the Espionage Act and appealed claiming his First Amendment rights had been violated.
Holmes: Although the court upheld Abrams’ conviction, Holmes dissented, saying for a “clear and present danger” to exist, it must present the danger of an immediate evil, which he thought this case did not present.
Accept reasoned responses as to why Holmes believed the two cases had different circumstances.

2. Do you think the provisions of the Espionage Acts quoted in the article were necessary during World War I? Why or why not? Are they needed today? Explain.

Accept reasoned answers.

3. What circumstances, if any, in peacetime might justify the government in placing limits on freedom of press or speech? Why?

Accept reasoned answers, but note that the Supreme Court has carved out exceptions to free speech in the areas of national security, obscenity, and defamation (damaging a persons's reputation through false statements).

III. Small-Group Activity—When Is Free Speech a “Clear and Present Danger”?

- A. Tell students that they are going to get the opportunity to debate actual World War I free speech cases heard by the U.S. Supreme Court. Divide the class into six groups. Give each group one of the following assignments:

Case A—pro Case A—con

Case B—pro Case B—con

Case C—pro Case C—con

- B. Review with students “Activity: When Is Free Speech a ‘Clear and Present Danger?’” on pages 37–38. Answer any questions students may have. Give the groups time to prepare for the debate.
- C. When the groups are ready, hold the debate on Case A. Review the facts of the case. Give each side a set amount of time to argue. When they finish, take a class vote on the case’s debate question. Repeat this process for the remaining cases.
- D. Inform students of the outcome of the three cases:

Case A: *Debs v. U.S.* (1919): A unanimous court, seven days after the *Schenck* decision, upheld Debs’ conviction. Justice Holmes wrote the opinion of the court.

Case B: *Frohwerk v. U.S.* (1919): Delivered the same day as *Debs*, this unanimous opinion was also written by Holmes. It upheld Frohwerk’s conviction.

Case C: *Gitlow v. New York* (1925): The court again upheld the conviction, but the vote was 7–2, with Holmes and Brandeis dissenting.

- E. Debrief the activity by asking the questions on page 38:

1. What were the most important differences in the circumstances of these three cases?

Accept reasoned answers.

2. Try to write a specific definition of “a clear and present danger.” Do you think this is an easy or a difficult task? Why?

Let students attempt to write definitions. Discuss the results.

Inform students that in 1969, the U.S. Supreme Court moved away from the “clear and present danger” test. In *Brandenburg v. Ohio*, a unanimous Supreme Court ruled that “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.” Ask students: Do you think this is a better test? Why or why not?

Accept reasoned answers.

Excerpts From President Woodrow Wilson's Speech to Congress on April 2, 1917

The present German submarine warfare against commerce is a warfare against mankind.

It is a war against all nations. American ships have been sunk, American lives taken, in ways which it has stirred us very deeply to learn of, but the ships and people of other neutral and friendly nations have been sunk and overwhelmed in the waters in the same way. There has been no discrimination.

The challenge is to all mankind. Each nation must decide for itself how it will meet it. The choice we make for ourselves must be made with a moderation of counsel and a temperateness for judgement befitting our character and our motives as a nation. We must put excited feeling away. Our motive will not be revenge or the victorious assertion of the physical might of the nation, but only the vindication of right, of human right, of which we are only a single champion.

. . .

There is one choice we cannot make, we are incapable of making: we will not choose the path of submission and suffer the most sacred rights of our Nation and our people to be ignored or violated. The wrongs against which we now array ourselves are no common wrongs; they cut to the very roots of human life.

With a profound sense of the solemn and even tragical character of the step I am taking and of the grave responsibilities which it involves, but in unhesitating obedience to what I deem my constitutional duty, I advise that the Congress declare the recent course of the Imperial German Government to be in fact nothing less than war against the government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it; and that it take immediate steps not only to put the country in a more thorough state of defence but also to exert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war.

Excerpts From President Wilson's Proclamation to the American People on April 15, 1917

Do Your Bit For America

My Fellow Countrymen

The entrance of our own beloved country into the grim and terrible war for democracy and human rights which has shaken the world creates so many problems of national life and action which call for immediate consideration and settlement that I hope you will permit me to address to you a few words of earnest counsel and appeal with regard to them.

We are rapidly putting our navy upon an effective war footing and are about to create and equip a great army, but these are the simplest parts of the great task to which we have addressed ourselves.

There is not a single selfish element, so far as I can see, in the cause we are fighting for. We are fighting for what we believe and wish to be the rights of mankind and for the future peace and security of the world.

To do this great thing worthily and successfully we must devote ourselves to the service without regard to profit or material advantage and with an energy and intelligence that will rise to the level of the enterprise itself. We must realize to the full how great the task is and how many things, how many kinds and elements of capacity and service and self-sacrifice it involves.

. . .

The supreme test of the nation has come. We must all speak, act, and serve together!

Local Draft Board for the County of Los Angeles
State of California
Los Angeles, Calif.

NOTICE OF CALL AND TO APPEAR FOR PHYSICAL EXAMINATION

You are hereby notified that pursuant to the act of Congress approved May 18, 1917, you are called for military service of the United States by this Local Board from among those persons whose registration cards are within the jurisdiction of the Local Board.

Your Serial Number is 4533 and your Order Number is 689.

You will report at the office of this Local Board on the 3rd of August, 1917, at 8:00 o'clock a.m.

Any claim for exemption or discharge must be made on forms which may be procured, or the form of which may be copied at the office of this Local Board, and must be filed at the office of this Local Board on or before the SEVENTH day after the date of mailing of this notice.

Your attention is called to the penalties for violation or evasion of the Selective Service Law approved May 18, 1917, and of the Rules and Regulations made pursuant thereto

Date of mailing notice: July 22, 1917.

Schenck v. U.S. (1919)

Free Speech in Wartime



An anti-war rally in 1914. Many Americans initially opposed the United States entering the Great War. But by the time the United States declared war in 1917, most supported the war.

On April 6, 1917, the United States entered World War I by declaring war on Germany. A few weeks later Congress passed a law that ordered the drafting of young men into the armed forces. Eventually more than a million American soldiers went to Europe to fight in the “Great War.” By the time the war ended on November 11, 1918, more than 50,000 Americans had died in combat.

At home most people supported President Woodrow Wilson and the war effort. “The world must be made safe for democracy,” Wilson said. Even so, a small number of American pacifists and political radicals spoke out against U.S. participation in the war. The dissenters against the war presented a dilemma for Americans: Just how much free speech should a democracy allow during wartime?

The Espionage Acts

Two months after declaring war, Congress passed the Espionage Act of 1917. Designed mainly to prevent sabotage and spying, the Espionage Act also prohibited any “attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States.”

The next year Congress enacted an amendment to the Espionage Act, making it a crime to “willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States.” The amendment also made it illegal to “willfully utter, print, write, or publish any disloyal, profane, scurrilous [insulting], or abusive language about the form of government of the United States, or the Constitution of the United States, or the . . . flag of the United States.”

The Espionage Acts of 1917 and 1918 carried penalties of up to \$10,000, 20 years in prison, or both. About 2,000 persons were arrested and prosecuted under these laws.

The *Schenck* Case

One of those arrested was Charles T. Schenck, general secretary for the American Socialist Party. During his trial, Schenck admitted printing about 15,000 anti-draft leaflets for distribution to men who had just received their draft notices. Some of the leaflets were mailed directly to drafted men.

After quoting the 13th Amendment (which prohibits slavery), the leaflet stated that a man drafted into the Army was little more than a prison convict. According to the writers of the leaflet, the draft was a monstrous wrong created to keep the war going so businessmen could make more money from it. Under a section titled “Assert Your Rights,” the leaflet called upon drafted men to recognize “your right to assert your opposition to the draft.”

Schenck and several other Socialist Party members were convicted of violating the parts of the Espionage Acts that prohibited interfering with the draft. Schenck appealed his conviction to the U.S. Supreme Court. He argued that everything he said, wrote, and did was protected by the First Amendment. Among other things, the First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”

The *Schenck* case finally reached the Supreme Court two months after the war ended. On

March 3, 1919, the court unanimously upheld Schenck’s conviction. Justice Oliver Wendell Holmes wrote the decision.

Justice Holmes first rejected Schenck’s argument that no evidence proved that the leaflets actually persuaded young men to violate the draft law. Holmes wrote that the *intention* of Schenck and his fellow defendants to obstruct the draft was clear enough to justify their conviction.

But what about the First Amendment? Did Congress itself act illegally by passing laws blocking Schenck’s freedom of speech?

Justice Holmes admitted that during peacetime, the leaflet distributed by Schenck and the other Socialists would have been protected by the First Amendment. “But,” Justice Holmes went on, “the character of every act depends upon the circumstances in which it is done.” The *circumstances* in this case involved not peacetime but wartime.

Justice Holmes next held that freedom of speech may be limited in certain circumstances. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic,” he wrote.

When is the government justified in punishing people for what they say or write? “The question in every case,” Holmes answered, “is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger.”

In the view of Justice Holmes and the other members of the Supreme Court, wartime was one of those circumstances when certain spoken and written words are too dangerous to allow. “When a nation is at war,” Holmes explained, “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.”

Justice Holmes concluded his written opinion by saying that any leaflet that encouraged men “to assert your opposition to the draft” was “a clear and present danger” when the United States was at war. Under these circumstances, the Supreme Court ruled that Schenck and the other defendants had been properly convicted.

The Abrams Case

Eight months after deciding the *Schenck* case, the Supreme Court handed down another opinion on free speech during wartime. But this time, the Supreme Court was not unanimous.

Jacob Abrams and four other defendants in this case were immigrants from Russia. They described themselves as “rebels,” “revolutionaries,” and “anarchists.” The group was accused of printing and distributing leaflets that insulted the United States and interfered with the nation’s war effort against Germany. The defendants were charged under provisions of the Espionage Acts of 1917 and 1918.

Most of the leaflets in question had been thrown out of a window of a building in New York City on August 22, 1918. This incident took place within a few months of the Russian Communist Revolution of 1917. Soon after this revolution, the new Soviet government ended Russian participation in the war against Germany. The United States and the other Allies deeply opposed the USSR’s withdrawal from the war. In response, some of the Allied powers, including the United States, sent troops into parts of the USSR. The five Russian immigrants printed and distributed their leaflet to protest this intervention.

One article in the leaflet denounced President Wilson as a hypocrite and a coward for sending American troops into the USSR. The article appealed for American workers to unite and revolt against the government.

A second article referred to “his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!” This article also addressed Russian immigrants working in U.S. ammunition factories: “you are producing bullets, bayonets, cannons, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.” The article called for a general strike in the United States “to create so great a disturbance . . . America shall be compelled to keep their armies at home, and not be able to spare any for Russia.”



Oliver Wendell Holmes Jr. (1841–1935) served on the Supreme Court for 30 years. Known as a legal scholar, he wrote many often-quoted decisions.

Were the words in this leaflet “a clear and present danger” to the United States, which at the time was still at war in Europe? Seven of the nine Supreme Court justices thought so. (*Abrams v. U.S.*, 1919)

The majority concluded that even if the authors of the leaflet were mainly concerned with the cause of the Russian Revolution, their plan of action included undermining the U.S. war effort. Appealing to workers to stop making ammunition and calling for a general strike during wartime was as much a threat to the country as interfering with the military draft.

Two justices, Louis D. Brandeis and Oliver Wendell Holmes, dissented. They argued that the circumstances in this case did not amount to “a clear and present danger.” Justice Holmes, who only a few months earlier had upheld the conviction of *Schenck*, wrote the dissenting opinion.

Justice Holmes argued that “it is only the present danger of immediate evil or an intent to bring it about” that justifies limiting free speech. Holmes

could find no “immediate evil” in what he called “a silly leaflet by an unknown man.” He also failed to see any intention on the part of the defendants to hinder America’s war against Germany. He wrote that the only purpose of the leaflet was “to help Russia and stop American intervention there.”

Justice Holmes also contended that “a clear and present danger” must be a real and immediate threat. He further declared that in a democracy the way to find the truth is “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.”

In the *Schenck* case, Justice Holmes recognized that in some circumstances, the government may limit what people say and write. In the *Abrams* case, Holmes warned against excessive attempts by the government to stifle free speech, even in wartime:

I think that we should be eternally vigilant against attempts to check the opinions that we loathe . . . unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

This language would set the tone for debate in free expression cases throughout the 20th century.

For Discussion

1. What were the *Schenck* and *Abrams* cases about? How did Justice Holmes think each case should be decided? What difference in the *circumstances* of the two cases might have caused Justice Holmes to believe they should have been decided differently?
2. Do you think the provisions of the Espionage Acts quoted in the article were necessary during World War I? Why or why not? Are they needed today? Explain.
3. What circumstances, if any, in peacetime might justify the government in placing limits on freedom of press or speech? Why?

ACTIVITY

When Is Speech a “Clear and Present Danger”?

In addition to *Schenck* and *Abrams*, the Supreme Court decided other similar World War I free-speech cases. In this activity, the class will debate these cases.

Your teacher has assigned your group one of the cases below and a side to take on the case’s question—either “pro” or “con.” In your group, prepare arguments for your side. Review both the *Schenck* and *Abrams* cases presented in this article.

Pro groups should base their arguments on the *Schenck* case.

Con groups should base their arguments on the dissent in the *Abrams* case.

If your group is involved in Cases A and B, review in your U.S. history textbook what most Americans thought about U.S. participation in World War I.

If your group is involved in Case C, read your U.S. history textbook about the “Red Scare” following the war.

Be prepared to present your arguments to the class.

Free Speech Cases

Case A: *Debs v. U.S.* (1919)

Eugene V. Debs, a leader of the American Socialist Party, addressed an anti-war rally in 1918. At this rally, Debs praised other Socialist leaders who had previously been arrested for opposing the draft law. Debs told his audience (which included draft-age men): “You have your lives to lose You need to know that you are fit for something better than slavery and cannon fodder.” Debs was arrested and tried for violating the 1918 Amendment to the Espionage Act. This law prohibited any speech that interfered with the drafting of men into the armed forces.

Debate Question: Was Eugene V. Debs’ speech at the anti-war rally a “clear and present danger” to the national security of the United States?

Case B: *Frohwerk v. U.S.* (1919)

Jacob Frohwerk published a pro-German newspaper in Missouri. Shortly after the United States entered World War I, Frohwerk printed a series of 12 articles opposing this action. He was arrested and put on trial for violating the Espionage Act of 1917.

Debate Question: Were Jacob Frohwerk's 12 articles a "clear and present danger" to the national security of the United States?

Case C: *Gitlow v. New York* (1925)

Benjamin Gitlow was a leader of the American Communist Party. After World War I, Gitlow published and distributed 16,000 copies of a Communist Party document called the "Left Wing Manifesto." This document argued for a Communist revolution in the United States and urged labor strikes and "class action . . . having as its objective the conquest of the power of the state." Gitlow was arrested by New York authorities for violating that state's Criminal Anarchy Act. This law made it a felony to advocate overthrowing established government by force or violence.

Debate Question: Was Benjamin Gitlow's "Left Wing Manifesto" a "clear and present danger" to the national security of the United States?

Debriefing Questions

1. What were the most important differences in the circumstances of these three cases?
2. Try to write a specific definition of "a clear and present danger." Do you think this is an easy or a difficult task? Why?