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## Discussion 8: The Wartime Constitution, part IV—First Amendment

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### Discussion of United States vs. O'Brien, 1968

What was going on around the world in 1968?

- There was a relaxation of traditional social norms
- Large hippie youth movement, drugs
- Vigorous anti-war movement

#### Case Background:

O'Brien is tried and convicted of destroying his draft card, so he appeals to the 1<sup>st</sup> circuit Court of Appeals for an order that the law prohibiting the *action* of destroying the draft card violates his First Amendment rights of free expression. O'Brien could have been convicted under a previous law that made it illegal simply to not be in possession of the card, but instead was only convicted of the *act* of destroying his draft card, made illegal by a 1965 law. O'Brien challenges his conviction as an unconstitutional limitation on his freedom of expression.

1<sup>st</sup> Circuit Court of Appeals says that because of the prior law, he could have been convicted of non-possession, thus the 1965 law was intended *solely* to prevent the public action of burning the draft card and is therefore a violation of the 1<sup>st</sup> Amendment.

#### Decision:

Supreme Court decides that the 1965 law was constitutional as enacted and as applied, thus overturning the ruling of the appeals court.

"As applied" Test: is the law constitutional when you apply it to the individual circumstance being contested? The motivation of the law does not matter, but how the law is applied to various situations must be consistent with the Constitution. This test is often used by the Court to reduce subjectivity in its decision-making; the test prevents the Court from having to determine the intent of the governing body in enacting a law. Instead, it only looks to how the law is executed and applied in practice.

O'Brien argues that the 1965 Amendment prohibits the "symbolic speech" he wants to partake in. The Court sets out a rule for when the government can prohibit symbolic speech:

*"A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."* (Warren, majority opinion in *United States v. O'Brien*, [www.findlaw.com](http://www.findlaw.com))

Does intent matter when determining constitutionality?

Congress passed the law challenged by O'Brien because people were burning their draft cards during protests. The law was intended to restrict free speech. In order to be constitutional, a law needs to further an important practical purpose to justify the restriction on individual rights. Because Congress has the power to raise an army, requiring people to carry their draft cards is determined to be necessary in order to run a smooth selective service system, which is an important interest.

In asking what the government interest is, you only look to what the interest is that is set forth by the government itself (powers of the Constitution). The government should always be able to do things that the Constitution gives it the power to do. Intent does not matter.

### **Brandenburg vs. Ohio, 1969**

Case Background: Brandenburg, a KKK leader, was convicted of violating an Ohio statute criminalizing: *"advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."* (Brandenburg v. Ohio, [www.findlaw.com](http://www.findlaw.com))

#### Constitutional Questions:

Brandenburg claims that he has a First Amendment right to advocate his views, regardless of their potential impact and that punishing the mere advocacy of views is viewpoint discrimination and an unconstitutional prohibition of free speech.

#### Supreme Court decision:

*"Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."* (Supreme Court holding in *Brandenburg v. Ohio*, [Findlaw.com](http://Findlaw.com))

#### Arguments for Brandenburg:

- Prohibition of mere advocacy is a blanket restriction on free speech that steps beyond constitutional limitations
- Clear and Present danger is an arbitrary standard with no constitutional grounding
- Clear and present danger does not apply because it only was intended to mean a clear and present danger to the fabric of the nation's constitution. Such cases involve wartime situations where a failure to uphold an asserted national security interest would arguably risk the overall constitutional system itself.

#### Arguments for Ohio

- Clear and present danger has been applied to more than wartime, for instance the case of yelling "fire" in a crowded theater presents a clear and present danger, thus the Congress should be able to regulate that type of speech
- The only intent of Brandenburg's speech was to incite violence against Blacks and Jews, actions that Congress has the power to regulate. Thus, it is consistent with prior precedents establishing tests for permissible prohibition of speech
- There is no bright line distinction between conspiracy laws and speech regulations, and our justice system must be able to prevent actions that attempt to undermine the rights of others