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Freedoms of expression, political extremism and seditious speech in the United States Supreme Court's jurisprudence (Part II)*

Keywords: First Amendment, freedom of speech, Supreme Court of the United States, clear and present danger, Oliver Wendell Holmes.

Abstract

The article constitutes the second part of a series devoted to analyzing the jurisprudence of the Supreme Court of the United States with respect to the First Amendment's guarantee of freedom of expression and politically extremist speech. The author discusses the seminal case of Schenck v. United States wherein Justice Oliver Wendell Holmes established the famous "clear and present danger" standard as a means to determine the constitutionality of legislation pertaining to speech. The test allowed for criminalization of expression which had been deemed to cause such a peril. The article analyzes the original meaning of the standard, pointing out its speech-restrictive impact.

This article is part of a series devoted to the examination of the United States' Supreme Court's adjudication on the question of the boundaries of the freedom of expression with respect to seditious, subversive or politically extremist speech. It is worth reminding the reader that the First (and also the Fourteenth) Amendment to the Constitution of the United States prohibits any abridgement of the freedom of speech; this commandment binds all levels of government — federal, state and local. The first part of the series analyzed the problem of so-called seditious libel, that is, libel aimed against the government and/or its officials, taking the form of either false statements of fact or pejorative opinions. In 1964 the U.S. Supreme Court officially and conclusively recognized the criminalization of such expression as unconstitutional (except for false statements of fact, verbalized with actual

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malice and directed against specific officials).[1] We will now turn our attention to the issue of speech expressed "with the aim of inducing reform by unlawful means or of promoting class warfare" or of preventing or frustrating the accomplishment of government objectives considered vital for national security or internal — not local — peace.[2] Such speech will therefore encompass, for example, the urging to boycott some crucial national policy, the criticism of the government's conduct in the area of foreign affairs, the advocacy of violent revolution or the promulgation of communist, fascist or Nazi doctrine. In order to distinguish this kind of expression from seditious libel in the sense adopted above (sometimes they are merged under the general concept of "seditious" libel), we will be using the term "subversive speech." This part of the series will focus on the very beginning of the U.S. Supreme Court's jurisprudence in this constitutional area. It all started in the early 1920s with a case whose circumstances should have consigned it to obscurity. Instead, it became a truly landmark case. One person played a truly instrumental, though possibly unwitting, role at the early stages of the development of the new doctrine of free speech and the First Amendment. That man was Oliver Wendell Holmes, the famous precursor and predecessor of legal realism and a Justice of the Supreme Court.[3]

Before 1919, the prevailing construction of the First Amendment precluded it from being an efficient guarantee of the freedom of speech. The relevant constitutional clause was usually interpreted as establishing a (not exceptionless) prohibition against prior restraints, and not as setting a limit on the possibility of subsequently imposing legal sanctions — for instance, criminal punishment — on a speaker of a disfavored message. In other words, while the introduction of some kind of press licensing system was perceived as unacceptable, incarceration of someone for his or her writings was not seen as violating the Constitution by the majority of legal actors. In the realm of the advocacy of illegal actions,

[1] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[2] E. Barendt, *Freedom of Speech*, Oxford 1985, p. 153.

[3] He was born on 8 March in 1841 in a prominent Bostonian family. Holmes was educated in E.S. Dixwell's private Latin School and later attended Harvard College, from which he graduated in 1861. He then participated in the Civil War (obviously on the North side) for three years. After the completion of military service, Holmes continued his education at Harvard Law School. He graduated in 1866 and was admitted to the bar in 1867. After that he started practicing law, in the end becoming partner in a Bostonian firm (Shattuck, Holmes, and Munroe). From 1870 to 1873 Holmes was an editor of the prestigious scholarly journal *American Law Review*; he also started to publish prolifically. His scientific endeavors did not escape the attention of the President of his alma mater who in 1882 invited Holmes to join the faculty of Harvard Law School. This proposal was accepted. Starting in the fall of this year, Holmes taught jurisprudence, torts, agency, and suretyship. This career did not last very long. In 1883 Holmes was appointed to the Massachusetts Supreme Judicial Court, becoming its Chief Justice in 1899. In 1902 Holmes was appointed Associate Justice of the United States Supreme Court. His tenure lasted almost 30 years, until his resignation in 1932. Holmes died on 6 March 1935. See P.A. Freund, "Oliver Wendell Holmes," [in:] *The Justices of the United States Supreme Court: Their Lives and Major Opinions*, eds. L. Friedman, F.L. Israel, vol. 3, New York 1997, pp. 874–880.

solicitation or incitement, courts applied a simple and not very speech-protective "bad tendency" test, investigating whether the expression in question displayed a tendency to bring about undesirable or dangerous (in view of political authorities) results.[4] The issues of that danger's likelihood, its proximity or even its seriousness were basically considered immaterial by courts. A consequence of this approach, as Samuel Walker remarks, was that "anything that might have the tendency to cause social harm could be restricted. This included criticism of the government."[5] In effect, legislatures, not courts, were therefore given primary responsibility as far as determining the scope and the boundaries of free speech was concerned. While this result may have been in agreement with the principles of a democratic (or rather majoritarian) political system, it did not bode well for the individual liberty in question. We should also mention the obvious fact that wartimes are not particularly conducive to a vigorous and robust protection of civil rights and liberties. The period of World War I was not an exception in that regard. On 15 June 1917, Congress passed the so-called Espionage Act and amended it (by virtue of the so-called Sedition Act) on 16 May 1918. Section 3 of the statute — in the amended form — stipulated that:

> whoever, when the United States is at war, shall wilfully make or 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, or shall wilfully make or convey false reports, or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor… with intent to obstruct the sale by the United States of bonds… or the making of loans by or to the United States, or whoever, when the United States is at war, shall wilfully cause… or incite… insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct… the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag… or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government… or the Constitution… or the military or naval forces… or the flag… of the United States into contempt, scorn, contumely, or disrepute… or shall wilfully display the flag of any foreign enemy, or shall wilfully… urge, incite, or advocate any curtailment of production in this country of anything or things… necessary or essential to the prosecution of the war… and whoever shall wilfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.[6]

[4] A.T. Mason, W.M. Beaney, *The Supreme Court in a Free Society*, Englewood Cliffs 1959, p. 290.

[5] S. Walker, *Hate Speech: The History of an American Controversy*, Lincoln 1996, p. 28.

[6] Espionage Act of May 16, 1918, http://www.vlib.us/amdocs/texts/esp1918.htm (accessed: 8.09.2013).

The prosecutions under the Espionage Act provided the Supreme Court with an opportunity to clarify the meaning of the First Amendment. The first case that stood before the Court was *Schenck v. United States*.[7]

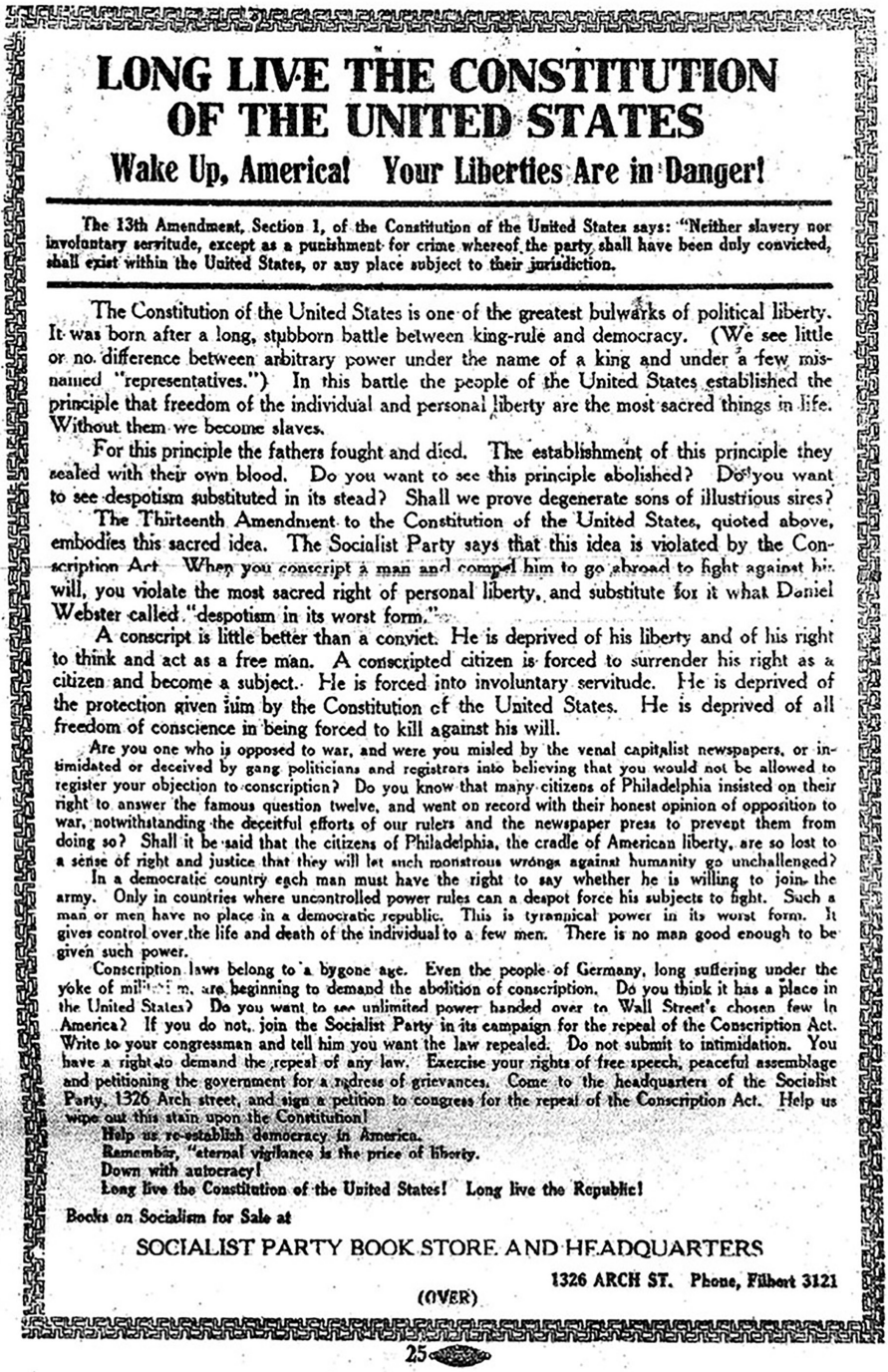
The Circumstances of the case were — perhaps deceptively — simple and unequivocal. On 13 August 1917, the Executive Committee of the Socialist Party, of which Charles Schenck was the General Secretary, adopted a resolution authorizing the printing and the distribution of 15,000 leaflets. The intended recipients were men drafted into the armed forces. Schenck played a leading role in executing the above-mentioned resolution. The leaflet in question was neither vulgar nor particularly incendiary.[8] In fact, it can be argued that the leaflet was a patriotic manifesto — whether sincere or not, is really beside the point — which purported to reveal the evil machinations of traitors of the American way. It is worth mentioning that the leaflet attached a huge importance to legal arguments, did not expressly advocate the violation of laws or incite its addressees to violence and verbosely extolled the virtues of the Constitution, the American political system and the protection of civil liberties inherent in it. All in all, the pamphlet just urged its recipients to use peaceful and democratic methods to effect a change in law. However, let us permit the reader of this article to make up his or her own mind (see Figs. 1–2).

The trial court did not share my assessment of the leaflet. It was indicative of the general approach of the judicial community to the First Amendment (exacerbated by the circumstances of World War I) that Schenck was pronounced guilty of violating Section 3 of the Espionage Act — specifically of attempting to cause insubordination in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the United States — and convicted to imprisonment. Schenck's lawyers decided to appeal the case to the Supreme Court. Prominent Philadelphia attorneys Henry J. Gibbons and Henry John Nelson decided to put forward the First Amendment defense before the Justices. Jeremy Cohen observes that the lawyers "attempted to show the importance of the First Amendment, its legislative history, and prior cases that supported their arguments, and finally suggested a judicial test they hoped the Court would use to decide the Case."[9] It certainly was an ambitious endeavor. They started by rejecting the narrowing "prior restraints" interpretation of the First Amendment. They asked emotionally and rhetorically: "How can a speaker or a writer be said to be free to discuss the actions of Government if twenty years in prison stares him in the face if he makes a mistake and says too much? […] How can the citizens find out whether a war is just or unjust unless there is a free and full dis-

[7] *Schenck v. United States*, 249 U.S. 47 (1919).

[8] See http://www.english.illinois.edu/-people/faculty/debaron/380/380reading/schenckpamphlet.html (accessed: 10.09.2013). I use a reproduction thereof for the purpose of this article.

[9] J. Cohen, *Congress Shall Make No Law: Oliver Wendell Holmes, the First Amendment, and Judicial Decision Making*, Ames 1989, p. 34.



LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.
Remember, "eternal vigilance is the price of liberty.
Down with autocracy!
Long live the Constitution of the United States! Long live the Republic!

Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

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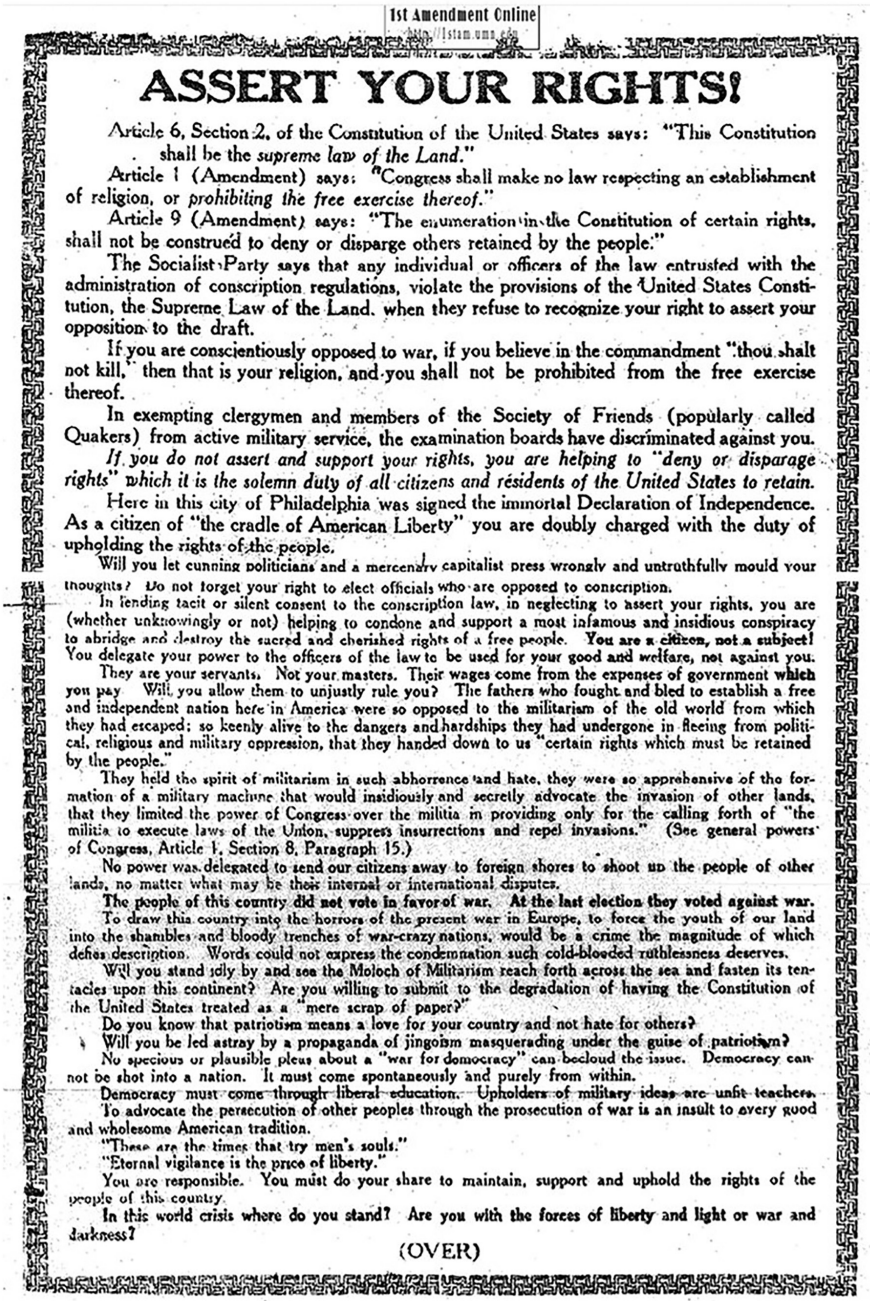
Fig. 1. Charles Schenck's 1917 leaflet
Source: http://www.english.illinois.edu/-people/faculty/debaron/380/380reading/schenck pamphlet.html (accessed: 10.09.2013).



1st Amendment Online

ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution shall be the *supreme law of the Land.*"

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*"

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the people."

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.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

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.

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly 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? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped; so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article 1, Section 8, Paragraph 15.)

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.

The people of this country did not vote in favor of war. At the last election they voted against war.

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?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

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

"These are the times that try men's souls."

"Eternal vigilance is the price of liberty."

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?

(OVER)

Fig. 2. Charles Schenck's 1917 leaflet
Source: http://www.english.illinois.edu/-people/faculty/debaron/380/380reading/schenck pamphlet.html (accessed: 10.09.2013).

cussion! […] How can truth survive if force is to be used, possibly on the wrong side?" They reminded the Court of the controversies surrounding the Sedition Act of 1798, quoted a number of rulings confirming broader construction of the Free Speech Clause (they extended its scope to subsequent repressions) and suggested that "the fair test of protection by the constitutional guarantee of free speech is whether an expression is made with sincere purpose to communicate honest opinion or belief, or whether it masks a primary intent to incite to forbidden action, or whether it does, in fact, incite to forbidden action."[10] In conclusion, after declaring that "absolutely unlimited discussion is the only means by which to make sure that 'truth is mighty and will prevail,' Gibbons and Nelson expressed an opinion that 'the case involved a political issue in which the law attempted to restrict a small group of citizens steadfastly standing for what they honestly, conscientiously believe.'"[11] I believe that the attorneys' erudition and eloquence made a significant impression on Holmes. Regardless of anything else, he accepted the introductory premise of their argument concerning the "prior restraints" theory. Let us note that the language the Justice used was far from enthusiastic. He somewhat grudgingly admitted that "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 main purpose."[12] I think that if it was not for the lawyers' persuasiveness, the case easily could have ended with a simple reaffirmation of the "prior restraints" conception. This statement is not meant to detract anything from Holmes. In fact, his judicial philosophy made him a perfect recipient for breakthrough interpretive arguments. Holmes is known for claiming that "when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters […] The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[13] Therefore, if anyone was intellectually, emotionally and temperamentally capable of rejecting the originalist (at least allegedly), dominant, narrow construction of the First Amendment, Justice Holmes was certainly that person.[14]

The rejection of the "prior restraints" conception did not, however, necessitate the overturning of Schenck's conviction. Holmes's main assumption which

[10] Ibid., pp. 34–36.

[11] C.E. Jenson, "Defining Free Speech Protection in the World War One Era," [in:] *Historic U.S. Court Cases: An Encyclopedia*, ed. J.W. Johnson, New York 2001, pp. 834–835.

[12] *Schenck v. United States*, 51–52.

[13] *State of Missouri v. Holland*, 252 U.S. 416, 432 (1920).

[14] It is worth noting that barely 12 years earlier Holmes expressly subscribed to the notion that the First Amendment's purpose was "to prevent all such previous restraints upon publications as had been practiced by other governments" and not to "prevent the subsequent punishment of such as may be deemed contrary to the public welfare," *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

allowed him to support the original verdict was firmly rooted in consequentialist, utilitarian philosophy, which fitted his generally pragmatic and relativist personal preferences. The Justice remarked: "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 […] 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." Moreover, "if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced […] 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."[15] Three points are immediately observable. First, the Justice does not make any distinction between speech and other kinds of activity. The First Amendment notwithstanding, speech does not enjoy "preferred position"[16] in comparison with other types of individual acts in the context of constitutional protection. Second, Holmes treats unsuccessful attempts (like Schenck's) and successful actions on an equal basis. Third, and most importantly, Holmes refuses to recognize that certain kinds of speech — like, for instance, political discourse or expression of political dissent — may enjoy absolute or near absolute protection from governmental interference. His consequentialist attitude creates a problem from the standpoint of the character of the right to free speech. The tension between the utilitarian and consequentialist approach and a deontological theory of rights seems obvious. It may be convincingly argued that the two are irreconcilable because "act consequentialism (the simplest form) maintains that an action is right if it can reasonably be expected to result in a state of affairs at least as good as the alternative states of affairs that would have resulted from alternative feasible acts."[17] Therefore, as John R. Rowan points out, "there is an almost immediate problem with attempting to incorporate rights into a goal-based moral framework. Within such a framework, attaining the goal is the only thing that matters, which means that all decision-making is conducted with respect to the goal. Thus the right decision (assuming the maximizing method of promotion) is the one that best promotes the goal, and all other considerations are irrelevant […] Rights, in contrast, may well constrain the pursuit of goals. In other words, the attainment of the goal ceases to be the sole consideration,

[15] *Schenck v. United States*, 52.

[16] Such a theory would assume that the right to free speech is elevated to some "exalted status" in comparison with other civil rights or liberties. See B. Schwartz, *The Supreme Court: Constitutional Revolution in Retrospect*, New York 1957, pp. 234–240. This approach gained formal recognition in the Supreme Court in the 1940s and 1950s. Even though it was later repudiated, currently, from a political and legal standpoint, the First Amendment freedoms certainly enjoy a special place in the American constitutional system.

[17] G. Scarre, *Utilitarianism*, London 1996, p. 10.

and thus at least some local losses may not be tolerated simply on the grounds that greater overall gains would be achieved as a result."[18] In other words, anything goes if an action leads to the desired result, either positively (promoting something) or negatively (avoiding something). In the free speech realm, this conception translates itself into a notion that any expression may be forbidden if, in particular circumstances, it leads (or may lead) to catastrophic/dangerous/unwanted results. Such is Holmes's position. Is this concept justifiable? Does it not weaken or even fully nullify the First Amendment and deprive expression of any meaningful protection? In my opinion, not necessarily so. Even though personally I do not approve of the tenets of utilitarianism, I think that — as a practical matter — no legal system may adopt a theory that certain rights are totally and absolutely inviolable under any circumstances. Any such assumption would be extremely harmful and impossible to maintain consistently. It is also true with regard to free speech. But, and it is a very significant "but," any abridgement of basic rights and freedoms (including free speech) is, in my view, acceptable only in a state of emergency. I believe that the Constitution of the United States embodies the same principle. Holmes appeared to believe so too.

One crucial problem remained. How to define this state of emergency which permits the abridgement of the freedom of speech? Reading the *Schenck* decision with that purpose in mind, we encounter the most famous metaphor ever used by a Supreme Court Justice. Holmes stated that "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 […] 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."[19] The "shouting of fire in a theatre" example and "clear and present danger" test have made a truly impressive career in legal scholarship or future jurisprudence. However, they both raise a number of conceptual problems and several interpretive ambiguities. First of all, the metaphor is a bit specious. Harry Kalven, Jr., points out that it "adds nothing to our understanding" of the issue of the boundaries of the freedom of speech (if you discount the — clearly untenable — absolutist construction of the First Amendment). The example is "trivial and misleading" because it is "so wholly apolitical [that] it lacks the requisite complexity for dealing with any serious speech problem likely to confront the legal system. The man shouting 'fire' does not offer premises resembling those underlying

[18] J.R. Rowan, *Conflict of Rights: Moral Theory and Social Policy Implications*, Boulder 1999, p. 57.

[19] *Schenck v. United States*, 52.

radical political rhetoric."[20] In other words, the metaphor is useless as a starting point for any clear and comprehensive theory of the constitutionally protected freedom of speech. It describes a very narrow set of circumstances and does not even elaborate on certain questions that it quite obviously raises itself (for example: What if there really is a fire? Or: Is the problem the falsity of the statement or its link to panic? Or: What happens if the factually false but made in good faith scream fails to cause any disturbance?). Second of all, the metaphor seems irrelevant to the case at hand. Comparatively I fail to find any similarity between our hypothetical example and Schenck's circular. As Richard Polenberg illustratively remarks, the Justice "would have rendered the facts in *Schenck* far more accurately — but far less memorably — had he written, 'The most stringent protection of free speech would not protect a man in falsely advising theatergoers that a "no smoking" ordinance deprived them of their rights, and causing the audience to turn him in as a troublemaker.'"[21] Remaining within the parameters set by Holmes himself, we can say that in this situation the theater was almost empty, evacuation routes were clearly marked and the crowd was not prone to panic. Additionally, Holmes's metaphor fails to discern any difference between factually false statements and non-falsifiable, non-verifiable opinions. Even if Holmes refused to see such a distinction as legally relevant, he still should have taken it into account and discussed it in detail in his opinion.

Holmes's exposition of the "clear and present danger" standard is also quite problematic. First of all, it is extremely cursory. Thomas I. Emerson is correct in observing that the First Amendment part of the opinion "was abrupt and begrudging."[22] The Justice does not explain to what kind of communication does the standard apply; he does not elaborate on the danger element, does not discuss the magnitude of evil which would justify a free speech restriction and does not enumerate the catalogue of dangers legitimizing such abridgement; he does not clarify the "presentness" requirement, particularly in the temporal context; he does not specifically take into account the question of the likelihood of whether the substantial evil will occur.[23] All in all, the "clear and present danger" formulation appears to be little more than a throwaway remark; certainly it remains a far cry from a fully developed test for adjudicating free speech controversies. It should also be noted that the doctrine put forward in *Schenck* was not used to question or challenge the constitutional validity of the Espionage Act. The "clear and present danger" standard was only meant to guide administrative

[20] H. Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, New York 1988, pp. 133–134.

[21] R. Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech*, New York 1987, pp. 215–216.

[22] T.I. Emerson, *The System of Freedom of Expression*, New York 1970, p. 64.

[23] See K. Greenawalt, "'Clear and Present Danger' and Criminal Speech," [in:] *Eternally Vigilant: Free Speech in the Modern Era*, eds. L.C. Bollinger, G.R. Stone, Chicago 2002, p. 99.

and judicial authorities "in the application of the act." In other words, Holmes implicitly assumed that Congress had a constitutionally mandated power to enact such a substantive legislation which seriously limits the freedom of expression.[24] Basically, the decision refused to "interpret the First Amendment literally or liberally."[25] The Justice's opinion is also notably lacking as far as the discussion of the social and doctrinal context of free speech goes.[26] All in all, although the decision notably strengthened the legal protection accorded to speech, it should be construed as an ideological compromise. This interpretation seems prevalent among constitutional scholars. According to Vernon Van Dyke, *Schenck* established a principle that individual rights — sometimes, when there is a compelling public interest — have to give way before the demands of common good. In the light of the decision, personal rights are conditional and qualified; therefore, they cannot be executed in a way which undermines societal foundations.[27] Richard C. Cortner emphasizes that the "clear and present danger" doctrine permits the government to act pre-emptively since it is not legally obliged to "wait until advocacy of unlawful action had actually produced such action." At the same time it suggests that the government must "demonstrate that the unlawful action was relatively imminent before speech" can be proscribed without violating the tenets of the First Amendment.[28] John E. Semonche points out a crucial feature of the decision: "The clear and present danger test, as outlined by Holmes, clearly placed limits on the individual's free speech right: furthermore, it placed that right in a social context and acknowledged that the context was crucial in determining the scope of protected speech. The philosophy of individual rights always carried with it a fundamental limitation — that the exercise of one's rights not endanger others." The commentator contends that Holmes in his decision simply recognized and openly sanctioned an inherent and natural boundary of individual freedoms. On the other hand, Semonche perceives certain dangers incipient in the opinion which derive from the fact that it does not include enough checks and guarantees to prevent the authorities from "exaggerating current threat to the detriment of freedom."[29] Very similar conclusions are drawn by Alpheus Thomas Mason and William M. Beaney, who observe that although the opinion "displayed a preference for a wide latitude of speech," it still "invited more questions that it answered,"[30] leaving wide open the possibility of the state enacting legislation substantially limiting free expression. Drew Noble Lanier goes even further by

[24] G.W. Spicer, *The Supreme Court and Fundamental Freedoms*, New York 1959, p. 18.

[25] R.J. Steamer, *The Supreme Court in Crisis: A History of Conflict*, Amherst 1971, p. 166.

[26] Z. Chafee, "Freedom of Speech in Wartime," *Harvard Law Review* 32, 1919, no. 8, p. 969.

[27] V. Van Dyke, *Ideology and Political Choice: The Search for Freedom, Justice, and Virtue*, Chatham 1995, p. 273.

[28] R.C. Cortner, *The Supreme Court and Civil Liberties Policy*, Palo Alto 1975, p. 116.

[29] J.E. Semonche, *Keeping the Faith: A Cultural History of the U.S. Supreme Court*, Lanham 1998, p. 171.

[30] A.T. Mason, W.M. Beaney, op. cit., p. 286.

insisting that *Schenck* is a manifest of conservative (meaning non-progressive) tendencies which demand that in every legal case individual freedoms have to be balanced against the requirements of national security and communal good.[31] In summation we can invoke the words of Henry J. Abraham, according to whom the concept put forward by Holmes in the analyzed decision "was designed to draw a sensible and viable line between the rights of the individual and those of society at the point where the former's actions or activities tended to create a danger to organized society, so 'clear and present' that government, the servant of the people — here the representative legislative branch by way of a wartime emergency statute — had a right to attempt to prevent the individual's actions or activities in advance." Abraham is convinced that it would be quite difficult to argue with the position that "any government worthy of the name" has a right (an obligation even) to protect itself versus the "clear and present danger" of interference with the conscription for military service. In particular, the "exigencies of wartime" amply justify the implementation of such measures.[32] Although one may obviously disagree with Abraham's quite enthusiastic affirmation of *Schenck* (the author of this paper certainly does not subscribe to such a viewpoint), his convictions appear to reflect those held by Holmes himself. As we can see, the Justice, while deciding the case, did not (as yet) attach a lot of importance to the "freedom of speech" clause in the First Amendment. The modification of his approach was to come in a very near future. Still, it can be persuasively argued that while Holmes in *Schenck* definitely stumbled on the road to according vigorous protection to political expression, it was nevertheless the first stuttering step in the history of the Supreme Court's adjudication towards actually breathing life into the free speech clause of the First Amendment.

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[31] D.N. Lanier, *Of Time and Judicial Behaviour: United States Supreme Court Agenda-Setting and Decision-Making 1888–1997*, Selinsgrove 2003, p. 46.

[32] H.J. Abraham, *Freedom and the Court: Civil Rights and Liberties in the United States*, New York 1967, pp. 158–159.

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