

# The Law and Free Speech: The Modern Origins of the First Amendment

## LECTURE OUTLINE

In this lesson, you will learn:

- The historical circumstances of the early 20th Century and the conditions they created for the Supreme Court's pivotal rulings on free speech
- Some of the most important free speech cases of the early 20th Century and their influence on First Amendment thought and future legal interpretations of free speech

### KEY CONCEPT #1:

Although the First Amendment was ratified in 1791, free speech as it now understood by our legal system has only come into being in the last 100 years.

Remember! The Freedoms Guaranteed by the First Amendment:

- Religion – Freedom to worship or not worship as you like; prohibition of government from officially favoring any religion over others
- Speech – Freedom to say what you like and not to be compelled to say things you don't agree with
- Press – The right to publish without interference or censorship from the government
- Assembly – is the right of individuals to gather peacefully for expressive purposes, including dissent
- Grievances – Freedom to complain to the government (by petition) without fear of punishment for doing so

GRASP-ing Your First Amendment Rights (mnemonic)

- Grievances
- Religion
- Assembly
- Speech
- Press

### KEY CONCEPT #2:

The late 1910s and early 1920s, when some of the earliest modern legal interpretations of the First Amendment were made by the Supreme Court, were a period of significant political and social upheaval in the United States.

## Early 20th Century Conflicts

- United States Entry into World War I
- Anti-immigrant sentiment in U.S.
- U.S. efforts to eliminate influence of communists/socialists in American politics
- President Woodrow Wilson and Congress tried to limit anti-American dissent by passing the Espionage Act in 1917

Woodrow Wilson's State of the Union Address, December 7, 1915:

"There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our Government into contempt, to destroy our industries wherever they thought it effective for their vindictive purposes to strike at them, and to debase our politics to the uses of foreign intrigue[.]"

## THE ESPIONAGE AND SEDITION ACTS (1917-18)

The Espionage Act was passed in 1917 as part of an effort to protect the American effort in World War I from interference and subversion

The Espionage Act included a series of amendments known as the Sedition Act of 1918, which criminalized speech critical of the American government

While the Sedition Act was repealed in 1920, the Espionage Act remains in effect today

## SPEECH UNDER THE ESPIONAGE ACT

The act criminalized "disloyal, profane, scurrilous, or abusive language" against the U.S. Government, President, and armed forces

Many were arrested and jailed for their political speech during this time.

While their treatment would be considered unconstitutional today, they were consistently upheld by the Supreme Court at the time.

Though the plaintiffs in Espionage Act-related speech cases often lost at the Supreme Court, their cases had profound implications for the legal future of free speech

## SCHENCK V. UNITED STATES (1919)

### BACKGROUND

- Charles Schenck was a Socialist Party leader who oversaw printing and mailing of 15,000 flyers urging men to resist the U.S. military draft

- Schenck was arrested and charged with violating the Espionage Act's prohibition on disrupting military operations by urging resistance to the draft

#### Schenck v. United States (1919)

- Schenck argued that his prosecution violated his First Amendment rights and that the Espionage Act was unconstitutional because it restricted his ability to express his opinion on U.S. government policy
- The U.S. government argued that Schenck's speech was not protected by the First Amendment and that the act's restrictions were necessary to protect the U.S. war effort
- On March 3, 1919, the Supreme Court ruled unanimously (9-0) against Schenck

From Justice Oliver Wendell Holmes, Jr., majority opinion

"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."

### **SCHENCK'S INFLUENCE**

Schenck set the tone for other cases relating to speech punished under the Espionage Act that came to the Supreme Court—cases which ruled decisively for the government and against protesters:

- Frohwerk v. United States (dec. Mar. 10, 1919), Court rules 9-0 against publisher of German-language newspaper condemning U.S. involvement in foreign wars
- Debs v. United States (dec. Mar. 10, 1919), Court rules 9-0 against Socialist presidential candidate Eugene V. Debs for making speech opposing World War I.
- Justice Holmes authored the Court's unanimous opinions in both cases

### **ABRAMS V. UNITED STATES (1919)**

Similar in nature to Schenck, Frohwerk, and Debs, this time involving activists arrested for printing and distributing flyers denouncing war and U.S. attempts to disrupt Russian Revolution, and calling for the U.S. to cease manufacturing arms for use against Russia

As in the other cases, defendants argued against the constitutionality of the law and claimed it was a violation of their First Amendment rights

As with the other cases, the plaintiffs lost

Supreme Court ruled that their flyers were not a simple act of political expression, but an unlawful attempt to interfere with the U.S. war effort by stopping arms manufacture

The Supreme Court ruled against Abrams by a vote of 7-2, in a decision handed down November 10, 1919

This time, however, Holmes dissented from the majority opinion

## **WHAT IS A DISSENT?**

A dissent is a legal opinion that declines to endorse the majority ruling, and which frequently puts forth an alternate interpretation of the law that they believe is more justified

Justices can dissent in whole or in part from the majority opinion and/or underlying legal reasoning

Because a dissent represents a minority opinion, it does not carry the force of law

Justice Holmes' dissent in Abrams v. United States is widely known as the "Abrams dissent" and is considered one of the most important and influential dissents in the history of the Supreme Court

## **THE ABRAMS DISSENT**

Holmes' Abrams dissent was delivered only eight months after writing the unanimous decision in Schenk

The Abrams dissent marked a major shift in Holmes' opinions on antiwar speech, from support for government restrictions to support for individual rights

The dissent also signified support for the idea that the public good is served when different opinions are allowed to clash publicly

Why and how Holmes changed his stance on free speech in the Abrams case remains a subject of speculation and debate within the historical and legal communities

"Persecution for the expression of opinions seems to me perfectly logical...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached 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..." —Oliver Wendell Holmes, Jr.

## **WHITNEY V. CALIFORNIA (1927) AND THE 'MORE SPEECH' ARGUMENT**

Like many other free speech cases of the era, this case concerned the rights of a disfavored political minority

Plaintiff Charlotte Anita Whitney was a women's rights activist and Community Party organizer

Was arrested after giving a speech in 1919 and charged with violating California's law against "criminal syndicalism"

Under criminal syndicalism laws, communist and socialist activists were arrested and accused of advocating for anti-government violence

Whitney argued that prosecuting her based on her political expression violated her 14th Amendment rights of Due Process and Equal Protection

The Supreme Court was not persuaded; all nine justices voted to uphold her punishment under California's criminal syndicalism laws

### **THE SUPREME COURT'S DECISION**

The majority opinion found that Whitney's free speech rights were not violated because the government had the right to sanction speech that had a "bad tendency" to "incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow."

However: not all justices agreed with the majority's reasoning

### **WHAT IS A CONCURRING OPINION?**

A concurring opinion is a separate opinion from the majority opinion one that may agree with the overall outcome of a case, but offer alternate or additional reasoning to support the decision

Like dissenting opinions, concurring opinions can concur in whole or in part with the majority opinion

An opinion can both concur with and dissent from the majority opinion

### **JUSTICE BRANDEIS' CONCURRENCE**

While Louis Brandeis concurred in the overall outcome of the case, upholding Whitney's criminal conviction, he used his opinion to offer a defense of freedom of speech and the need for differences of opinion as essential to a modern democracy

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

"[The founders] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones."

### **UNITED STATES V. SCHWIMMER (1929)**

Rosika Schwimmer was a Hungarian citizen who applied for U.S. citizenship

Citizenship was declined after answering "I would not take up arms personally" in response to a



question on the oath of allegiance as part of her citizenship test

Schwimmer did not believe that her pacifist beliefs were incompatible with her swearing an oath pledging allegiance to the U.S.

The Supreme Court ruled against Schwimmer (6-3), foreclosing the possibility of her attaining citizenship

“The pacifism that Schwimmer professes may hinder her ability to develop the nationalism that the country attempts to foster.”

Holmes dissented in Schwimmer, also joined by Brandeis

### **“FREEDOM FOR THE THOUGHT THAT WE HATE”**

“If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”

Holmes’ dissent has become one of the most famous endorsements of an individual’s right to freedom of conscience

### **BRANDEIS & HOLMES’ LASTING INFLUENCE**

Though Holmes’ and Brandeis’ famous endorsements of free speech came from cases where the court majorities rejected plaintiffs’ free speech claims, they have been cited numerous times since in the defense of First Amendment rights and strongly influenced subsequent rulings

State and federal courts have cited Brandeis’ concurrence in Whitney and Holmes’ dissents in Abrams and Schwimmer more than 400 times in First Amendment-related cases

### **SUMMING UP**

The landmark Supreme Court rulings of the early 20th century laid the foundation for our modern understanding of free speech, and they have significantly influenced court rulings on free speech since.

#### Terms and Concepts

- Majority opinion
- Dissent
- Concurrence
- Espionage Act
- Sedition Act
- Syndicalism
- Incitement

- “Free trade in ideas”
- Freedom of conscience

### TEST YOUR MEMORY

Which court case led Justice Oliver Wendell Holmes, Jr. to say that free speech would “not protect a man in falsely shouting fire in a theater and causing a panic?” (Schenck v. U.S.)

Which case caused Oliver Wendell Holmes, Jr. to state that: “the best test of truth is the power for the thought to get itself accepted in the competition of the market?” (Abrams v. U.S.)

Which case included this famous phrase from Justice Louis Brandeis: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence”? (Whitney v. California)

What are the similarities and differences between concurring opinions and dissenting opinions?

### DISCUSSION QUESTIONS

What do you think Justice Holmes means by this: “not free thought for those who agree with us but freedom for the thought that we hate”?

What role do you believe freedom of thought plays in protecting freedom of speech?