

McCormick Foundation Civics Program

2010 First Amendment Summer Institute

Freedom of Speech: Clear & Present Danger

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Freedom of Speech

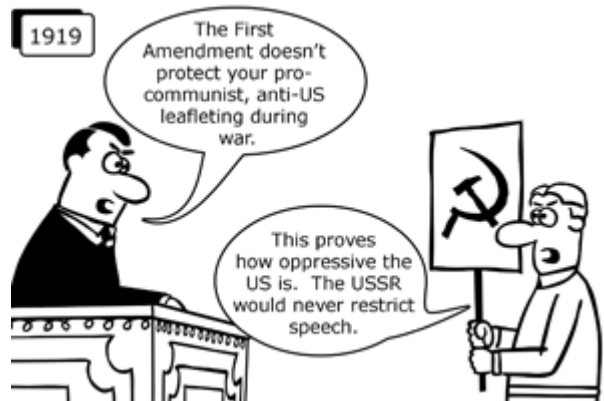
- **First Amendment:** “Congress shall make no law...abridging...the freedom of speech...”
- **An historic progression of free speech tests:**
 - Bad tendency
 - Rooted in English Common Law and articulated in *Gitlow v. New York* (1925)
 - Clear and present danger
 - First articulated by Holmes in *Schenck v. U.S.* (1919), and adopted by a majority of the Court in *Herndon v. Lowry* (1937)
 - Imminent lawless action
 - Supplants clear and present danger test in *Brandenburg v. Ohio* (1969)
 - Exception: speech cases in military courts

Bad Tendency Test

- **World War I:** Used as test to determine whether speech critical of government during the war and its aftermath crossed the line
- **Sedition Act of 1917:**
 - Congress intended to forestall threats to military operations
 - The Wilson Administration used to prohibit dissenting views
 - *Shaffer v. U.S.* (9th Circuit Court of Appeals): “It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here is...whether the natural and probable tendency and effect of the words...are such as are calculated to produce the result condemned by the statute.”

Bad Tendency Test Continued

- **Abrams v. U.S. (1919):**
 - Pamphlet critical of Wilson's decision to send troops to Russia, urging U.S. workers to strike in protest
 - Charged under 1918 amendment to Sedition Act prohibiting expression of disloyalty and interference with the war effort
 - Downplayed clear and present danger distinction: "for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States and the war."



Bad Tendency Test Continued

○ *Gitlow v. New York (1925):*

- Socialist Benjamin Gitlow distributed a flyer calling for mass insurrection and the overthrow of the capitalist system, violating New York's criminal anarchy statute
- Conviction upheld under bad tendency test
- Freedom of speech and press incorporated to the states

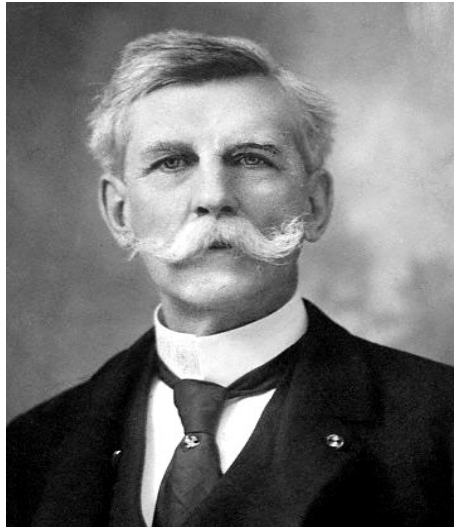
○ *Whitney v. California (1927):*

- Charlotte Anita Whitney is arrested for her membership in communist and socialist organizations that helped to form the Communist Labor Party
- She was charged under California's criminal syndicalism laws, and the Supreme Court rejected her free speech claims
- "A state in its exercise of police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite crime, disturb the public welfare, or endanger the foundations of organized government and threaten its overthrow by violent means."

Clear and Present Danger Test

○ *Schenk v. U.S. (1919):*

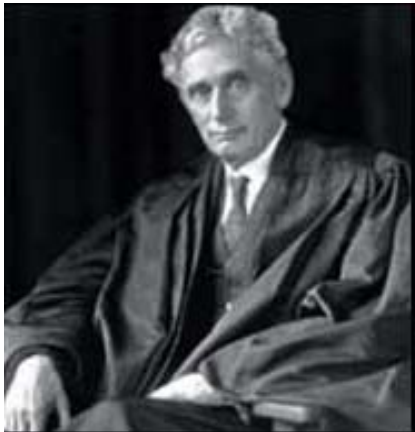
- Justice Holmes: “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the United States Congress has a right to prevent. It is a question of proximity 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.”



Clear and Present Danger Test Continued

○ *Abrams v. U.S.* (1919):

- Holmes found Schenk test insufficient in dissent: “We should be eternally vigilant against attempts to check the expression of opinions...unless they so imminently threaten immediate interference with the lawful and pressing purpose of law that an immediate check is required to save the country.”
- Brandeis, joined by Holmes: “evil apprehended” should be “so substantial as to justify the restriction apprehended by the legislature.”



Clear and Present Danger Test Continued

○ *Herndon v. Lowry (1937):*

- Justice Owen Roberts rejected bad tendency test in favor of clear and present danger
- Employed by Court in 12 cases following Herndon through 1951
- Freedom of assembly incorporated to the states

○ *Dennis v. U.S. (1951):*

- Judge Learned Hand, embraced by Chief Justice Vinson: “Clear and present danger depends upon whether the mischief of the repression is greater than the gravity of the evil, discounted by its improbability.”
- The clear and present danger distinction became blurred and essentially gave carte blanche to all legislative infringements on free speech.

Clear and Present Danger Test Continued

- **McCarthyism and the Challenge to Free Speech:**
 - Discuss the following in the context of the clear and present danger test:
 1. Loyalty oaths
 2. HUAC
 3. Senator Joseph McCarthy

- ***Brandenburg v. Ohio* (1969):**
 - Facts of the case
 - Issues/ decisions
 - Reasoning
 - Separate opinions
 - Discussion

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Questions?

