AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Free Speech

**Feiner v. New York, 340 U.S. 315 (1951)**

*Irving Feiner, a student at Syracuse University, gave a speech on a street corner on the night of March 8, 1949, which called for racial equality and bitterly condemned local elected officials. The speech attracted a small crowd. In the opinion of a local police officer, Officer Flynn, the crowd became “unruly” after about twenty to thirty minutes. Officer Flynn asked Feiner to stop speaking, but Feiner refused. When Feiner refused a third official request to stop speaking, he was arrested for disorderly conduct. A local court convicted him of that offense and that conviction was sustained by the New York Court of Appeals. Feiner appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-3 vote ruled that Feiner was constitutionally convicted. Chief Justice Vinson’s opinion maintained that the police were motivated by legitimate concerns for public welfare and not by an interest in repressing speech. Vinson and Justice Black characterized the fact situation in* Feiner *differently. Vinson blamed Feiner for the unruly crowd. Black claimed the police overreacted. Did these differences in fact perception affect the outcome of the case or did the justices perceive the facts differently because they had different understandings of free speech rights? Under what circumstances do you believe Feiner and those in his positions should be required to stop speaking? Would the police have acted correctly if there had been a substantial threat of a riot, even though Feiner was not engaged in incitement?*

CHIEF JUSTICE VINSON delivered the opinion of the Court.

. . .

. . . The courts below recognized petitioner’s right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner’s views and opinions. Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. . . . But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. . . . The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner’s deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.

JUSTICE BLACK, dissenting.

. . .

. . . Even accepting every “finding of fact” below, I think this conviction makes a mockery of the free speech guarantees of the First and Fourteenth Amendments. The end result of the affirmance here is to approve a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of the local police. I will have no part or parcel in this holding which I view as a long step toward totalitarian authority.

The Court’s opinion apparently rests on this reasoning: The policeman, under the circumstances detailed, could reasonably conclude that serious fighting or even riot was imminent; therefore he could stop petitioner’s speech to prevent a breach of peace; accordingly, it was “disorderly conduct” for petitioner to continue speaking in disobedience of the officer’s request. As to the existence of a dangerous situation on the street corner, it seems far-fetched to suggest that the “facts” show any imminent threat of riot or uncontrollable disorder. It is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things. Nor does one isolated threat to assault the speaker forebode disorder. Especially should the danger be discounted where, as here, the person threatening was a man whose wife and two small children accompanied him and who, so far as the record shows, was never close enough to petitioner to carry out the threat.

Moreover, assuming that the “facts” did indicate a critical situation, I reject the implication of the Court’s opinion that the police had no obligation to protect petitioner’s constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. . . . Their duty was to protect petitioner’s right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.

Finally, I cannot agree with the Court’s statement that petitioner’s disregard of the policeman’s unexplained request amounted to such “deliberate defiance” as would justify an arrest or conviction for disorderly conduct. On the contrary, I think that the policeman’s action was a “deliberate defiance” of ordinary official duty as well as of the constitutional right of free speech. For at least where time allows, courtesy and explanation of commands are basic elements of good official conduct in a democratic society. Here petitioner was “asked” then “told” then “commanded” to stop speaking, but a man making a lawful address is certainly not required to be silent merely because an officer directs it. Petitioner was entitled to know why he should cease doing a lawful act. Not once was he told. I understand that people in authoritarian countries must obey arbitrary orders. I had hoped that there was no such duty in the United States.

In my judgment, today’s holding means that as a practical matter, minority speakers can be silenced in any city. . . .

JUSTICE DOUGLAS, with whom JUSTICE MINTON concurs, dissenting.

Public assemblies and public speech occupy an important role in American life. One high function of the police is to protect these lawful gatherings so that the speakers may exercise their constitutional rights. When unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and heckling from the crowd. When a speaker mounts a platform it is not unusual to find him resorting to exaggeration, to vilification of ideas and men, to the making of false charges. But those extravagances . . . do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct.

A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of “fighting words.” . . . But this record shows no such extremes. It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech. Police censorship has all the vices of the censorship from city halls which we have repeatedly struck down. . . .