

The Importance of the Time's Political Climate in Cases of Incitement

Kimberly George



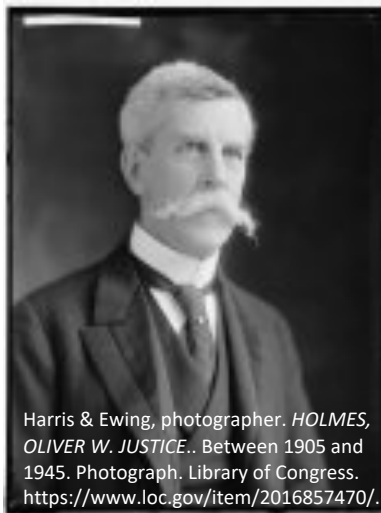
Introduction

While the Supreme Court is supposed to be above politics, it rarely ever is. It can clearly be seen when looking at cases dealing with incitement. Incitement speech has been ruled not Constitutionally protected. Three Supreme Court Cases that deal with incitement speech are *Schenck v. United States* (1919), *Dennis v. United States* (1951), and *Brandenburg v. Ohio* (1969). These cases created standards for what is considered incitement speech. The political climate during the time periods of *Schenck v. United States* (1919), *Dennis v. United States* (1951), and *Brandenburg v. Ohio* (1969), impacted their outcomes.

Schenck v. United States (1919)

In 1917, the U.S. entered WWI and the Espionage Act passed making it illegal to obstruct the recruitment process. In 1917, Charles Schenck, the General Secretary of the Socialist Party, was arrested for creating pamphlets that encouraged draft resistance. Justice Oliver Wendall Holmes upheld Schenck's conviction and created a test to determine the constitutionality of speech. Congress could prevent words that would "create clear and present danger".

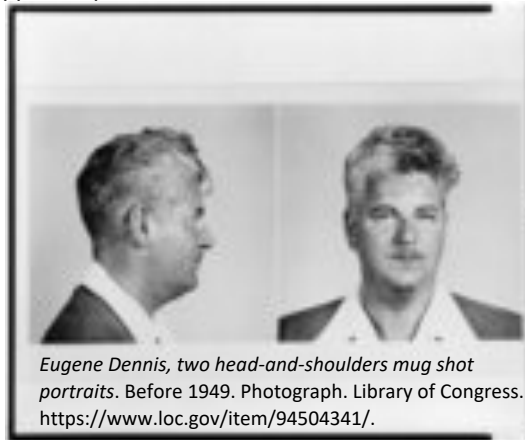
The fact the United States was at war when Schenck's pamphlets were made and that Schenck was a socialist had an impact the case's outcome. Many considered Socialists as the enemy. In his Opinion, Holmes said that if Schenck had said these things during a time of peace they would have been protected, but since it was a time of war, they were not. This shows how much the politics of society affected this ruling.



Harris & Ewing, photographer. HOLMES, OLIVER W. JUSTICE.. Between 1905 and 1945. Photograph. Library of Congress. <https://www.loc.gov/item/2016857470/>.

Dennis v. United States (1951)

Eugene Dennis was a member of the Communist Party of USA. He was arrested under the Smith Act, which made it illegal to teach or advocate the overthrow of the United States Government. Dennis was found guilty and the appeals judge, Learned Hand created the "gravity of evil test". This meant even a small chance of something bad happening could justify suppressing free speech if the supposed harm is grave enough. The Supreme Court used this test in *Dennis*. This weakened the need for the danger in "clear and present danger" to be immediate in order for the government to suppress speech.



Eugene Dennis, two head-and-shoulders mug shot portraits. Before 1949. Photograph. Library of Congress. <https://www.loc.gov/item/94504341/>.

The ruling in *Dennis* was considered a "green light" for further persecutions of Socialists under the Smith Act. This act and ruling contributed to the crippling of the Communist Party of the United States of America. Party leaders feared there were informants in the ranks and starting expelling loyal members out of fear.

This case perfectly displays the dominant narrative of anticommunism in American society and the Supreme Court was not immune to it. Judges would not have been able to resist the ideological and emotional pressures of the Cold War.

Brandenburg v. Ohio (1969)

Clarence Brandenburg was a Klu Klux Klan member who made a racist speech at a meeting. He called for a march on Congress with hundreds of thousands of people. He was arrested under Ohio's Criminal Syndicalism Law, which made it illegal to advocate violence as a means for reform. The case was brought to the Supreme Court claiming Brandenburg's speech was constitutionally protected under the First Amendment. This case created the current standard for what incitement speech is. Speech could only be punished "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This test ended the use of the broadly defined "clear and present danger" test to determine what is considered unprotected incitement speech. This case took place during the Civil Rights Movement and the progressive Warren Court. The ACLU took on Brandenburg's defense. Although Brandenburg's speech was racist, the ACLU wanted to prove free speech was for more than just activists. This test made it difficult to suppress speech based on fear of the idea, which was important during the fight for civil liberties.

References

- Belknap, Michael R. "Why *Dennis v. United States* Is a Landmark Case." *Journal of Supreme Court History* 34, no. 3(2009):289-302. doi:10.1111/j.1540-5818.2009.01218.x.
- Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- Espionage Act of 1917, Pub. L. No. 24, 40 Stat. 217 (1917).
- Mauro, Tony. *Illustrated Great Decisions of the Supreme Court*. Washington DC: SAGE Publications, 2005. ProQuest Ebook Central.
- Schenck v. United States*, 249 U.S. 47, (1919).
- Steiner, Ronald. "Gravity of Evil Test." *The First Amendment Encyclopedia*, <https://mtsu.edu/first-amendment/article/963/gravity-of-the-evil-test>.
- Sykes, Emerson J. "In Defense of *Brandenburg*: THE ACLU AND INCITEMENT DOCTRINE IN 1919, 1969, AND 2019." *Brooklyn Law Review* 85, no. 1 (2019):15-36. <https://misericordia.idm.oclc.org/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=141522681&site=ehost-live>.
- William M. Wiecek, "The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*," *Supreme Court Review* 2001 (2001): 375-434. <https://heinonline.org/HOL/P?h=hein.journals/suprev2001&i=381>.