

As the authoritative interpreters of the Constitution, the justices of the Supreme Court have been responsible for both protecting and limiting our rights as citizens of the United States. From the 1890s through to the 1930s, the Supreme Court defined what free speech and “substantive due process” actually meant when practically applied. As the Court and the times changed, so did our nation’s understanding of the Constitution and the rights it bestowed.

World War I provided the backdrop for the first of modern decisions on free speech. The Espionage Act made it a crime to cause, attempt to cause, or conspire to cause insubordination in the American military or try to disrupt recruitment (Fallon 34). One case to arise under this law was that of *Schenk v. United States*, in which Schenk distributed literature opposed to conscription. Judge Oliver Wendell Holmes established the precedent of “clear and present danger” concerning free speech rights – these rights could be limited if they presented a “clear and present danger,” threatening “substantive evils the Congress has a right to protect” (Fallon 35). Schenk lost his case, as did Eugene V. Debs, the American socialist icon, in a similar, higher-profile case in 1919. The Court took a rather vague, harsh stance on dissident speech. Holmes convicted both rather readily, but in the future, he would prove to be much more lenient.

Holmes soon began to pursue another course beginning with *Abrams v. United States* (1919), in which he introduced his “marketplace of ideas” justification for extensive protections of speech. Holmes believed that almost all dissent was healthy – viable, truthful ideas would fare well in the marketplaces of ideas, while poorer, false

arguments would fall by the wayside. He raised his own bar in limiting speech, as the “clear and present danger” rationale was discarded unless it posed an immediate, pressing threat. Brandeis further argued in his concurring opinion in *Whitney v. California* (1927) that “the path to safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”

Holmes and Brandeis established a precedent in preserving free speech that would endure throughout the century. In *Brandenburg v. Ohio* (1969), the Supreme Court affirmed a Ku Klux Klan member’s right to voice his opinions, so long as it did not advocate “imminent lawless action and is likely to incite or produce such action” (Fallon 40). The Court also protected expressive conduct in flag burning cases in 1989 and 1990, despite convicting a man for burning his draft card in *United States v. O’Brien* (1968), as he was arrested for reasons other than the message he meant to convey. In *Cohen v. California* (1971) the Court acknowledged a man’s right to use offensive language in expressing his political beliefs. While free speech was being expanded in the political forum, however, it was being curtailed in advertising and the broadcast media, in the cases of *Central Hudson v. Public Service Commission* (1981) and *FCC v. Pacifica Foundation* (1978), respectively. While Courts change over time, the general trend has been toward a more open and free society, until very recently, after the *Lorillard Tobacco Co. v. Reilly* and more severe FCC regulation of the media.

In cases of “substantive due process,” the Supreme Court addressed the issues of state regulation of the economy. Many believed that regulation of the economy was a violation of property rights, and thus unconstitutional. The *Lochner vs. New York* (1905) decision set and initial precedent; in it they struck down a New York law limiting the

work week to 60 hours for bakery workers. The Court believed that regulating to benefit one group of citizens (bakery workers) over another (bakery owners) was in violation of the Constitution. The Supreme Court took a hard stance against labor and the working class, clearly the victims of unfettered capitalism. However, the tide was to turn with *West Coast Hotel Co. v. Parrish* (1937), in which the Court affirmed the state's right to regulate the economy. The court affirmed that a free market was not necessarily untouchable and entirely a force for good. Holmes believed that elected officials should address economic issues, not the courts. Justice Hugo Black, in 1963, wrote that legislatures were responsible for economic regulation, not the courts. Substantive due process soon fell out of the judicial realm as more liberal justices were installed in the Court.

Over the course of the century, the Supreme Court's opinions on freedom of speech and substantive due process were to change drastically as justices came and went. Decision from early in the century were to be replaced by latter ones, as *Schenk* fell to *Abrams* and *Lochner* fell to *West Coast Hotel*. The tack of the Supreme Court on these issues reflected our Constitution's flexibility and adaptability when the interests of individuals, the state, and the people collide.