# The Supreme Court *vs.* Civil Liberty

## Dissenting opinions of Justices Brandeis and Holmes in cases affecting civil liberty.

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DURING the past two years the Supreme Court of the United States has had before it a number of grave questions involving civil liberty. The cases dealt with freedom of speech, freedom of the press, freedom from unlawful searches and seizures, and the right of labor to organize, strike and boycott.

In respect to freedom from unlawful searches and seizures, the Supreme Court, in a number of decisions culminating with the recent case of Gouled v. United States (Feb. 28, 1921), has so clarified and extended previous decisions that a liberal interpretation of the constitutional provision is now assured.

However, in respect to all the other phases of civil liberty mentioned above, the Supreme Court has gone over to the side of reaction. By judicial construction it has forged a powerful weapon for those who believe in governmental suppression of ideas deemed to be dangerous. This departure from what most accept as the traditional American political philosophy has not been accomplished without the vigorous and able dissent of Mr. Justice Holmes and Mr. Justice Brandeis and occasionally Mr. Justice Clarke. The extent of the Courts' departure from the principle of civil liberty is made clear by the following excerpts from these dissenting opinions.

## PUNISHMENT OF WORDS SPOKEN OR WRITTEN

### The Abrams Case:*

In this case four young Russians, three men and a girl, were convicted under the Espionage Act for circulating hand-bills criticising the Government's policy toward Russia, couched in highly-colored language and calling for a general strike among munition-makers against the manufacture of munitions for use against Russia. From the dissenting opinion of Mr. Justice Holmes, in which Mr. Justice Brandeis concurred (at pages 630 and 631):

> "In this case sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the government has to publish the Constitution of the United States now vainly invoked by them. . . .
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> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free-trade in ideas, —that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.
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> "Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be externally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . .
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> "Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here; but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defend-

**Abrams v. United States, 250 U. S. 616.*

ants were deprived of their rights under the Constitution of the United States."

## The Philadelphia Tageblatt Case:*

The defendants were the editors of the Philadelphia *Tageblatt,* a German-language newspaper. They were convicted under the Espionage Act for publishing certain news-items and editorials, which, because of the opinions expressed and because of certain changes and omissions were deemed to be evidence of the commission of the offenses penalized. From the dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred (at page 493 and 494):

". . . The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts, but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance. To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive treason.

"To hold that such harmless additions to or ommissions from news items, and such impotent expressions of editorial opinion, as were shown here, can afford the basis even of a prosecution, will doubtless discourage criticism of the policies of the government. To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities.

"Nor will this grave danger end with the passing of the war . The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal, opinions with which it disagrees. Convictions

*Schaefer, et al v. United States, 251 U. S. 466.*

such as these, besides abridging freedom of speech, threaten freedom of thought and of belief."

*(In this case Mr. Justice Clarke also dissented upon other grounds.)*

## The Pierce Case:*

The defendants were convicted under the Espionage Act for distributing a leaflet entitled "The Price We Pay," which had been written by Irwin St. John Tucker and published by the Socialist Party. It described many of the ills of humanity, and particularly the calamity of war, as the price paid for not adopting the program of the Socialist Party. From the dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred (on page 273):

> ". . . The fundamental right of free men to strive for better conditions through new legislation and new institutions will not now be preserved, if efforts to secure it by argument to fellow-citizens may be construed as criminal incitement to disobey the existing law,—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning, or intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in 'The Price We Pay.'."

## Minnesota Sedition Law Case:†

The defendant was convicted under the Minnesota State Sedition Act for a speech made at a Non-partisan League mass meeting in which he questioned the sincerity of the application to the United States of "making the world safe for democracy," and suggested that America had been stampeded into the war "by newspaper rot to pull England's chestnuts out of the fire for her." From the dissenting opinion of Mr. Justice Brandeis:

*Pierce v. United States, 252 U. S. 239.
†Gilbert v. Minnesota, U. S. Supreme Court, December 13th, 1920.

". . . The statute is said to have been enacted by the state under its police power to preserve the peace; but it is in fact an act to prevent teaching that the abolition of war is possible. Unlike the Federal Espionage Act of June 15, 1917, it applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances. The restriction imposed relates to the teaching of the doctrine of pacifism, and the legislature in effect proscribes it for all the time.

That such a law is inconsistent with the conceptions of liberty hitherto prevailing seems clear. But it is said that the guaranty against abridging freedom of speech, contained in the first amendment of the Federal Constitution, applies only to Federal action; that the legislature here complained of is that of a state; that the validity of the statute has been sustained by its highest court as a police measure; that the matter is one of state concern; and that, consequently, this court cannot interfere.

But the matter is not one merely of state concern. The state law affects directly the functions of the Federal government. It affects rights, privileges and immunities of one who is a citizen of the United States; and it deprives him of an important part of his liberty. These are rights which are guaranteed protection by the Federal Constitution; and they are invaded by the statute in question . . .

The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of Federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so "the right of the people to assemble for the purpose of petitioning Congress for a redress of grievances or for anything else connected with the powers or duties of the national government" would be a right totally without substance . . ."

*(In this case the Chief Justice also dissented upon other grounds.)*

## THE POST-OFFICE CENSORSHIP

### Milwaukee Leader Case:*

Mr. Justice Brandeis said in dissenting from the majority opinion sustaining the Postmaster General's power, under the postal laws of 1879, to exclude from the mails all future issues of a periodical or newspaper because of his belief that some of its past issues have been non-mailable:

> ". . . If, under the Constitution, administrative officers may, as a mere incident of the peace-time administration of their departments, be vested with the power to issue such orders as this, there is little substance in our Bill of Rights, and in every extension of governmental functions lurks a new danger to civil liberty. . ."

*(Mr. Justice Holmes concurred in the dissent.)*

## CASES INVOLVING THE RIGHT TO ORGANIZE, STRIKE AND BOYCOTT

### The Hitchman Case:†

The coal company had entered into an agreement with the United Mine Workers of America organizing its mines, but during a strike in 1906 it adopted the policy of withholding further recognition of the union, and employed miners only upon their signing an agreement not to join the United Mine Workers. The Union undertook to combat this by sending an organizer to solicit the company's employees to join the union when a sufficient number of others had promised to join in order to make a strike for recognition possible.

The company secured an injunction from the United States Disrtict Court restraining these activities of the Union. The

**U. S. A. ex rel Milwaukee Social Democratic Publishing Co. v. Burleson, United States Supreme Court, March 7, 1921.*

*†Hitchman Coal & Coke Co. v. Mitchel, 245 U. S. 229.*

Supreme Court of the United States sustained the injunction, thereby deciding three important propositions of law: (1) "that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and this is a part of the constitutional rights of personal liberty and private property, . . ."; (2) that a contract against joining a union, such as was made in this case, will be protected by injunction by the federal courts; (3) that under the laws of West Virginia it is unlawful to persuade an employee to leave his employer and that the courts will grant injunctive relief from such efforts.

Mr. Justice Brandeis delivered a dissenting opinion, concurred in by Mr. Justice Holmes and Mr. Justice Clarke, reaching a conclusion opposite to that held by the majority of the Court. This opinion is too lengthy for inclusion here, and impossible to excerpt satisfactorily. It argued for the propositions: (1) that the closed union shop is lawful; that a strike to establish it is lawful, and that the union was as much entitled to use economic pressure to secure a closed union shop as the company was entitled to use economic pressure to secure a closed non-union shop; (2) that the course of conduct described did not in effect amount to soliciting a breach of the agreement not to join the United Mine Workers, and (3) that persuading an employee to leave his employer is not unlawful unless malice is shown, and that where such persuasion is part of the policy of a trade union to benefit its members, it is not proper to infer malice.

## Duplex Printing Co. Case:*

The plaintiff, a manufacturer of printing presses, conducted the only large printing press plant in the country which did not operate under an agreement with the International Association of Machinists establishing substantially a closed union shop. The Union, finding that the competition of the cheaper labor costs secured by the Duplex Co. was forcing union printing press

*Duplex Printing Press Co. v. Deering, January 3, 1921.*

manufacturers to threaten to reduce wages below the union scale, decided to bring economic pressure to bear in order to unionize the Duplex shop. To this end it caused its members in New York to refuse to install Duplex-made printing presses, threatened sympathetic strikes against the customers of the Duplex Co. and interfered with repair shops working on Duplex presses. The Duplex Co. applied to the United States District Court for an injunction to restrain this course of conduct as constituting an unlawful restraint of inter-state commerce in violation of the Sherman Anti-Trust Law. Relief by injunction was refused by the District Court and by the Circuit Court of Appeals, but was granted by the United States Supreme Court.

In so ruling, the Supreme Court decided a number of important propositions of law: (1) that the section of the Clayton Act which declares that the labor of a human being is not an article of commerce and removes labor union activities from the scope of the Sherman Act, applies only to the *lawful* activities of labor organizations in carrying out their *legitimate* objects; (2) that the section of the Clayton Act which purports to prohibit injunctions against certain activities of labor organizations, such as were involved in this case, applies only to disputes between an employer and persons directly in his employ, and does not protect sympathetic strikes or labor activities generally classed as secondary boycotts.

Mr. Justice Brandeis delivered a dissenting opinion in which Mr. Justice Holmes and Mr. Justice Clarke concurred, in which he argued for the propositions: (1) that the unorganized character of the Duplex shop, carrying as it did a direct threat against the wage scale of the union members employed in other shops, gave such members a direct interest in unionizing the Duplex shop, which made their conduct lawful and hence outside the prohibition of the Sherman Act; (2) that the latter section of the Clayton Act, above referred to, is not closely limited in the manner held by the majority of the Court, but extends to labor disputes in general. This dissenting opinion is too long for inclusion, and impossible to excerpt satisfactorily.