Oliver Wendell Holmes, Jr.

"War, when you are at it, is horrible and dull. It is only when time has passed that you see that its message was divine. . . . But some teacher of the kind we all need. In this smug, over-safe corner of the world we need it, that we may realize that our comfortable routine is no eternal necessity of things."

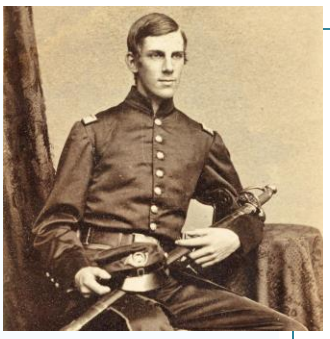
—Oliver Wendell Holmes, Jr., Memorial Day speech (1895)

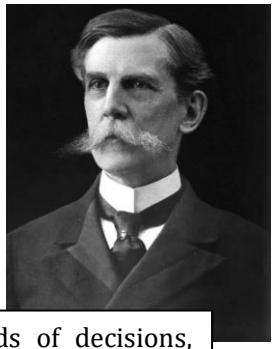
He joined the Union army while he was still in college and fought with distinction in the Civil War. At age 61, he took a seat on the Supreme Court, where he served for 30 years. Oliver Wendell Holmes, Jr., (1841–1935) dedicated most of his 94 years to serving his country. His goal throughout was to put his mind and learning to work on important questions.

Two influences shaped Holmes's life. First was his background. He came from a line of prominent New England families. His father was an admired doctor and famous author. Holmes developed a deep love for New England traditions. At the same time, he was not bound by these traditions. He questioned what he read. He had a probing mind. Second was the Civil War. The war broke out as he was completing college. He enlisted and after graduation marched to the front as a second lieutenant.

In his three years in the army, Holmes was wounded three times—once so severely that he was given up for dead. The war gave him a sense of a larger purpose in life and shaped his career. Holmes's questioning mind had led him to philosophy. However, a desire for public service aroused by his war duty led him to the law. He wanted not just to think but "to think for action." After graduating from law school in 1866, Holmes combined a legal practice with intense study. He also worked as editor of the *American Law Review* and he taught. In 1881 he revealed his legal philosophy in *The Common Law.* "The life of the law has not been logic," he wrote. "It has been experience." To know the law, a person had to understand its present interpretation and the past that shaped it.

The next year, Holmes was named to the Massachusetts Supreme Court. After twenty years on that bench, he joined the U.S. Supreme Court, where he remained for 30 years. When he resigned in 1932, the 90-year-old Holmes said it was time to "bow to the inevitable." He judged cases in light of his idea of the law. "The provisions of the Constitution," he wrote, "are not mathematical formulas. . . . They are organic living institutions." However, he was careful not to impose his own opinions on a case. A judge may disagree with a law, he believed, without the law becoming unconstitutional.





Holmes wrote hundreds of decisions, some for the majority and some in dissent, explaining his reasons for disagreeing with the majority decisions. He opposed the Court's decision in ***Lochner v. New York,*** supporting Progressivism and interpreting the law in a modern, dynamic way. Two of his most famous opinions, both from 1919, involve free speech and violations of the controversial, war-driven legislation often referred to as the **Espionage and Sedition Acts**.

First was ***Schenck* v. *United States***. Charles Schenck, a socialist, had been convicted of trying to interfere with the military draft during World War I. Schenck argued that the arrest violated his right to free speech. Holmes wrote the opinion of the unanimous *majority* that upheld the convictions. The government has the right to restrict speech, he wrote, when the speech presents a "clear and present danger" to society. The context in which speech occurs determines whether the speech is protected. The first amendment does not protect someone from "falsely shouting fire in a theater and causing a panic."

That same year, 1919, Holmes wrote a *minority* opinion in ***Abrams* v. *United States*** that urged allowing free speech in another context. Jacob Abrams, an anarchist, had been convicted of making and distributing pamphlets that criticized the government's interference in the Russian Revolution. The majority upheld the convictions. Holmes argued that the pamphlets represented free speech.

Questions

1. What value did Holmes see in war?
2. What does Holmes mean by saying that law is based on experience, not solely on logic?
3. Why did Holmes rule differently in the two free speech cases, *Schenck* and *Abrams*?
4. What other dangerous times for the United States have led to American rights and freedoms being jeopardized or abridged?

The **Alien and Sedition Acts** were four bills passed in 1798 by the Federalists in the 5th United States Congress during an undeclared naval war with France, later known as the Quasi-War. They were signed into law by President John Adams. Proponents claimed the acts were designed to protect the United States from alien citizens of enemy powers and to stop seditious attacks from weakening the government. The Democratic-Republicans, like later historians, attacked them as being both unconstitutional and designed to stifle criticism of the administration, and as infringing on the right of the states to act in these areas. They became a major political issue in the elections of 1798 and 1800. The Espionage Act made it a crime to aid enemies of the United States or to interfere with the war effort or with military recruitment. The Sedition Act extended its provisions to cover a broader range of offenses, notably speech and the expression of opinion that cast the government or the war effort in a negative light or interfered with the sale of government bonds. One historian of American civil liberties has called it "the nation's most extreme antispeech legislation."[6] Those convicted under the act generally received sentences of imprisonment for 10 to 20 years.[7]

The **Logan Act** is a United States federal law that forbids unauthorized citizens from negotiating with foreign governments. It was passed in 1799 and last amended in 1994. Violation of the Logan Act is a felony, punishable under federal law with imprisonment of up to three years.

The text of the Act is broad and is addressed at any attempt of a US citizen to conduct foreign relations without authority. However, there is no record of any convictions or even prosecutions under the Logan Act.[1][2]

Passed under the administration of President John Adams, during tension between the U.S. and France, it was informally named for Dr. George Logan of Pennsylvania, a state legislator (and later US Senator) and pacifist who in 1798 engaged in semi-negotiations with France during the Quasi-War.[1]

Smith Act

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The **Alien Registration Act** or **Smith Act** (18 U.S.C. § 2385) of 1940 is a United States federal statute that makes it a criminal offense for anyone to

> knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States or of any State by force or violence, or for anyone to organize any association which teaches, advises, or encourages such an overthrow, or for anyone to become a member of, or to affiliate with, any such association.

It also required all non-citizen adult residents to register with the government; within four months, 4,741,971 aliens had registered under the Act's provisions.

The Act is best known for its use against political organizations and figures. Prosecutions continued until a series of United States Supreme Court decisions in 1957 threw out numerous convictions under the Smith Act as unconstitutional. The statute remains on the books, however.

The Act was proposed by Congressman Howard W. Smith of Virginia, a Democrat and a leader of the "anti-labor" bloc of Congressmen.[1] It was signed into law by President Franklin D. Roosevelt.

The first trial, in 1941, focused on Trotskyists, the second trial in 1944 prosecuted alleged fascists and, beginning in 1949, leaders and members of the Communist Party USA were targeted.

The **Hatch Act of 1939** is a United States federal law whose main provision is to prohibit federal employees (civil servants) from engaging in partisan political activity. Named after Senator Carl Hatch of New Mexico, the law was officially known as **An Act to Prevent Pernicious Political Activities**.

The act precluded federal employees from membership in "any political organization which advocates the overthrow of our constitutional form of government." During the Second Red Scare, this designation was interpreted to include communist and labor organizations. The **Violent Radicalization and Homegrown Terrorism Prevention Act of 2007** was a bill sponsored by Rep. Jane Harman (D-CA)[1][2][3] in the 110th United States Congress. Its stated purpose is to deal with "homegrown terrorism and violent radicalization"[4] by establishing a national commission, establishing a center for study, and cooperating with other nations.

Espionage Act

As Congress debated the law's provisions, one argument made in its favor was that the country was witnessing instances of mob and vigilante behavior that represented the public's own attempt to punish criminal speech in light of the government's inability to prosecute such speech. The Sedition Act, it was argued, would prevent mobs from doing what the government could not.[8] While much of the debate focused on the law's precise language, there was considerable opposition in the Senate, almost entirely from Republicans like Henry Cabot Lodge and Hiram Johnson, the former speaking in defense of free speech and the latter assailing the administration for failing to use the laws already in place.[9] Former president Theodore Roosevelt voiced opposition as well.[10] President Wilson and his Attorney General Thomas Watt Gregory viewed the bill as a political compromise. They hoped to avoid hearings that would embarrass the administration for its failure to prosecute offensive speech. They also feared other proposals that would have withdrawn prosecutorial authority from the Justice Department and placed it in the War Department, creating a sort of civilian court-martial process of questionable constitutionality.[11] The final vote for passage was 48 to 26 in the Senate[9] and 293 to 1 in the House of Representatives.[12]

Officials in the Justice Department who had little enthusiasm for the law nevertheless hoped that even without generating many prosecutions it would help quiet public calls for more government action against those thought to be insufficiently patriotic.[13] In fact the legislation came so late in the war, just a few months before Armistice Day, that prosecutions under the provisions of the Sedition Act were few.[14] One notable case was that of Mollie Steimer, convicted under the Espionage Act as amended by the Sedition Act.[15] U.S. Attorneys at first had considerable discretion in using these laws, until Gregory, a few weeks before the end of the war, instructed them not to act without his approval. Enforcement varied greatly from one jurisdiction to the next, with most activity in the Western states where the I.W.W. was active.[16]

The U.S. Supreme Court upheld the Sedition Act in *Abrams v. United States*,[17] but subsequent Supreme Court decisions, such as *Brandenburg v. Ohio* in 1969, make it unlikely that similar legislation would be considered constitutional today.[*citation needed*]

Most U.S. newspapers "showed no antipathy toward the act" and "far from opposing the measure, the leading papers seemed actually to lead the movement in behalf of its speedy enactment."[18]

In March 1919, President Wilson, at the suggestion of Attorney General Thomas Watt Gregory released or reduced the sentences of some 200 prisoners convicted under the Espionage Act or the Sedition Act.[19]

With the act rendered inoperative by the end of hostilities, Attorney General A. Mitchell Palmer waged a public campaign, not unrelated to his own campaign for the Democratic nomination for president, in favor of a peacetime version of the Sedition Act.[20] He sent a circular outlining his rationale to newspaper editors in January 1919, citing the dangerous foreign-language press and radical attempts to create unrest in African American communities.[21] He testified in favor of such a law in early June 1920. At one point Congress had more than 70 versions of proposed language and amendments for such a bill,[22] but it took no action on the controversial proposal during the campaign year of 1920.[23] After a court decision later in June cited Palmer's anti-radical campaign for its abuse of power, the conservative *Christian Science Monitor* found itself unable to support him any more, writing on June 25, 1920: "What appeared to be an excess of radicalism...was certainly met with...an excess of suppression."[24]

Congress repealed the Sedition Act on December 13, 1920.[25][26][27]

The Alien Registration Act of 1940 was the first American peacetime sedition act.[28]