

0. A CLEAR AND PRESENT DANGER - Story Preface

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The U.S. Constitution begins with the important words "We the People." As Abraham Lincoln expressed the concept, in the Gettysburg Address, America's government is "of the people, by the people, for the people." The U.S. Constitution includes a Bill of Rights, the first of which guarantees free speech. However, during World War I, Congress passed Espionage and Sedition Acts which greatly infringed on the rights of Americans to engage in free speech. This image depicts the U.S. Constitution and its famous first words.

Charles Schenck's case led to the Supreme Court's first decision on the issue of free speech. Oliver Wendell Holmes, whom many lawyers consider one of the finest jurists in American history, wrote the high court's unanimous opinion. The justices upheld Schenck's conviction.

The court strayed little from the old British approach to free speech: no prior restraint. In other words, the government could not prevent people from saying what was on their mind, but they could (and did) prosecute them for saying it.

In times of war, says the Schenck court, the government may pass laws which restrict actions that are unrestricted in peace time:

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.

Holmes then illustrates his point with one of the most famous phrases ever written in a Supreme Court opinion:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.

Freedom of speech, therefore, is not unlimited. A person cannot shout "Fire!" in a crowded theater unless there really is a fire. No one, even in peace-time America, is entitled to say anything they want to say with total impunity. Sometimes there are consequences.

At times, as in the case of Charles Schenck, those consequences are severe.

But ... how does one know when speech is acceptable (and when it isn't)? Holmes set forth the "clear and present danger test," which the Supreme Court used as a free-speech guide for the next fifty years:

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.

Many legal scholars (then and now) thought Holmes and his fellow justices went too far in their *Schenck* opinion. After all, the evidence was clear that no draftee had refused induction into the armed forces because of Schenck's leaflets. Even so, the court upheld Schenck's conviction because his circular *could* have caused such an action:

The statute of 1917 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.

Holmes assumed the Schenck case presented a simple problem. He believed the high court had crafted a simple solution. But legal scholars - people whom he respected and whose opinions he highly valued - were critical of his opinion. The University of Chicago's Ernst Freund observed:

(T)olerance of adverse opinion is not a matter of generosity but of political prudence.

Failing to understand the objections of people who had previously respected him (and his opinions), Holmes agreed to meet with Zechariah Chafee, Jr., a Harvard Law School professor. Chafee argued free speech was more important to a country than stifled speech. America would suffer more from repressed speech than from expressed unpopular ideas.

It wasn't long before Justice Holmes officially changed his mind.

The case which allowed him to express his new-found understanding of the importance of First-Amendment free speech arose from the actions of a Yiddish-speaking Russian émigré whose name was Jacob Abrams.

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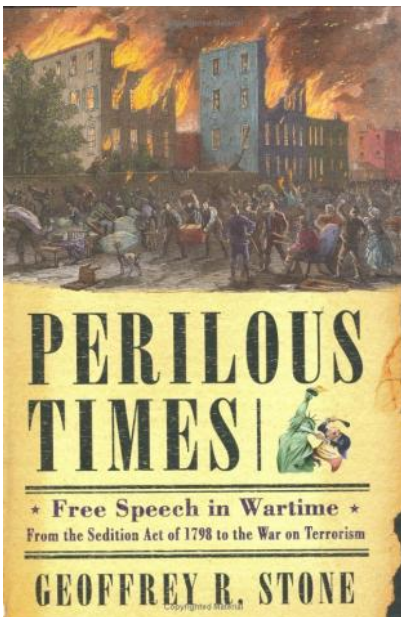


Justice Oliver Wendell Holmes

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