

Schenck v. United States, 249 U.S. 47 (1919)

Condensed Case



The Big Picture

Speech producing a “clear and present danger” is not protected by the First Amendment.

Ruling

The criminalization of speech that threatens violence, insurrection, or marks a threat to national security does not violate the Free Speech Clause of the First Amendment.

Constitutional Text

The First Amendment: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The Selective Service Act of 1917:

OPINION OF THE COURT:

[During World War I, Mr. Schenck printed and circulated pamphlets that were critical of the military draft. He was indicted on conspiracy to violate the Espionage Act of June 15, 1917, by causing and attempting to cause insubordination in the military and naval forces of the United States and obstructing United States military recruiting and enlistment when the United States was at war with the German Empire.]

[One printed side of the pamphlet contains a portion] of the Thirteenth Amendment [which stated] the idea [behind the Amendment] was violated by the [Selective Service Act of 1917] and that a conscript is little better than a convict. In impassioned language [the pamphlet implied] that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few.

[The second printed side of the pamphlet described arguments] 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[,] 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 military service].

[Schenck argued carrying the pamphlet is protected by the First Amendment to the Constitution]. 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. 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.



Constitutional Law Center

Joseph F. Rice School of Law

UNIVERSITY OF SOUTH CAROLINA

No person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration his release from military service or liability there to.

Dissenting Opinion

There was no dissenting opinion filed in this case.

[The character of] every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.

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 Espionage Act] of 1917 punishes conspiracies to obstruct as well as actual obstruction. [If the speech in question] 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.

Judgments affirmed.

