AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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

Supplementary Material

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

**Terminiello v. City of Chicago, 337 U.S. 1** (1949)

*Over the course of the 1930s and 1940s, Father Arthur Terminiello built a significant group of followers for his Union of Christian Crusaders from his diocese in Mobile, Alabama. His anti-New Deal agitation soon grew into spreading anti-Semitic conspiracy theories, opposition to American entry into the World War II, and advocacy of American Christian nationalism. The Catholic Church eventually stripped him of his priesthood, but he remained an active public speaker and toured the country on behalf of the America First Party.*

*In the winter of 1946, Terminiello and Christian nationalist Gerald K. Smith went on a speaking tour in the upper Midwest. One stop was in a Jewish suburb of Chicago, where Terminiello and Smith spoke to a packed-house in an 800-person auditorium. Meanwhile, several hundred protestors organized by communist groups demonstrated outside. The protests were violent, with objects thrown, windows broken, and policemen pushed. Several protestors were arrested, and police escorts were needed to move people in and out of the auditorium. Terminiello’s speech in Chicago was typical for him in its warnings of the “attempt to destroy American by revolution” and a “tidal wave of Communism” and its call for sending “Communistic Zionistic Jews . . . back where they came from.”*

*At the conclusion of the meeting, Terminiello was charged with disorderly conduct that included “misbehavior” that “stirs the public to anger, invites dispute, brings out the condition of unrest, or creates a disturbance.” He was convicted by a jury and fined $100. He appealed to the state supreme court, which affirmed the conviction. In a 5-4 decision, the U.S. Supreme Court reversed, concluding that the disturbing the peace ordinance could not be constitutionally applied to Terminiello’s speech. The Court’s majority did not formally overturn the fighting words doctrine, but emphasized that the state could not criminally prosecute someone for delivering a speech that stirred the public to anger. In dissent, Justice Jackson emphasized that local police needed a free hand to head off organized street violence of the type that had helped usher the Nazis to power in Germany.*

JUSTICE DOUGLAS delivered the opinion of the Court.

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 The argument here has been focused on the issue of whether the content of petitioner's speech was composed of derisive, fighting words, which carried it outside the scope of the constitutional guarantees. See *Chaplinsky v. New Hampshire* (1942); *Cantwell v. Connecticut* (1940). We do not reach that question, for there is a preliminary question that is dispositive of the case.

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The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.

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*Reversed*.

CHIEF JUSTICE VINSON, dissenting.

I dissent. The Court today reverses the Supreme Court of Illinois because it discovers in the record one sentence in the trial court's instructions which permitted the jury to convict on an unconstitutional basis. The offending sentence had heretofore gone completely undetected. It apparently was not even noticed, much less excepted to, by the petitioner's counsel at the trial. No objection was made to it in the two Illinois appellate tribunals which reviewed the case. Nor was it mentioned in the petition for certiorari or the briefs in this Court. In short, the offending sentence in the charge to the jury was no part of the case until this Court's independent research ferreted it out of a lengthy and somewhat confused record. I think it too plain for argument that a reversal on such a basis does not accord with any principle governing review of state court decisions heretofore announced by this Court. . . .

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The Court, as I understand it, does not reach the issue which the parties argued here—whether a properly instructed jury could constitutionally have found from the conflicting evidence in the record that, under the circumstances, the words in the petitioner's speech were 'fighting words' to those inside the hall who heard them. Certainly, the Court does not decide whether the violent opposition of those outside the hall, who did not hear the speech, could constitutionally warrant the conviction of the petitioner in order to keep the streets from becoming ideological battlegrounds. Since neither of these constitutional issues is decided by the Court, I think that it is not within my province to indicate any opinion concerning them. . . .

JUSTICE FRANKFURTER, with whom JUSTICE JACKSON and JUSTICE BURTON join, dissenting.

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Only the uninformed will deride as a merely technical point objection to what the Court is doing in this case. The matter touches the very basis of this Court's authority in reviewing the judgments of State courts. We have no authority to meddle with such a judgment unless some claim under the Constitution or the laws of the United States has been made before the State court whose judgment we are reviewing and unless the claim has been denied by that court.

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. . . . The relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter. It is too delicate to permit silence when a judgment of a State court is reversed in disregard of the duty of this Court to leave untouched an adjudication of a State unless that adjudication is based upon a claim of a federal right which the State has had an opportunity to meet and to recognize. If such a federal claim was neither before the State court nor presented to this Court, this Court unwarrantably strays from its province in looking through the record to find some federal claim that might have been brought to the attention of the State court and, if so, brought, fronted, and that might have been, but was not, urged here. This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.

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JUSTICE JACKSON, with whom JUSTICE BURTON joins, dissenting.

The Court reverses this conviction by reiterating generalized approbations of freedom of speech with which, in the abstract, no one will disagree. Doubts as to their applicability are lulled by avoidance of more than passing reference to the circumstances of Terminiello's speech and judging it as if he had spoken to persons as dispassionate as empty benches, or like a modern Demosthenes practicing his Philippics on a lonely seashore.

But the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two. When the trial judge instructed the jury that it might find Terminiello guilty of inducing a breach of the peace if his behavior stirred the public to anger, invited dispute, brought about unrest, created a disturbance or molested peace and quiet by arousing alarm, he was not speaking of these as harmless or abstract conditions. He was addressing his words to the concrete behavior and specific consequences disclosed by the evidence. He was saying to the jury, in effect, that if this particular speech added fuel to the situation already so inflamed as to threaten to get beyond police control, it could be punished as inducing a breach of peace. When the light of the evidence not recited by the Court is thrown upon the Court's opinion, it discloses that underneath a little issue of Terminiello and his hundred-dollar fine lurk some of the most far-reaching constitutional questions that can confront a people who value both liberty and order. This Court seems to regard these as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order.

An old proverb warns us to take heed lest we 'walk into a well from looking at the stars.' To show why I think the Court is in some danger of doing just that, I must bring these deliberations down to earth by a long recital of facts.

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The court below, in addition to this recital, heard other evidence, that the crowd reached an estimated number of 1,500. Picket lines obstructed and interfered with access to the building. The crowd constituted 'a surging, howling mob hurling epithets at those who would enter and tried to tear their clothes off.' One young woman's coat was torn off and she had to be assisted into the meeting by policemen. Those inside the hall could hear the loud noises and hear those on the outside yell, 'Fascists, Hitlers!' and curse words like 'damn Fascists.' Bricks were thrown through the windowpanes before and during the speaking. About 28 windows were broken. The street was black with people on both sides for at least a block either way; bottles, stink bombs and brickbats were thrown. Police were unable to control the mob, which kept breaking the windows at the meeting hall, drowning out the speaker's voice at times and breaking in through the back door of the auditorium. About 17 of the group outside were arrested by the police.

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Terminiello, of course, disclaims being a fascist. Doubtless many of the indoor audience were not consciously such. His speech, however, followed, with fidelity that is more than coincidental, the pattern of European fascist leaders.

The street mob, on the other hand, included some who deny being communists, but Terminiello testified and offered to prove that the demonstration was communist-organized and communist-led. He offered literature of left-wing organizations calling members to meet and 'mobilize' for instruction as pickets and exhorting followers: 'All out to fight Fascist Smith.'

As this case declares a nation-wide rule that disables local and state authorities from punishing conduct which produces conflicts of this kind, it is unrealistic not to take account of the nature, methods and objectives of the forces involved. This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe. Increasingly, American cities have to cope with it. One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other's pickets; parade is met with counterparade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence. This technique appeals not to reason but to fears and mob spirit; each is a show of force designed to bully adversaries and to overawe the indifferent. We need not resort to speculation as to the purposes for which these tactics are calculated nor as to their consequences. Recent European history demonstrates both.

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The present obstacle to mastery of the streets by either radical or reactionary mob movements is not the opposing minority. It is the authority of local governments which represent the free choice of democratic and law-abiding elements, of all shades of opinion but who, whatever their differences, submit them to free elections which register the results of their free discussion. The fascist and communist groups, on the contrary, resort to these terror tactics to confuse, bully and discredit those freely chosen governments. Violent and noisy shows of strength discourage participation of moderates in discussions so fraught with violence and real discussion dries up and disappears. And people lose faith in the democratic process when they see public authority flouted and impotent and begin to think the time has come when they must choose sides in a false and terrible dilemma such as was posed as being at hand by the call for the Terminiello meeting: 'Christian Nationalism or World Communism—Which?'

This drive by totalitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of these officials. This is such a case. . . . Terminiello's victory today certainly fulfills the most extravagant hopes of both right and left totalitarian groups, who want nothing so much as to paralyze and discredit the only democratic authority and can curb them in their battle for the streets.

I am unable to see that the local authorities have transgressed the Federal Constitution. Illinois imposed no prior censorship or suppression upon Terminiello. On the contrary, its sufferance and protection was all that enabled him to speak. It does not appear that the motive in punishing him is to silence the ideology he expressed as offensive to the State's policy or as untrue, or has any purpose of controlling his thought or its peaceful communication to others. There is no claim that the proceedings against Terminiello are designed to discriminate against him or the faction he represents or the ideas that he bespeaks. There is no indication that the charge against him is a mere pretext to give the semblance of legality to a covert effort to silence him or to prevent his followers or the public from hearing any truth that is in him.

A trial court and jury has found only that in the context of violence and disorder in which it was made, this speech was a provocation to immediate breach of the peace and therefore cannot claim constitutional immunity from punishment. Under the Constitution as it has been understood and applied, at least until most recently, the State was within its powers in taking this action.

Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish. Where an offense is induced by speech, the Court has laid down and often reiterated a test of the power of the authorities to deal with the speaking as also an offense. . . .

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No one will disagree that the fundamental, permanent and overriding policy of police and courts should be to permit and encourage utmost freedom of utterance. It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-semitic or anti-semitic, pro-negro or anti-negro, pro-Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods the one we have. It is our philosophy that the course of government should be controlled by a consensus of the governed. This process of reaching intelligent popular decisions requires free discussion. Hence we should tolerate no law or custom of censorship or suppression.

But we must bear in mind also that no serious outbreak of mob violence, race rioting, lynching or public disorder is likely to get going without help of some speech-making to some mass of people. A street may be filled with men and women and the crowd still not be a mob. Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties.

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Because a subject is legally arguable . . . does not mean that public sentiment will be patient of its advocacy at all times and in all manners. So it happens that, while peaceful advocacy of communism or fascism is tolerated by the law, both of these doctrines arouse passionate reactions. A great number of people do not agree that introduction to America of communism or fascism is even debatable. Hence many speeches, such as that of Terminiello, may be legally permissible but may nevertheless in some surrounding, be a menace to peace and order. When conditions show the speaker that this is the case, as it did here, there certainly comes a point beyond which he cannot indulge in provocations to violence without being answerable to society.

Determination of such an issue involves a heavy responsibility. Courts must beware lest they become mere organs of popular intolerance. Not every show of opposition can justify treating a speech as a breach of peace. Neither speakers nor courts are obliged always and in all circumstances to yield to prevailing opinion and feeling. As a people grow in capacity for civilization and liberty their tolerance will grow, and they will endure, if not welcome, discussion even on topics as to which they are committed. They regard convictions as tentative and know that time and events will make their own terms with theories, by whomever and by whatever majorities they are held, and many will be proved wrong. But on our way to this idealistic state of tolerance the police have to deal with men as they are. . . .

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But if we maintain a general policy of free speaking, we must recognize that its inevitable consequence will be sporadic local outbreaks of violence, for it is the nature of men to be intolerant of attacks upon institutions, personalities and ideas for which they really care. In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. . . .

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.