

KEY TERMS

The Draft

During times of war, the federal government of the United States can force male citizens to enter the military and engage in the conflict. Social protests had historically accompanied attempts to impose the draft, such as those seen during the Civil War, WWI, WWII, and the Cold War conscription efforts. Although there are a few exceptions under the current law, male citizens between the ages of 18 and 25 are still required to register with the Selective Service System.

The Clear and Present Danger Test

The “clear and present danger test,” established in *Schenck v. United States*, limited free speech under the First Amendment by outlawing speech that posed a threat to the common good. The ruling that developed this judicial test argued that the culture of war time had more dangers, and therefore speech could be more severely restricted during times of conflict.

be limited the speech would “bring about substantive evils that Congress has a right to prevent.”

In *Brandenburg v. Ohio* (1969), the language of the “clear and present danger test” was abandoned in favor of a stricter test that speech could only be prosecuted if it could result in “imminent lawless action.”

The Facts of the Case: Charles Schenck was arrested for violating the Espionage Act, passed by Congress in 1914. The Espionage Act made it illegal to defame the government and to interfere with military operations or recruitment efforts. Schenck, a member of the Socialist Party, opposed the war and printed and distributed pamphlets urging citizens to oppose the draft which he likened to slavery (involuntary servitude). Schenck claimed his first amendment rights were violated.

The Supreme Court Decision: In 1919, the court unanimously ruled against Schenck saying that the Espionage Act did not violate the first amendment and that in times of war the government may place reasonable limitations on freedom of speech. Justice Oliver Wendell Holmes outlined the court’s opinion by explaining that when a “clear and present danger” existed such as shouting fire in a crowded theater, freedom of speech may

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Patterson v. Colorado (1907)—developed the “bad tendency test,” which used English common law to argue that speech was not protected under the First Amendment if it had a tendency to harm the public good.

SUBSEQUENT CASE

Tinker v. Des Moines Independent Community School District (1969)—ruled that public-school students could engage in nondisruptive, symbolic protest against the Vietnam War because there was no evidence that their actions constituted a “clear and present danger.” The *Tinker v. Des Moines* decision expanded the rights of students to express unpopular ideas under the First Amendment.

1. Why did the US government arrest Charles Schenck?

2. What were the motives behind Schenck's protest against the draft?

3. Do you agree or disagree with the Supreme Court's decision in *Schenck v. U.S.*? Explain

4. Do you agree or disagree with the Supreme Court's decision on the subsequent case of *Tinker v. Des Moines Independent Community School District* (1969)? Explain