NAME _____ CLASS _____ DATE _____

Close Up on the Supreme Court Landmark Cases

Engel v. *Vitale*, 1962

Historical Background

After World War II, the United States experienced another period of intense concern about the spread of communism abroad and fear of subversion at home. The Federal Government enacted a program requiring all employees to take loyalty oaths, while U.S. Senator Joseph McCarthy claimed there were communist agents in government. Alleged "communist spies" were called forth to give testimony before a Senate subcommittee chaired by McCarthy. These hearings had the impact of sensational court dramas that filled the media, while the deployment of U.S. soldiers to fight communist aggression in Korea made the threat of communism at home all the more palpable. In this context, some States enacted a variety of programs to encourage patriotism, moral character, and other values of good citizenship. They also began challenging separation of church and state issues in hopes of providing students with strong moral and spiritual stamina. In this case, the Warren Court once again was to take up a controversial issue.

Justice Hugo Black

Circumstances of the Case

In 1951 the New York State Board of Regents (the State board of education) approved a 22-word "nondenominational prayer" for recitation each morning in the public schools of New York. It read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." The Regents believed that the prayer could be a useful tool for the development of character and good citizenship among the students of the State of New York. The prayer was offered to the school boards in the State for their use, and participation in the "prayer-exercise" was voluntary. In New Hyde Park, New York, the Union Free School District No. 9 directed the local principal to have the prayer "said aloud by each class in the presence of a teacher at the beginning of the school day."

The parents of ten pupils in the New Hyde Park schools objected to the prayer. They filed suit in a New York State court seeking a ban on the prayer, insisting that the use of this official prayer in the public schools was contrary to their own and their children's beliefs, religions, or religious practices. The State appeals court upheld the use of the prayer, "so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection."

Constitutional Issues

The question before the Court involved the Establishment Clause of the 1st Amendment. Did the Regents of New York violate the religious freedom of students by providing time during the school day for this particular prayer? Did the prayer itself represent an unconstitutional action—in effect, the establishment of a religious code—by a public agency? Did the Establishment Clause of the 1st Amendment prevent schools from engaging in "religious activity"? Was the "wall of separation" between church and state breached in this case?

NAME _____ CLASS _____ DATE _____

Close Up on the Supreme Court Landmark Cases

Engel v. *Vitale*, 1962

Arguments

For Engel (the parents): The separation of church and state requires that government stay out of the business of prescribing religious activities of any kind. The Regents' prayer quite simply and clearly violated the 1st Amendment and should, therefore, be barred from the schools.

For the Regents of the State of New York: The New York Regents did not establish a religion by providing a prayer for those who wanted to say it. Countless religious elements are associated with governments and officials, reflecting the religious heritage of the nation. New York acted properly and constitutionally in providing an optional, nonsectarian prayer. It would be an intrusion into State matters for the Supreme Court to strike down the right of the Regents to compose the prayer and encourage its recitation.

Decision and Rationale

The Court found the New York Regents' prayer to be unconstitutional. Justice Hugo Black wrote the opinion for the 6–1 majority: "We think that by using its public school system to encourage recitation of the Regents' Prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings...in the Regents' Prayer is a religious activity..."

Black further explained that "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.... The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

To support the Court's finding, Black referred to the following ideas of the Framers: "To those who may subscribe to the view that because the Regents' official prayer is so brief and general [it] can be no danger to religious freedom..., it may be appropriate to say in the words of James Madison, the author of the First Amendment:... 'Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?'"

The Court's decision was not, Black pointed out, antireligious. It sought, rather, only to affirm the separation between church and state. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers..." Thereafter, State governments could not "prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."

Questions for Discussion

1. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Does this amendment provide for a separation of church and state?
2. Does the Court's decision in *Engel* take both the Establishment and Free Exercise Clauses into account? Is Black correct in claiming that the Court's opinion is not anti-religious?

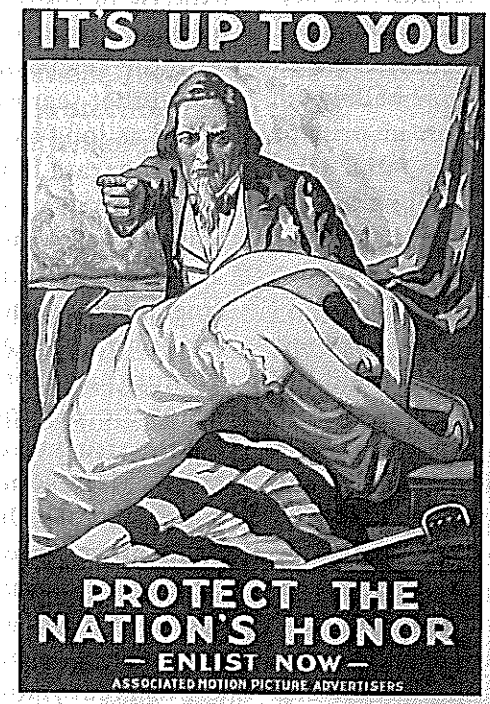
NAME _____ CLASS _____ DATE _____

Close Up on the Supreme Court Landmark Cases

Schenck v. *United States*, 1919

Historical Background

A major effort to promote national unity accompanied America's involvement (1917–1918) in World War I. As a part of this effort, Congress enacted a number of laws severely restricting 1st Amendment freedoms to curb antiwar dissent. In 1917, Congress passed the Espionage Act, which set stiff penalties for uttering and circulating "false" statements intended to interfere with the war effort. Any effort to cause unrest in the military forces or to interfere with the draft was forbidden. In 1918, Congress passed a Sedition Act—the first such act in 120 years—which made it a crime to interfere with the sale of government securities (war bonds) and also prohibited saying or publishing anything disrespectful to the government of the United States.



A poster encouraging Americans to enlist in the armed forces during World War I.

The Committee on Public Information, a collection of leading writers and journalists, effectively functioned as a propaganda arm of the government, distributing some 75 million pieces of literature on behalf of the war effort from 1917 to 1918. But the strict conformity demanded by the government in wartime invited an element of hysteria. Dissenters were often forcibly silenced and jailed for their views. Among the best organized organs of dissent against the war was the Socialist party. Its leader, Eugene V. Debs, was sentenced to 10 years in prison for his statement that while the "master classes" caused the war, the "subject classes" would have to fight it. A Butte, Montana, mob dragged antiwar labor-organizer Frank Little through the streets before they hung him from a railroad trestle. In Washington, the House of Representatives refused to allow Milwaukee representative Victor Berger, a Socialist elected in 1918, to take his seat, despite his service in that chamber from 1911 to 1913. Berger, too, had been jailed for his antiwar views. Berger was allowed back into the chamber from 1923 to 1929.

Circumstances of the Case

Charles Schenck was the general secretary of the Socialist Party of America. Socialists believed that the war had been caused by and would benefit only the rich, while causing suffering and death for the thousands of poor and working-class soldiers who would do the actual fighting in Europe. Party officials not only opposed the war, they urged American workers to oppose the war as well.

Schenck participated in many antiwar activities in violation of the Espionage Act, including the mailing of about 15,000 leaflets urging draftees and soldiers to resist the draft. He was arrested and charged with "causing and attempting to cause insubordination in the military and naval forces of the United States" and with disturbing the draft. He was arrested, tried, convicted, and sentenced to prison for violating the Espionage Act of 1917, and he appealed his case to the Supreme Court.

Constitutional Issues

Were Schenck's political statements protected by the free speech section of the 1st Amendment? What was the meaning of the 1st Amendment's statement that "Congress shall make no law...abridging the freedom of

speech"? Were there different standards for protected political speech during peacetime and in war? Was the Espionage Act constitutional or did it violate the 1st Amendment? Should Schenck remain in prison?

Arguments

For Schenck: The Espionage Act was unconstitutional. Schenck and the Socialist party were persecuted for opposing what they felt was an "immoral war." The 1st Amendment was specifically included in the Constitution to protect political speech, and to prevent a "tyranny of the majority." The 1st Amendment protections would be meaningless if Congress could choose where and when citizen's rights may be diminished.

For the United States: A nation at war is justified in taking steps to insure the success of its effort to defend itself. The case involves congressional draft policy, not the 1st Amendment. Statements critical of the government cannot be tolerated in a crisis. The nation cannot allow an effort to deprive the armies of necessary soldiers. The actions and words of the Socialist party were a danger to the nation. The Espionage and Sedition acts, by contrast, were legitimate and appropriate in a time of war.

Decision and Rationale

The Court's unanimous (9–0) decision was written by Justice Oliver Wendell Holmes. In it, the Court upheld Schenck's conviction, declaring the Espionage Act a reasonable and acceptable limitation on speech in time of war.

In the operative passage of the decision, Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic." Holmes argued that "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In short, the Court held that reasonable limits can be imposed on the 1st Amendment's guarantee of free speech. No person may use free speech to place others in danger. "Protected political speech" was diminished in time of war.

The *Schenck* case stands as the first significant exploration of the limits of 1st Amendment free speech provisions by the Supreme Court. Its clarifications on the meaning of free speech have been modified, rewritten, and extended over the years. Flowing directly from this case, two schools of legal thought on the protections of the Bill of Rights emerged. One "absolutist" group felt that the Constitution meant to tolerate no interference by government with the people's freedoms, "absolutely none." More widely held was the "balancing doctrine," which suggested that the right of the people to be left alone by a government had to be "balanced" against "compelling public necessity."

Questions for Discussion

1. Does the "clear and present danger" test represent a reasonable means of balancing free speech and national security?
2. Did Schenck's actions present a real danger? Why or why not?

NAME _____ CLASS _____ DATE _____

Close Up on the Supreme Court Landmark Cases

New York Times Co. v. *United States*, 1971

Historical Background

Over the years the Supreme Court has disagreed on the limits that can be placed on the 1st Amendment guarantees of freedom of speech and press. In 1971, the Court faced these issues again in a case brought by the *New York Times*. The newspaper had obtained a copy of documents known as "The Pentagon Papers"— an internal Defense Department report that detailed government deception with regard to the Vietnam War. The Pentagon Papers surfaced at a time when the American people were deeply divided on the question of United States involvement in the war. The *New York Times* fought for the right to publish the papers under the umbrella of the 1st Amendment.

Circumstances of the Case

The Pentagon Papers, officially known as "History of U.S. Decision-Making Process on Viet Nam Policy," were illegally copied and then leaked to the press. The *New York Times* and the *Washington Post* had obtained the documents. Acting at the Government's request, the United States district court in New York issued a temporary injunction—a court order—that directed the *New York Times* not to publish the documents. The Government claimed that the publication of the papers would endanger the security of the United States. The *New York Times* appealed the order to the United States Supreme Court, arguing that prior restraint—preventing publication—violated the 1st Amendment.

American Paratroopers drop into a grass field in Phan Rang, Vietnam, during the Vietnam War.

Constitutional Issues

Are the freedoms provided by the 1st Amendment absolute? Did the threat to national security outweigh the freedom of press guaranteed by the 1st Amendment? Did the publication of the Pentagon Papers in fact pose a threat to national security?

Arguments

For the *New York Times*: The 1st Amendment's guarantee of freedom of the press protects the newspaper in the publication of these documents. One of the few restraints on executive power in matters of national defense is a knowledgeable population. The press must be free to inform the American people. In addition, the Government has failed to show that publication of the Pentagon Papers would endanger national security.

For the United States: The 1st Amendment does not guarantee an absolute freedom of the press, especially when the nation's security is involved. The Court must strike a balance between the fundamentally important right to a free press and the equally important duty of the Government to protect the nation. Allowing the publication of these documents would establish a dangerous precedent for future cases involving national security.

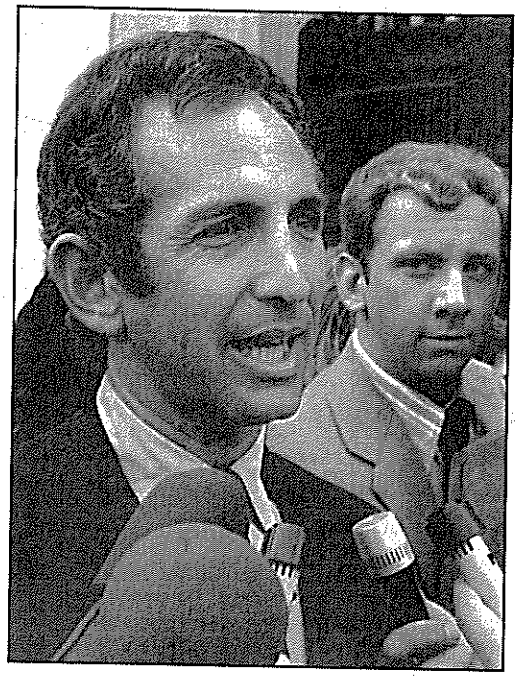
NAME _____ CLASS _____ DATE _____

Close Up on the Supreme Court Landmark Cases

New York Times Co. v. United States, 1971

Decision and Rationale

By a 6–3 decision, the Court ruled in favor of the *New York Times*. In the judgment, the Court cited a prevailing precedent, noting: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." In other words, the Court would not be favorably disposed to stifling the press on the order of the government.



Daniel Ellsberg, the Defense Department analyst who "leaked" The Pentagon Papers, speaking to reporters about his trial.

Justices Hugo Black and William Douglas, members of the majority, held that the 1st Amendment is absolute. Justice Black called it "unfortunate" in his view "that some of my Brethren [fellow justices] are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding," he wrote, "would make a shambles of the First Amendment."

Justice Byron White, joined by Justice Potter Stewart, believed that while there are situations in which the 1st Amendment may be abridged, they had to "concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system." Although the justices thought that the *New York Times* had probably gone too far in publishing the Pentagon Papers, they found nothing in the law to prevent the newspaper from doing so.

Deferring to responsibilities of the Executive, Chief Justice Warren Burger dissented. Given those vast responsibilities, Burger noted, the Executive also had to be given broader authority. "In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive," Burger wrote. "Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy."

The decision reinforced the Court's stance against prior restraint and has often been noted in subsequent prior restraint cases. In the spring of 2000, a Texas district court judge ordered the Associated Press (AP) not to publish a story about a state-guaranteed loan to a Texas shrimp farm. Lawyers for the AP cited the *New York Times* case in their argument. The judge lifted the order after two days of hearings.

Questions for Discussion

1. In terms of freedom of the press, what is the difference between prior restraint and punishment after the fact?
2. Do you think that prior restraint should disallowed under all circumstances? If not, under what circumstances do you think it should be allowed.

Name _____ Class _____ Date _____

Case 21: Texas v. Johnson (1989) Flag-Burning

THE ISSUE Does the First Amendment protect burning the U.S. flag as a form of symbolic speech?

WHAT'S AT STAKE?

Determining the limits of symbolic speech, especially in regard to one of our national symbols.

FACTS AND BACKGROUND

At the 1984 Republican National Convention in Texas, Gregory Lee Johnson doused a U.S. flag with kerosene and burned the flag. He did this as a form of protest. A Texas law made it a crime to *desecrate* [treat disrespectfully] the national flag. Johnson was convicted of violating this law. He was sentenced to one year in prison and fined $2,000.

The Texas Court of Criminal Appeals reversed the conviction. The court maintained that Johnson's burning of the flag was actually a form of symbolic speech. Therefore, the First Amendment protected it. Texas then appealed to the U.S. Supreme Court.

It was up to the Supreme Court to decide the validity of Johnson's conviction. The First Amendment says, "Congress shall make no law . . . abridging the freedom of speech." What actions, however, can be included under the term speech? According to the Texas Court of Criminal Appeals, burning a flag could be protected speech. The court stated, "Given the context of an organized demonstration . . . anyone who observed . . . would have understood the message . . . [The flag burning] was clearly 'speech' [under] the First Amendment . . ." The state of Texas, however, argued that it had an interest in preserving the flag as a symbol of national unity and preventing disruptions.

THE DECISION

The Court ruled for Johnson. The vote was very close, five to four. Justice Brennan wrote for the majority. He said that Johnson was within his constitutional rights when he burned the U.S. flag in protest.

As in *Tinker* v. *Des Moines Independent Community School District,* the Court looked at the First Amendment and symbolic speech. Brennan concluded that Johnson's act was "expressive conduct." He was trying to "convey a . . . message." Thus, his burning the flag as a form of symbolic speech—like the students wearing armbands in Des Moines in their political protest—is protected by the First Amendment. According

to Brennan, "Government may not prohibit the expression of an idea [because it is] offensive."

Answering the state of Texas' arguments, Brennan said that Johnson's act posed no threat of disruption. Also, burning the flag did not endanger its status as a national symbol. As a result, the Court declared the Texas law unconstitutional.

Chief Justice Rehnquist dissented. He quoted poetry to show how much Americans love the flag. He said the flag is "the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."

THE IMPACT OF THE DECISION

Critics of the Court's ruling in *Texas* v. *Johnson* argued that the Court had interpreted the term "speech" too broadly. Many people were deeply offended that flag burning could go unpunished. In direct response to the Court's controversial ruling, the U.S. Congress passed the Flag Protection Act of 1989. The Supreme Court ruled this act unconstitutional in *The United States* v. *Eichman* in June 1990.

Thus the only way to overturn the decision is through a constitutional amendment. Many amendments banning flag burning have been proposed, but none, so far, has become part of the Constitution.

QUESTION

1. In your own words, explain what Justice Brennan meant when he said "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." Do you agree with Brennan? Why or why not?

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ONLINE EXTRA

The First Amendment permits some restrictions on speech. Read the online discussion of *Schenck* v. *United States* (1919). Why was speech limited in that case? Take a look at *United States* v. *American Library Association* (2003). What limits, if any, did the Court place on speech in that case?