

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era – Democratic Rights/Free Speech/Advocacy

Abrams v. U.S., 250 U.S. 616 (1919)

Jacob Abrams opposed American military intervention in the Russian Revolution. On August 22, 1918, Abrams and other socialists distributed a circular that, in both English and Yiddish, condemned government policy. One passage asserted,

With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.

For expressing these sentiments, Abrams was arrested and charged with violating the Sedition Act of 1918. The fourth count of his indictment accused him of “unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war.” Abrams was tried in federal district court, found guilty and sentenced to twenty years in prison. He then appealed to the Supreme Court of the United States.

The Supreme Court a 2 vote declared that Abrams was constitutionally convicted and sentenced. Both Justice Clarke’s majority opinion and Justice Holmes’s dissent claimed to be faithful to the Supreme Court’s decision in Schenck v. United States (1919). Which decision do you believe is most consistent with that precedent? Many commentators believe that Justice Holmes first gave the “clear and present danger test” some teeth in his Abrams dissent. In this view, Holmes may have been inspired by published articles by Zechariah Chafee and Ernst Freund, as well as correspondence with lower court Justice Learned Hand.¹ Is the Holmes dissent in Abrams more speech-protective than Holmes’s opinions in Schenck and Debs v. United States (1919)? How much weight would you put on Holmes’s assertion in Abrams that this was a “silly leaflet by an unknown man,” while Schenck and Debs were prominent Socialist leaders?

JUSTICE CLARKE delivered the opinion of the court.

...

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans, and not to work in ammunition factories where their work would produce “bullets, bayonets, cannon” and other munitions of war the use of which would cause the “murder” of Germans and Russians.

¹ See Gerald Gunther, “Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History,” *Stanford Law Review* 27 (1975): 719.

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This is not an attempt to bring about a change of administration by candid discussion, for, no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

...

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: "Revolutionists! Unite for Action!"

After denouncing the President as "Our Kaiser" and the hypocrisy of the United States and her Allies, this article concludes:

Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations, Unite for action, and let us save the Workers' Republic of Russia,

Know you lovers of freedom that, in order to save the Russian revolution, we must keep the armies of the allied countries busy at home.

Thus was again avowed the purpose to throw the country into a state of revolution if possible, and to thereby frustrate the military program of the Government.

...

These excerpts sufficiently show that, while the immediate occasion for this particular outbreak of lawlessness on the part of the defendant alien anarchists may have been resentment caused by our Government's sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing, and, if possible, defeating the military plans of the Government in Europe. . . . [T]he language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus, it is clear not only that some evidence, but that much persuasive evidence, was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment. . . .

JUSTICE HOLMES dissenting.

...

. . . [T]o make the conduct criminal, that statute requires that it should be "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." It seems to me that no such intent is proved.

I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if, at the time of his act, he knew facts

from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of Schenck, Frohwerk and Debs . . . were rightly decided. I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times.

But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. . . .

...
In this case, sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong, and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper, I will add, even if what I think the necessary intent were shown, the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges, but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. 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, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so

imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States.

JUSTICE BRANDEIS concurs with the foregoing opinion.



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