

## Civil Liberties and Rights

### The Consistency of the Supreme Court in Free Expression Cases

American history is often demarcated by the different crises the country has faced. In each of these times of trouble the country utilizes the powers and tools afforded to the government to be able to meet and neutralize the threat before it does or continues to do more harm to the citizenry. Interestingly, these responses often involve the extension of governmental powers into private space many believe is not constitutionally accorded to it. One of the principal private areas in which the powers of the state are extended into is into the citizenry's rights to free expression and free association.

Only in the last century did Americans begin to see their complaints against these governmental restrictions on speech be adjudicated by the Supreme Court. ALL THIS IS TOO MUCH SUMMARY OF HISTORY – YOU NEED TO GET TO THE POINT.

These precedent setting cases are typically interpreted by many scholars to be a period of great inconsistency on the part of the Court, as it moved between advocating varying levels of tolerance of free expression.<sup>1</sup> These variations are often discussed as a movement from one doctrine to another, moving the nation's level of legal toleration for free speech along with it. Intriguingly, what this characterization of the Court as incoherent fails to recognize is an underlying consistency in all of the cases from *Schenck v United States* (1919) to *Dennis v United States* (1951). OK – GREAT THOSE TWO PREVIOUS SENTENCES ARE TERRIFIC. A deeper analysis of these cases ultimately reveals that the principle that truly guided these decisions was a concern for “substantive evil,” rather than any variation of “clear and present danger” or “bad tendency” doctrine. Determining the level of “substantive evil” in each case ultimately decided for the Court

whether to uphold or reject on constitutional grounds the repressive actions by the government. OK- THIS IS GREAT – AND SUGGESTS THAT YOU ARE GOING TO MAKE A CONTROVERSIAL ARGUMENT. WHAT I NEED AS A READER IS AN INTER-SUBJECTIVE DEFINITION OF THE DIFFERENCE BETWEEN SUBSTANTIVE EVIL AND CLEAR AND PRESENT DANGER. SO, YOU PROBABLY NEED TO OUTLINE THAT THE PROXIMITY AND THE PROBABILITY OF THE EVIL IS IRRELEVANT, BUT THE AMOUNT OF THE EVIL IS WHAT IS RELEVANT – THAT MAKES IT MORE SPECIFIC.

The concern for “substantive evil” originates for free expression cases in the original free expression case. In *Schenck v United States* (1919) the Court upheld the government’s move during World War I to restrict some forms of expression under the Espionage Act of 1917. Justice Holmes’s opinion was that of a unanimous court, and it ultimately begins this consideration of the likelihood that a form of expression “will bring about substantive evil.”<sup>2</sup> In determining the “question of proximity and degree” the Court established what has come to be known as “the clear and present danger doctrine.” THIS LAST SENTENCE DOES NOT SEEM TO FOLLOW FROM THE PREVIOUS. I ASSUMED THAT THE PROXIMITY WOULD BE IRRELEVANT IN SCHENCK FROM YOUR ARGUMENT. PERHAPS THAT IS WHERE YOU ARE GOING BUT IT IS CONFUSING.

Yet, the fundamental idea underlying this doctrine was the need for the Court to examine and ascertain the level of threat or substantive evil expressive acts could have

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<sup>1</sup> In this paper, scholars usually comes to mean Lee Epstein and Thomas G. Walker.

<sup>2</sup> Justice Holmes, “The Opinion of the Court- *Schenck v. United States* (1919)” in Rights, Liberties, and Justice: Constitutional Law for a Changing America, ed Lee Epstein and Thomas G. Walker, (Washington D.C.: Congressional Quarterly Press, 2004) p 218.

for American society. It recognized that wars and crises change the level of what is protected speech, due to the heightened vulnerability of the country to substantive evils. In doing so, the Court established that by no means did it have any intention of reading the First Amendment literally, under the understanding that if a citizen's expression heightened the likelihood HMM – BUT ISN'T THIS CLEAR, WHICH WOULD BE MORE THAN SUBSTANTIVE EVIL and proportion of danger to the public, then the government was within its own right to protect itself and the republic in censoring such speech. In *Schenck*, the Court found that the defendant had indeed used forms of expression that raised the proximity and degree AGAIN – PROXIMITY OF THE DANGER IS MORE THAN JUST HOW SUBSTANTIVE IT IS – THIS IS WHY THE DEFINITION OF TERMS IS SO NECESSARY BECAUSE NOW I DON'T KNOW HOW TO EVALUATE WHETHER YOUR EVIDENCE IS CONSISTENT WITH YOUR ARGUMENT BECAUSE I AM NOT EXACTLY CLEAR ON WHAT YOU ARE ARGUING of danger posed to the public to such an extent that Congress was justified in censoring such speech, and the conviction should be upheld.

Holmes and others later claim that this precedent of gauging the “proximity and degree” of “substantive evil” was changed by the Court within the year in *Abrahms v United States* (1919). OK – SO THIS LEADS ME TO BELIEVE THAT YOU ARE GOING TO ARGUE THAT PROXIMITY AND DEGREE IS A PART OF ALL THESE FUTURE CASES Many scholars point to *Abrahms* as the beginning of many oscillations within the Court's decisions concerning speech. The justification for this viewpoint is that in the dissenting opinion by Justice Holmes, who for the first time did not vote to uphold movements by the state abridging rights to expression, he made clear that he felt

the Court had deviated from “his” clear and present danger standard. Given the fact that Holmes is credited with creating the clear and present danger doctrine in *Schenck*, this estimation has a level of credibility.<sup>3</sup> THIS IS AN EXCELLENT EXAMPLE OF A COUNTERARGUMENT – IT IS CLEAR AND IT SETS UP THE READER WITH THE EXPECTATION OF BEING REFUTED. EXCELLENT JOB.

Converse to this commonly accepted opinion, lays the reality that *Abrahms* merely continued the Court’s preference for determining these cases on the basis of the proximity of substantive evil brought about by the expression of the citizen. In the majority opinion by Justice Clark, the principal reason for upholding the conviction of Abrahms was “the effects which their acts were likely to produce.”<sup>4</sup> YOU PROBABLY MEAN LIKELY TO BE EMPHASIZED – NOW I SEE WHERE YOU ARE GOING WITH THIS Clark believed that Abrahms purpose behind his acts of expression was to “defeat the war plans of the United States” through general strikes and even revolution, an act that certainly offered a heightened level of danger for American citizens both fighting the war abroad and those supporting it at home.

Although he never explicitly states a concern for substantive evil, Clark’s opinion reveals that it such a consideration underlies its opinion in *Abrahms*, ultimately upholding the Court’s original interpretation in *Schenck*. His reasoning for upholding the conviction was that Abrahms’s actions did intensify both the proximity and degree of threat. I SEE DEGREE AND PROBABILITY WITH THE LIKELY, BUT I AM NOT YET CONVINCED OF THE PROXIMITY Here it also becomes more apparent that the substantive evil most troublesome to the judges was violence and inflamed chaos

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<sup>3</sup> Lee Epstein and Thomas G. Walker, p 222.

amongst the population. Clark's extensive comment's regarding Abrahms calls for revolution against the state illustrates that fact. Ultimately, an analysis of his opinion compared to that of Justice Holmes's dissent shows that rather than the Court deviating from the original doctrine expressed in *Schenck*, it was Justices Holmes and Brandeis who deviated from the original findings of the Court. Therefore the common belief that "the majority shifted constitutional standards" is erroneous. Holmes and Brandesi shifted their own standards relative to rest of the Supreme Court. GREAT WAY TO END THE PARAGRAPH – I AM STILL NOT CONVINCED OF THE PROXIMITY BUT AT LEAST YOU SAY EXPLICITLY WHAT YOU THINK IT TO BE CONCLUDED FROM THE EVIDENCE IN THIS PARAGAPH.

This is supported by the fact that in *Schenck* and other cases earlier that year the Court unanimously upheld the actions of the government, and that it was Holmes and Brandeis who suddenly reversed their own trend and precedent. WELL, NOT ACTUALLY – THEY ALL VOTED TO UPHOLD THE CONVICTION AND COULD HAVE USED MUCH MORE LIBERAL WAYS OF ALLOWING CONVICTIONS THAN CLEAR AND PRESENT DANGER It is much more likely that in the course of one year two justices suddenly shifted towards tolerance than seven justices suddenly shifted towards repression. Further evidence of the fact that it was Holmes and Brandeis rather than the rest of the Court who changed their opinions is seen in the curious discrepancy in their vote between *Schenck* and *Abrahms* despite the very similar nature of the cases. This is seen in the reality that both Charles Schenck and Jacob Abrams were held under the Espionage Act for the similar crime of publishing pamphlets or leaflets

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<sup>4</sup> Justice Clark, "The Opinion of the Court- *Abrahms v United States* (1919)" in Rights, Liberties, and Justice. p 220.

urging acts that hindered the US war effort. In a massive reversal of opinion, Holmes swung from viewing the pamphlets of Schenck as being a clear and present danger to the United States to believing the leaflets of Abrahms as “silly” and posing no danger to the country. This in spite of the very resembling nature found in each of advocating the obstruction of the American effort in Europe.

The big change that occurs in Holmes’s and Brandeis’s thinking most likely seems to center on a new perception of the level of actual threat posed by the individual’s act of expression to the state. Whereas they initially viewed such acts in the same manner as the rest of the Court, in *Abrahms* their perspective altered and they no longer took the acts of individuals to be as threatening as the other justices. Their shift ultimately makes the actual original position of the Court clearer. It does so as it exposes that for the majority, the concern that supported their vote in favor of Holmes’s “clear and present danger doctrine” in *Schenck* was one of a fear of the substantive evil named as a clear and present danger. I DON’T GET THE POINT OF THIS PARAGRAPH OR HOW IT CONTRIBUTES TO THE ARGUMENT.

If anything the split that occurs between the majority justices and the Holmes/Brandeis duo occurred as the two groups came to disagree over what “clear and present danger” had originally meant in *Schenck*. As the Court continued taking cases focusing on issues of free expression, and as they tried increasingly to articulate what exactly they intended by “clear and present danger” and how it should apply in differing contexts, a difference of opinion obviously emerges within the Court. Clark’s establishment of a “bad tendency test” actually served to clarify what the majority of the justices had intended in *Schenck*, and that was that the key question of; do the words have

a tendency to heighten the likelihood of and the severity of evil? In contrast, Holmes's attempt to refine his thoughts on the clear and present danger doctrine reveals a shift towards a more tolerant approach to rights. This transformation towards tolerance continues throughout the rest of the cases he is involved in. THIS SHOWS WHY IT IS SO IMPORTANT TO DEFINE THE LINE BETWEEN WHAT WE KNOW FROM THE COURT OPINION ABOUT WHAT CONSTITUTES THE DIFFERENCE BETWEEN SUBSTANTIVE EVIL AND NON- SUBSTANTIVE EVIL. I AM CURIOUS HOW YOU ARE GOING TO HANDLE BRANDENBURG.

This continuation of what the majority of the Court in *Abrahms* had originally intended in *Schenck* is seen throughout the expression cases of the 1920s. In *Gitlow v New York* (1925) Justice Sanford's opinion of the Court clearly states the special role that concern for substantive evil plays. His writings on the rights of the States when confronted by speech that threatens the State's self-preservation are where this consideration is made most explicit. Here he writes that a State's right to self-preservation trumps speech claims when the, "...utterances advocating the overthrow of organized government by force, violence, and unlawful means are so inimical to the general welfare and *involve such danger of substantive evil.*"<sup>5</sup> Sanford proceeds to state that this substantive evil is clear enough that "... the immediate danger is none the less real and substantial..." just because a danger is hard to recognize.<sup>6</sup>

A counterpoint to my contention that Sanford and the Court in *Gitlow* were continuing to use the principle of judging the proximity and degree of substantive evil they intended to establish in *Schenck* comes from Sanford's own dismissal of the

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<sup>5</sup> Justice Sanford, "The Opinion of the Court- *Gitlow v New York* (1925)" in Rights, Liberties, and Justice, p 226. Italics mine.

defense's arguments. In this case the defense tried to use the modified clear and present danger doctrine as advocated by Holmes in *Abrahms*. The fact that Sanford dismisses the claims of the defense made according to Holmes's modified doctrine has encouraged some scholars to state that this is further evidence of the erosion of rights due to the use of the bad tendency test.

Yet, what this counterpoint fails to consider is that Sanford and the other justices actually were only dismissing the modified form of Holmes's clear and present danger doctrine given in *Abrahms*. In doing so they further reveal that the original intention for the majority of the Court in *Schenck*, this being to formulate a precedent with a focus paying particular regard to the proximity and degree of substantive evil in speech contemplated. OK BUT WHAT IS THE EVIDENCE FOR THIS? THE POINT THAT YOU ARE MAKING IS NOT SPECIFIC ENOUGH – WHAT WOULD CONSITUTE EVIDENCE – THE LEAST EFFECTIVE EVIDENCE FOR THE OTHER SIDE'S POINT? For the majority, then, as was consistent with their earlier decisions, “the language of direct incitement” offered enough of a possible of magnified substantive evil -- danger due to the violence intensified by the speech -- as to warrant limitations on the personal freedom of the defendant.

Holmes's and Brandeis's shift away from the original principle established in *Schenck* continues through *Gitlow* and into later decisions. Holmes's dissent, much like his previous one, focused on the improbable chances that the defendant and his cohorts had of actually beginning a “conflagration.” Due to the implausibility of success for the defendants, the State lacked the right to repress the speech of Benjamin Gitlow. Ultimately, the shift of this twosome continued to the point where two years later, in

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<sup>6</sup> Ibid, p 226.

*Whitney v California* (1927) they actually completely scrapped any restrictions on speech, and began to advocate restrictions only as applied to behavior.<sup>7</sup>

Despite this shift by Holmes and Brandeis, the rest of the Court remained consistent in their concern for violent and chaotic OK – NOW IT IS MORE SPECIFIC THAN SUBSTANTIVE EVIL – YOU CHARACTERIZE IT AS CHAOTIC AND VIOLENT WHICH IS A SUBSET OF ALL POSSIBLE SUBSTANTIVE EVILS substantive evil. Again, many incorrectly point to this era as a time period of change for the Court. Such a perspective is born out of the actual rulings of the Court striking down many laws repressing free expression, seemingly breaking the trend established in the past decade. Because similar laws being upheld characterized the previous decade, many observers can understandably make this inference.

Yet, what such a viewpoint fails to bear in mind is that these 1930s cases considered forms of expression much less volatile than those examined in from 1919 through the 1920s. Whereas the 1930s were marked by cases of individuals speaking out against unlawful police raids {*DeJonge v Oregon* (1937)} or by speech for the purpose of religious proselytizing {*Schneider v New Jersey* (1939)}, the 1920s saw defendants attempting to be cleared for speech that was certainly more inciting. Claimants to the Court like Gitlow and Abrahms were arrested for advocating revolution and disorder. In stark contrast were the defendants of the 1930s, who the Court explicitly stated had no intentions of overthrowing the government.<sup>8</sup> Ultimately, the Supreme Court did not abandon any concern for the proximity of substantive evil – BUT NOW IT IS A DIFFERENT SUBSET OF SUBSTANTIVE EVIL WHICH IS THE INCITEMENT TO

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<sup>7</sup> Epstein and Walker, p 230.

OVERTHROW THE GOVERNMENT. Their findings in these 1930s cases reveal that they did not consider the expression of the citizens in question to create the tendency of substantive evil to a level warranting state action, unlike the speech characterizing the cases considered the decade preceding. This lack of a perception of substantive evil resulting from the expression sought by the defendants in the 1930s is due mainly of the lack of avocation of violence in the speech of these individuals.

The important role of violence in accessing the level of substantive evil in a form of expression by the Court appears again in *Denis v United States* (1951). Commonly referred to as yet another key “turning point” in the history of the Court’s rulings on freedom of expression, ultimately what *Dennis* represents is a return to the cases of the 1920s in which the speech being considered contained enough substantive evil to warrant constraint. Justice Vinson’s opinion of the Court shows this concern with violence right from its beginning, noting that the law under which Eugene Dennis and other communists were charged (the Smith Act of 1940) focused on preventing political change “by violence, revolution, and terrorism.”<sup>9</sup>

Continuing in his focus on speech advocating “the overthrow of the government by force and violence,” Vinson eventually returns the anxiety over violence back to its original theoretical framework regarding cases of freedom of expression. He does so by refocusing in on the substantive evil inherent in such speech, noting that the forceful overthrow of the government qualifies as a substantive evil requiring action by the government to neutralize it. OK – AGAIN MORE SPECIFIC THAN IN YOUR ORIGINAL ARGUMENT.

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<sup>8</sup> See *Stromburg v California* (1931). In Epstein and Walker, p 230.

The consistency seen in these freedom of expression cases ended during the 1960s, as speech advocating and inciting violence was officially accepted as constitutionally protected by the Court in *Brandenburg v Ohio* (1969). OK – GOOD – THIS IS HOW YOU DEALT WITH THIS – GOOD. Until this time, the Supreme Court consistently utilized a principle of substantive evil in adjudicating cases regarding freedom of speech. This substantive evil principle primarily focused on whether the expression of the individual or group heightened the proximity and degree of potential political violence. In cases where the defendant did in fact advocate violent political acts such as revolution, the Court regularly upheld whichever law was keeping such speech censored or punishable. Yet, in instances where the speech did not focus on inciting violent acts, the speech was found not to be substantially evil enough to warrant the law in question, and the Court (seen predominately in the 1930s) invariably struck down the code for being overly-repressive.

NICE ESSAY

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<sup>9</sup> Justice Vinson, “The Judgement of the Court- *Dennis v United States* (1951)” in Rights, Liberties, and Justice. p 236.