

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.”

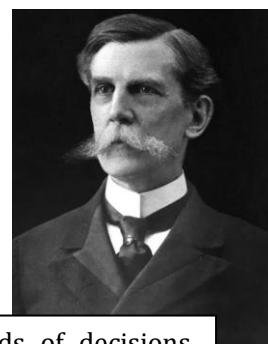
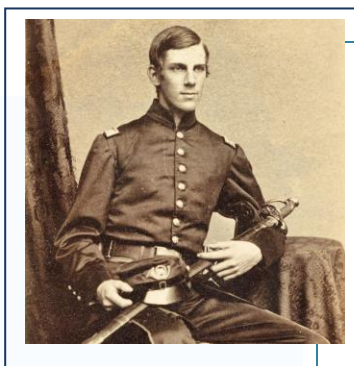
—Oliver Wendell Holmes, Jr., *Memorial Day speech (1895)*

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 have abridged or jeopardized American rights?

