3.3 First Amendment: Freedom of Speech

ESSENTIALS

1. In Schenck (1919) the Supreme Court recognized that there are limits to our speech. In this case speech was limited because of a "clear and present danger."
2. The Supreme Court has held that symbolic speech is protected by the 1st Amendment - Tinker (1969).
3. The Court has consistently limited obscene speech. Obscenity is defined locally.

1. What is the underlying idea of this cartoon?

2. Do the wealthy unfairly have access to greater speech?

The Supreme Court has held that **symbolic speech** is protected by the First Amendment. In Tinker v. Des Moines Independent Community School District (1969) the Court ruled that public-school students could wear black armbands in school to protest the Vietnam War. The standard centered around whether or not the students were disruptive to the learning process. **Check out these other school speech cases. How would you have decided?**

Bethel School District v. Fraser (1986)

Hazelwood v. Kuhlmeier (1988)

Morse v. Frederick (2007)

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Justice Fortas in Tinker (1969)

How best to balance the words of Fortas with "in loco parentis" rights?

Schenck v. U.S. (1919)

The United States entered World War I on the side of the Allies in 1917, after several years of maintaining its neutrality. President Woodrow Wilson had campaigned for reelection in 1916 on the slogan “He Kept Us Out of War.” This abrupt change in policy meant there were many Americans who disagreed with the decision to go to war.

As part of the war effort, the US government attempted to quell dissent. For example, Congress passed the Espionage Act of 1917, which outlawed interfering with military operations or recruitment, as well as supporting US enemies during wartime. Although it has been altered many times over the years, the Espionage Act is still in force today.

In this climate, socialist antiwar activists Charles Schenck and Elizabeth Baer mailed 15,000 fliers urging men to resist the military draft through peaceful means, such as petitioning for the repeal of the conscription law. They argued that the draft was a violation of the Thirteenth Amendment’s prohibition of involuntary servitude.

Schenck and Baer were convicted under the Espionage Act for interfering with military recruitment. They appealed to the Supreme Court on the grounds that the Espionage Act violated their First Amendment right to freedom of speech.

Source: Khan Academy

How did the Court rule? Agree?

SCOTUS COMPARISON

On June 28, 1964, Clarence Brandenburg held a Ku Klux Klan rally on a farm in rural Hamilton County, Ohio.' He invited a Cincinnati television reporter, whose film of the Klan meeting was televised both locally and nationally. The film showed twelve hooded figures, some carrying firearms, gathered around a burning cross, muttering words of racial hatred and veiled threats. Then Brandenburg, in Klan robes, spoke to the group of armed Klansmen…

The State of Ohio indicted Brandenburg under Ohio's Criminal Syndicalism Act and charged him with advocating the propriety of violence “as a means of accomplishing..., political reform.” The prosecution's case seemed airtight. The State introduced the film of the meeting, testimony identifying Brandenburg as the hooded speaker, several guns, and the red Klan hood worn by Brandenburg. Brandenburg was convicted by a jury, fined $1000, and sentenced to one to ten years in prison. Brandenburg appealed, arguing that Ohio's Criminal Syndicalism Act violated the First and Fourteenth Amendments, but the Ohio courts rejected his challenge. The United States Supreme Court reversed, and in a unanimous, per curiam opinion, held Ohio's statute unconstitutional: “[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy .... Such a statute falls within the condemnation of the First and Fourteenth Amendments.”

…In the Court's view, “the mere abstract teaching... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” The First Amendment barred states from punishing “advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

Source: Giles, Susan M., “Brandenburg v. Ohio: An ‘Accidental,’ ‘Too Easy,’ and ‘Incomplete’ Landmark Case, Capital University Law Review, Spring 2010

A. Identify the clause of the First Amendment that is common to both Schenck v. U.S. (1919) and Brandenburg v. Ohio (1969).

B. Explain how the difference in facts led to a different decision in both Schenck v. U.S. (1919) and Brandenburg v. Ohio (1969).

C. Explain how the outcome in Brandenburg v. Ohio (1969) demonstrates the balance of power between the national and state governments has changed over time.