AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era—Democratic Rights/Free Speech

**Stromberg v. California, 283 U.S. 359** (1931)

*The criminal code of California made it a felony to display a red flag or other similar banner “as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character.” Yetta Stromberg, a member of the Young Communist League, supervised a summer camp for children where she taught the children “class consciousness” and “the solidarity of all workers,” led the children in producing and raising a reproduction of the Soviet flag, and led of a pledge of allegiance to “the worker’s red flag, and to the cause for which it stands.” She and the camp also maintained a library that included a large number of pamphlets urging “armed uprisings” and the need for “desperate, bloody, destructive war,” though Stromberg maintained that the children were not taught the need for violent revolution.*

*Stromberg was charged and convicted in state court for displaying a red flag as a symbol of opposition to organized government, and her conviction was upheld on appeal. The U.S. Supreme Court in a 7-2 decision reversed that conviction. The primary ground for reversal was the concern that the California statute and the instructions to the jury did not adequately clarify that peaceful opposition to the government is constitutionally protected, though the dissenters thought the trial judge had made that issue clear to the jury. Only one of the justices raised doubts about whether the display of a flag was outside the scope of the First Amendment’s protection of freedom of speech.*

CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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. . . . The principles to be applied have been clearly set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech. *Gitlow v. New York* (1925). The right is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions. We have no reason to doubt the validity of the second and third clauses of the statute as construed by the state court to relate to such incitements to violence.

The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag "as a sign, symbol or emblem of opposition to organized government," and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it might be construed as embracing conduct which the State could not constitutionally prohibit. Thus it was said that the clause "might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations." The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside.

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*Reversed*.

JUSTICE McREYNOLDS, dissenting.

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JUSTICE BUTLER, dissenting.

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Shortly prior to the trial of this case, the supreme court of California held invalid a city ordinance purporting to make unlawful the public display of a flag or emblem of an organization espousing for the government of the people of the United States principles antagonistic to our Constitution or form of government. Under that decision the California lower courts were bound to hold invalid the first clause of § 403a construed as peaceable opposition to organized government. And the record shows that in the case before us counsel and the trial court had that decision in mind.

. . . .

The effect of the three instructions here referred to was definitely to direct the jury that defendant had the right without limit to advocate peaceable changes in our government, that under our constitution and laws an organization peaceably advocating changes in our government, no matter to what extent or upon what theories or principles, may adopt a flag signifying the purposes of such organization, and that it is impossible to make that unlawful.

. . . .

It seems to me that on this record the Court is not called on to decide whether the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press or to decide whether such freedom is a part of the liberty protected by the Fourteenth Amendment or whether the anarchy that is certain to follow a successful "opposition to organized government" is not a sufficient reason to hold that all activities to that end are outside the "liberty" so protected. . . .