AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

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

*Zechariah Chafee, Jr.*, **Freedom of Speech** (1920)[[1]](#footnote-1)

*Zechariah Chafee, Jr. was born to an upper class family in Rhode Island and graduated from Brown University in 1907. He soon abandoned his family’s ironworks business and entered Harvard Law School, where he excelled. He practiced for a time in Rhode Island before returning to Harvard as a member of the faculty, where he became one of its most distinguished members in the first half of the twentieth century (though conservative alumni tried to have him removed from the faculty as too radical during World War I). He was instrumental in constructing a progressive civil libertarian defense of free speech that emphasized that freedom of speech was distinct from and more fundamental than other personal liberties, was not a doctrine only of interest to political radicals, and was consonant with the needs of an evolving democratic society. In doing so, he rejected the importance of rights as such and focused his attention on how courts should balance competing social interests to facilitate human progress. His arguments became the cornerstone of the liberal reworking of the American constitutional law of free speech in the twentieth century.*

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[A] provision like the First Amendment to the federal Constitution . . . is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress within that boundary. It is a declaration of national policy in favor of the public discussion of all public questions. . . . Our Bill of Rights perform a double function. They fix a certain point to halt the government abruptly with a “Thus far and no further”; but long before that point is reached they urge every official of the three branches of the state a constant regard for certain declared fundamental policies of American life.

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[I]t is necessary to determine where the line runs between utterances which are protected by the Constitution from governmental control and those which are not. . .

One theory construes the First Amendment as enacting Blackstone’s statement that “the liberty of the press . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published.” . . .

This Blackstonian theory dies hard, but it ought to be knocked on the head once for all. . . .

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[I]t is hardly necessary to argue that the Blackstonian definition gives very inadequate protection to the freedom of expression. A death penalty for writing about socialism would be as effective suppression as a censorship. . . .

A second interpretation of the freedom of speech clauses limits them to the protection of the use of utterance and not to its “abuse.” It draws the line between “liberty” and “license.” . . .

To a judge obliged to decide whether honest and able opposition to the continuation of a war is punishable, these generalizations furnish as much help as a woman forced, like Isabella in *Measure for Measure*, to choose between her brother’s death and loss of honor, might obtain from the pious maxim, “Do right.” What is abuse? What is license? What standards does the law afford? . . .

Clearly, we must look further and find a rational test of what is use and what is abuse. Saying that the line lies between them gets us nowhere. And “license” is too often “liberty” to the speaker, and what happens to be anathema to the judge.

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The framers of the First Amendment make it plain that they regarded freedom of speech as very important – “absolutely necessary” is Luther Martin’s phrase. But they say very little about its exact meaning. That should not surprise us. . . . Men rarely define their inspirations until they are forced into doing so by sharp antagonism. Therefore, it is not until the Sedition Law of 1798 made the limits of liberty of the press a concrete and burning issue that we get much helpful expression of opinion on our problem. . . .

. . . . Two different views of the relation of rulers and people were in conflict. According to one view, the rulers were the superiors of the people, and therefore must not be subjected to any censure that would tend to diminish their authority. The people could not make adverse criticism in newspaper or pamphlets, but only through their lawful representatives in the legislatures, who might be petitioned in the ordinary manner. According to the other view, the rulers are agents and servants of the people, who may therefore find fault with their servants and discuss questions of their punishment or dismissal, and of governmental policy.

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The few early judicial decisions to the contrary ought not to weigh against the statements of Franklin, Jefferson, and Madison, and the general temper of the time. . . . “Let a stranger go into our courts,” wrote one observer, “and he would almost believe himself in the Court of the King’s Bench.” . . . The judges forgot the truth emphasized by Maitland: “The law of a nation can only be studied in relation to the whole national life.” . . . The First Amendment was written by men . . . who intended to wipe out the common law of sedition, and make further precautions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America.

It must not be forgotten that the controversy over liberty of the press was a conflict between two views of government, that the law of sedition was a product of the view that the government was master, and that the American Revolution transformed into a working reality the second view that the government was the servant, and therefore subjected to blame from its master, the people. . .

. . . . The real issue in every free speech controversy is this – whether the state can punish all words which have some tendency, however remoted, to bring about acts in violation of law, or only words which directly incite to acts in violation of law.

If words do not become criminal until they have “an immediate tendency to produce a breach of the peace,” there is no need for a law of sedition, since the ordinary standards of criminal solicitations and attempt apply. Under those standards the words must bring the speaker’s unlawful intention reasonably near to success. Such a limited power to punish utterances rarely satisfies the zealous in times of excitement like a war. They realize that all condemnation of the war or of conscription may conceivably lead to active resistance or insubordination. Is it not better to kill the serpent in the egg? All writings that have even a remote tendency to hinder the war must be suppressed.

Such has always been the argument of the opponents of free speech. And the most powerful weapon in their hands, since the abolition of censorship, is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts. Closely related to it is the doctrine of constructive intent, which regards the intent of the defendant to cause violence as immaterial so long as he intended to write the words, or else presumes the violent intent from the bad tendency of the words on the ground that a man is presumed to intend the consequences of his acts. When rulers are allowed to possess these weapons, they can by the imposition of severe sentences create an *ex post facto* censorship of the press. . . .

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[T]he meaning of the First Amendment did not crystallize in 1791. The framers would probably have been horrified at the thought of protecting books by Darwin or Bernard Shaw, but “liberty of speech” is no more confined to the speech they thought permissible than “commerce” in another clause is limited to the sailing vessels and horse-drawn vehicles of 1787. Into the making of the constitutional conception of free speech have gone, not only men’s bitter experience of the censorship and sedition prosecutions before 1791, but also the subsequent development of the law of fair comment in civil defamation, and the philosophical speculations of John Stuart Mill. Justice Holmes phrases the thought with even more than his habitual felicity. “The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil.”

. . . . The truth is that all provisions of the Constitution must be construed together so as to limit each other. In a war as in peace, this process of mutual adjustment must include the Bill of Rights. There are those who believe that the Bill of Rights can be set aside in war time at the uncontrolled will of the government. The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war. . . . If the First Amendment is to mean anything, it must restrict powers which are expressly granted by the Constitution to Congress, since Congress has no other powers. It must apply to those activities of government which are most liable to interfere with free discussion, namely, the postal service and the conduct of war.

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggressions. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.

Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock. Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. “Your right to swing your arms ends just where the other man’s nose begins.” To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being to who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right. It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about rights is that each side is so busy denying the other’s claim to rights that it entirely overlooks the human desires and needs behind that claim.

The rights and powers of the Constitution, aside from the portions which create the machinery of the federal system, are largely means of protecting important individual and social interests, and because of this necessity of balancing such interests the clauses cannot be construed with absolute literalness. The Fourteenth Amendment and the obligation of contracts clause, maintaining important individual interests, are modified by the police power of the states, which protects health and other social interests. The Thirteenth Amendment is subject to many implied exceptions, so that temporary involuntary servitude is permitted to secure social interests in the construction of roads, the prevention of vagrancy, the training of the militia or national army. It is common to rest these implied exceptions to the Bill of Rights upon the ground that they existed in 1791 and long before, but a less arbitrary explanation is desirable. Not everything old is good. Thus the antiquity of peonage does not constitute an exception to the Thirteenth Amendment; it is not now demanded by any strong social interest. . . . The Bill of Rights does not crystallize antiquity. It seems better to say that long usage does not create an exception to the absolute language of the Constitution, but demonstrates the importance of the social interest behind the exception.

The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matter vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. This social interest is especially important in war time. . . . . Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished. . . .

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The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. . . .

Thus our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts. . . . And we can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies. The history of the Amendment and the political function of free speech corroborate each other and make this conclusion plain.

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1. Excerpt taken from Zechariah Chafee, Jr., *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920). [↑](#footnote-ref-1)