The Freedom of Speech: An Introduction

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THE NATURE OF FREE SPEECH

The First Amendment of the United States Constitution prohibits Congress from enacting any law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

According to the elementary rules of grammar, the placement of a comma before the first "or" signifies that the second clause is independent from the first. Likewise, the appearance of a comma before the "and" indicates that the fourth clause is independent of the third. By placing the second "or" after the semicolon, the framers also meant that the third and fourth clauses are independent from the first two. Strunk & White, *The Elements of Style* 5-6 (3d Ed. 1979).

The framers chose this grammatical structure in order to express four separate and distinct rights. The freedom of speech is not the same as the freedom of the press; nor is either the same as the other two. The right of the people to assemble is not identical to the right to petition the government for redress of grievances; nor is either equal to the other two. Each has its own specific content and each is secured from laws that abridge it.

The framers also chose this structure to denote that they had something definite in mind in choosing the exact words that they did. They introduced each of the two pairs of clauses with the definite article "the." The word, the, in the common use of day came "before nouns which are specific or understood" and/or "to limit their signification to a specific thing or things." Webster's 1828 Dictionary.

In order to have used "the" to introduce each of the four rights specified in the First Amendment, then, the framers must have had something specific and definite in mind and must have designed the Amendment to accomplish that limited objective. Thus, one can approach the language of the First Amendment confident that, while the text itself does not define the terms, the terms were well known to the framers from antecedent texts and from history.

A Textual History

The First Amendment is the work-product of the First Congress of the United States. James Madison, a member of the House of Representatives, introduced the proposal that served as the initial working draft of that Amendment. That proposal read as follows:

> *The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.*
> *The people shall not be restrained from peaceably assembling and consulting for their common good; not from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.* Reprinted in *Sources of Our Liberties* 422 (Perry, ed. Rev. Ed. 1978) (Emphasis added). (Hereinafter *Sources).*

Even a cursory glance at this proposal in comparison with the final text reveals that the Congress significantly refined Madison's initial text. All, but one of the changes, however, were editorial in nature, not intended to change the substance of the original proposal.

The phrase that the freedom of press is "one of the great bulwarks of liberty," being editorial in nature was dropped. The phrase, "consulting for their common good," being understood as a necessary ingredient of a peaceable assembly was discarded as surplusage. Article XVI of the 1776 Pennsylvania Constitution reprinted in *Sources* at 331 and Article XIX of the 1780 Constitution of Massachusetts reprinted in *Sources* at 377. The reference to "remonstrances" was eliminated as redundant, a remonstrance being one kind of petition. Webster, *American Dictionary of the English Language* (1828).

Only the change from "their right to speak, to write or to publish their sentiments" to "the freedom of speech" was substantive. As will be seen below, the reason for this change was to make more certain Madison's initial effort to establish four distinct and separate rights consistent with his initial grammatical structure.

Madison undoubtedly derived the right "to speak, to write and to publish" from two state constitutions, Pennsylvania and Vermont. Both included similar language in an Article that read, as follows:

> *That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained. Id.* at 330, 366.

No other state constitution contained any phrase even remotely similar to the one appearing before the semicolon in these two constitutions. Those that guaranteed the freedom of the press simply stated that guarantee without any introductory language. See Article I, Section 12 of the Virginia document reprinted in *Sources* at 312 and Article XVI of the 1780 Constitution of Massachusetts reprinted in *Sources* at 376.

Still, the language borrowed by Madison served as a preface to the press guarantees in the Pennsylvania and Vermont documents. In light of this textual record, no one could be sure that Madison's first right, the one "to speak, to write and to publish," was really independent from the freedom of the press.

If the link between the speech and the press clauses was to be broken, and a separate and distinct right to be established, it was obvious that other language would have to be utilized. The select House Committee, to which Madison's proposal was sent for action, chose the phrase, "the freedom of speech":

> *The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for the common good, and to apply to the government for redress of grievances, shall not be infringed.* Reprinted as Appendix C in Farber & Sherry, *A History of the American Constitution* 433 (1990).

"Little is known about the workings of the committee that produced this draft." *Id.* at 231. What is known, however, is that this was not the first time that the phrase, "the freedom of speech," appeared in a constitutional document. Article XXX of the 1784 Constitution of New Hampshire, for example, guaranteed "the freedom of ... speech" but limited that guaranty to members of the state's legislature. *Id.* at 385.

The phrase had also made a previous appearance in Article V of the Articles of Confederation which provided that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress ...."

These speech protections for the people's representatives when acting within their legislative bodies did not originate in America. Rather, they were rooted in the 1689 English Bill of Rights. *United States v. Johnson,* 383 U.S. 169, 177-78 (1966).

Section 9 of that English document read, as follows:

> *That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament. Id., Sources* at 247.

By borrowing from these constitutional provisions, the select House Committee divorced "the freedom of speech" protection from any relation to "the freedom of the press" and linked it to the guaranty that had theretofore been enjoyed only by the people's representatives in legislative assembly.

What transpired thereafter in the House debates reinforces this understanding. Because the freedom of speech would be extended to the people generally, Theodore Sedgwick of Massachusetts questioned whether it was necessary to include the right to assemble:

> *What, said he, shall we secure the freedom of speech, and think it necessary, at the same time, to allow the right of assemblying? If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question .... Id.* at 235.

John Page of Virginia concurred that the freedom of speech necessitated the right to assemble, but claimed that the latter was separate and distinct and needed explicit textual recognition in order to secure it. *Id.* at 236. The full House agreed with Page; thus, the select House Committee's version passed the House.

The Senate made some editorial changes in the House version, but offered nothing of substance. *Id.* at 241-42. After passage by the Senate, a Conference Committee "reached an agreement on what eventually became the First Amendment." *Id.* at 243.

Later, in 1800, James Madison explained why the freedom of speech - which had been limited to the people's representatives - was now secured to the people, themselves. He also made it clear that "the freedom of speech" guaranty was quite distinct from that of "the freedom of the press":

> *In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle, that the Parliament is unlimited in its power .... Hence, too, all the ramparts for protecting the rights of the people ... are merely legislative precautions against executive usurpation. Under such a government as this, an exemption*

> *of the press from previous restraint by licensers appointed by the king, is all the freedom that can be secured to it.*
>
> *In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power .... Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from the previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.* Reprinted in *Sources* at 425-26.

In summary, "the freedom of speech" was a separate and distinct right from the "freedom of the press." In England, the latter was a liberty enjoyed by all of the people, whereas the former was limited to the people's elected legislative representatives. The latter protected the people only from "previous restraints upon publications," such as government licensing, whereas the former also protected members of parliament from criminal or civil liability. Compare Blackstone's description of the liberty of the press in IV Blackstone, *Commentaries on the Laws of England* 151-52 with the Supreme Court's description of the freedom of speech of English parliamentarians in *United States v. Johnson, supra,* 383 U.S. at 178-79.

In America, however, all of the people were promised the benefit of both freedoms. But the fulfillment of those promises, especially the one securing the freedom of speech, would not come without a fight. To understand this struggle, one must first know the battle in England that the Parliament waged in order to secure the freedom of speech for itself.

English History

For generations, English kings protected their sovereign prerogatives through a number of criminal laws. First, they utilized the common law to create the crime of "constructive treason."

This common law offense was derived from a statute that defined treason to include any act "compassing or imagining" the death of the king. IV Blackstone's *Commentaries* c. 6 (1769). Under this common law derivation, a person could be convicted of constructive treason on the basis of unpublished writings expressing sentiments that wished the present king were dead. *Id.* at 80-81.

The underlying rationale for this crime was that the king's person embodied the nation and, therefore, that any threat directed at him personally threatened the life of the nation. Given this presupposition, anyone who claimed the people or the people's representatives had a right to revolt and take the government in their own hands was guilty of constructive treason and punishable not only by death, but by death by means of "drawing and quartering." Siebert, *Freedom of the Press in England,* 1476-1776 267 (1952); Van Alstyne, *First Amendment* 23, n. 50 (1991).

The 1688 Glorious Revolution changed all that. The leaders of Parliament claimed civil sovereignty

for themselves and made that the foundation of the British monarchy:

> *The Bill of Rights and the other documents constituting the Revolution Settlement ... asserted the supremacy of Parliament over the claimed divine right of kings .... [E]ven the possession of the crown became a statutory right, not a hereditary right. Sources* at 223.

This cut the ground out from underneath the application of constructive treason to any member of parliament, but it did not directly lead to a change in the common law definition of constructive treason. By 1720, however, prosecutions for constructive treason were abandoned in favor of ones for seditious libel and stirring up sedition. Siebert, *Freedom of the Press in England* at 265-69.

Prior to the Bill of Rights of 1689, the king claimed that he had authority to hold members of Parliament criminally responsible for showing contempt for the king and for stirring up political unrest against him. In 1629, three members of the House of Commons were successfully prosecuted for "contempts of the King and his government, and stirring up sedition." These prosecutions were based upon the assumption that any criticism of the king and his policies threatened the very existence of the nation and, therefore, were criminally punishable. *Sources* at 235.

Even before the 1689 Bill of Rights, the Parliament declared such prosecutions of its members for speeches or debates in Parliament assembled were illegal. To secure this position after the Glorious Revolution, the Bill of Rights provided as follows:

> *That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.* Sources at 247.

The immediate object of this clause was to afford parliamentarians absolute protection from stirring up sedition or seditious libel charges. They could be disciplined by their fellow parliamentarians, but could not be "impeached or questioned in any court or place out of parliament." *Sources* at 235.

While members of parliament enjoyed this freedom, ordinary people did not. They could be, and were, charged with stirring up sedition, and more commonly, with seditious libel.

Seditious libel prosecutions were brought against any person who published a writing that held the government up for public contempt or ridicule. Chief Justice Holt explained the rationale for the crime:

> *If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it. Rex v. Tutchin,* 14 State Trials 1095, quoted in Siebert, *Freedom of the Press in England* at 271.

The people fought back through jury nullification, but the judges countered with rulings eliminating truth as a defense and taking the question whether a statement was libelous from the jury. Levy, *Emergence of a Free Press* 7-13 (1985).

The conflict between the people and the government came to a head in 1792 with the prosecution of Thomas Paine for the publication of his "Rights of Man." This led to the passage of Fox's Libel Act in the same year. Cohen & Varat, *Constitutional Law* 1196 (9th Ed. 1993). That Act gave to the jury the power to render a "general verdict" in seditious libel cases, returning the issues of libel and truth to the jury. *Sources* at 308.

Soon thereafter prosecutions for seditious libel died out in England. But the issue remained very much alive on the other side of the Atlantic. With the United States on the verge of war with France and with fear and hostility towards the French Revolution, the United States Congress enacted the Sedition Act of 1798. Stone, Seidman, Sunstein & Tushnet, *Constitutional Law* 1015 (2d Ed. 1991).

American History

The Sedition Act prohibited both seditious libel and stirring up sedition. The seditious libel portion of the statute outlawed any publication of

> *false, scandalous, and malicious writing or writings against the government of the United States, or either house of Congress of the United States, or the President of the United States, with intent to defame [them]; or to bring them [into] contempt or disrepute; or to excite against them [the] hatred of the good people of the United States ....*

This was not the first time that governing authorities attempted to import the common law of seditious libel onto American soil. In 1735, John Peter Zenger was prosecuted in New York and tried according to the English common law rules that existed before Fox's Libel Act. Zenger's lawyers insisted that the jury had the right to determine if the publication was libelous and, if so, if it was true. The trial judge refused to give those issues to the jury; nevertheless the jury acquitted Zenger.

Aware of the Zenger precedent and of the enactment of Fox's Libel Act in England, Congress provided for all the jury safeguards of Fox's Libel Act. The jury would be judge of both law and fact and truth was a good defense. *Sources* at 308.

The Congress soon discovered that the English solution would not work in America. Thomas Jefferson and his new Republican Party argued that the Sedition law was unconstitutional, that the same freedom of speech enjoyed by parliamentarians in England was secured to the people.

This claim fell on deaf ears in the federal courts. But it played well with the people. In the 1800 elections, the Republicans captured both houses of Congress and the presidency. As soon as he came into office, President Jefferson pardoned all who had been convicted under the act and Congress repaid most of the fines. Stone, Seidman, Sunstein & Tushnet, *Constitutional Law* 1015-16 (2d Ed. 1991).

The Sedition Act expired automatically on March 3, 1801, the very day when President Jefferson took office. This fact reinforced the popular sentiment that the Act was unconstitutional and designed by the Federalist solely to get rid of their political opponents.

It would not be until 1918, in the heat of World War I, that Congress would once again outlaw

seditious libel. The Sedition Act of 1918 prohibited any person from uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government of the United States, the Constitution, or the flag.

The United States Supreme Court never passed on the constitutionality of the act, which was repealed in 1921. But Justice Oliver Wendell Holmes, Jr. did comment on it in his dissenting opinion in *Abrams v. United States,* 250 U.S. 616 (1919):

> *I wholly disagree with the argument of the Government that the First Amendment left the common law of seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Id.,* 250 U.S.

The issue would lie dormant for another 45 years before the Court would finally make up its mind about seditious libel. Justice William J. Brennan in *New York Times v. Sullivan,* 376 U.S. 254 (1964):

> *Although the Sedition Act [of 1798] was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. [Jefferson], as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines. [Those] views reflect a broad consensus that the Act, because of the restraint it imposed upon the criticism of government and public officials was inconsistent with the First Amendment .... Id.,* 376 U.S. at ---.

For years, a number of constitutional scholars and free speech advocates had maintained this position. Among them was Professor Harry Kalven of the University of Chicago who wrote:

> *The Court did not simply ... put to rest the status of the Sedition Act. More important, it found in the controversy over seditious libel the clue to "the central meaning of the First Amendment" ... - a core of protection of speech without which a democracy cannot function, without which, in Madison's phrase, "the censorial power" would be in the Government over the people and not "in the people over the Government" .... The theory of the freedom of speech clause was put right side up for the first time. [The] central meaning of the Amendment is that seditious libel cannot be made the subject of government sanction.* Kalven, "The New York Times Case: A Note on the Central Meaning of the First Amendment," *1964 Sup. Ct. Rev.* 191, 208-09.

A number of scholars, however, were not persuaded that the freedom of speech clause actually added any protections beyond that secured by the freedom of press guaranty. In the introduction of his book, *Emergence of a Free Press* (1985), Professor Leonard Levy wrote:

> *[It is conventional wisdom] that it was the intent of the American Revolution or the Framers of the First Amendment to abolish the common law of seditious libel. [The] evidence suggests that the proposition is suppositious and unprovable .... [T]his should be expected because the Framers were nurtured on the crabbed historicism of Coke and*

> *the narrow conservatism of Blackstone, as well as Zenger's case. The ways of thought of a lifetime are not easily broken. The Declaration of Independence severed the political connection with England but the American states continued the English common law system except as explicitly rejected by statute.* Levy, *supra*, at xii-xv.

Is Levy right? Or was Kalven? As pointed out in the first section of this essay the text of the First Amendment and the relevant history concerning the freedom of speech favors the Kalven view. But there is more support than that, and it is found in the Declaration of Independence and in the early state constitutions.

SEDITION AND FREE SPEECH

As the charter of the nation, the Declaration of Independence has committed the United States to the legal and political principle that the people, not the people's representatives, possess civil sovereignty. Thus, the nation was established by the People and the constitution was proposed in the name of the People. See *Sources of Our Liberties* 319, 408. (Perry, ed Rev. Ed. 1978).

In contrast, the British nation was established by "the lords spiritual and temporal, and commons assembled at Westminster, lawfully, fully and freely representing all the estates of the people of this realm." *Id.* at 245. Under the British system, the people's representatives in Parliament assembled embody the civil sovereignty of the nation. Thus, "the freedom of speech" was guaranteed to those representatives in the 1688 Bill of Rights:

> *That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament. Id.* at 247.

Unquestionably, this jurisdictional barrier protected parliamentarians from prosecutions for seditious libel, that is, for speeches that brought the king or the form of government into contempt or disrepute. But it also protected parliamentary speakers from prosecutions for stirring up sedition, a separate and distinct offense. *Id.* at 233-35.

At common law, a seditious uprising was a serious felony. It was a crime akin to the breach of the peace, but it was politically charged. ln his 1828 Dictionary, Noah Webster defined sedition as a "factious commotion of the people, or a tumultuous assembly of men rising in opposition to law, or the administration of justice, and in disturbance of the public peace."

While Blackstone does not use the word, sedition, he describes a felonious breach of the peace to include a "riotous assembling of twelve persons or more ... to change the laws of the kingdom." No actual riot or breach of the physical peace was necessary. It was enough that the form of government was threatened by the assembly.

But the English law reached beyond seditious assemblies to other threats to the government. "Seditious words" and "seditious conspiracies" were initially punishable as treason; later they became punishable as common law misdemeanors or as felonies under the common law of seditious libel. Chafee, *Free Speech in the United States* 497-504 (1941).

What the freedom of speech guaranteed to the English parliamentarians was the liberty to speak on

any matter before the Parliament without fear that the king or queen would prosecute them for stirring up political unrest among the people. Because parliamentarians were subject to the discipline of the legislative rules of decorum and germaneness, the freedom of speech guaranteed by the English Bill of Rights was limited by the customs and practices of the Parliament.

In the United States of America, however, where civil sovereignty was transferred from the people's representatives to the people generally, the young republic struggled to come to terms with its dedication to a regime of freedom of speech for everyone.

The French Revolution

The first challenge arose early in the history of the nation. In 1798, with America on the verge of war with France, a Federalist Congress enacted the Alien and Sedition Act containing prohibitions against both seditious libel and stirring up sedition. Under the Act, members of the Republican party who supported the revolutionary government of France were targeted for prosecution. Many Federalists considered supporters of the French Revolution to be a dangerous threat to the established government in the United States.

In the heat of the political battle, many American leaders forgot their commitment to the right of the people to contend, even to agitate, for a wholesale change of government. The Declaration of Independence had committed the nation to that right in no uncertain terms:

> *...[W]henever any form of government becomes destructive of ... [the lawful] ends [of government], it is the right of the people to alter or abolish it, and to institute a new government ...[and] when a long train of abuses and usurpations ... evinces a design to reduce ... [the people] under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new safeguards for their security. Id.* at 319.

In the decade that followed America's successful war for independence, her leaders remained committed to these revolutionary principles. They saw to it that these ideas were enshrined in the constitutional documents forming their new governments as a reminder that they too could become tyrants, and that the people had the same right to throw them out as they had claimed against King George III and the English Parliament.

To that end, all of the early state constitutions contained a provision acknowledging that all civil power originates in the people and must be exercised according to a civil covenant entered into between the people and their rulers. Thus, Section 1 of the 1776 Delaware Declaration of Rights read:

> *That all government of right originates from the people, is founded in compact only, and instituted for the good of the whole. Id.* at 338.

Implicit in this statement of right was the correlative right of the people to criticize the government and stir up political unrest - even call for its overthrow, if necessary. The framers of the 1776 Virginia and Pennsylvania constitutions made that explicit in two sections, one of which stated that civil magistrates are the servants of the people and accountable to them, followed by a second section affirming the right of the people to throw the rascals out and institute a new government:

> *That government is, or ought to be, instituted for the common benefit, protection and security of the people ... and that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal. Id.* at 329.

If these guarantees were to be taken seriously, then the common law prohibiting seditious libel would certainly have to give way. That many of the same men who penned these words would, after having become civil magistrates themselves, attempt to use the common law of seditious libel - as the Federalists did with the Sedition Act of 1798 - did not change this textual commitment.

But the issues raised by the freedom of speech clause transcended even the question of the common law crime of seditious libel. It was also designed to ban the efforts of government officials to criminalize actions stirring up sedition. That issue, however, has proved to be far more controversial and intractable than the fight over seditious libel.

Because the Alien and Sedition Act of 1798 contained a prohibition against seditious libel, its provision outlawing stirring up sedition did not receive the same attention. Federal prosecutions for seditious libel were preferred because a case of libel against the government could be proved by the words themselves. Stirring up sedition required proof of words that would incite the readers or listeners to unlawful action, not just contempt or ridicule.

After Thomas Jefferson was elected to the presidency in 1800, one of his first acts was to pardon all those who had been convicted of seditious libel. His action, and that of the Congress repaying the fines to those who had been convicted, ultimately led the United States Supreme Court to conclude that the freedom of speech at least prohibits any prosecution for seditious libel. *New York Times* v. *Sullivan,* 376 U.S. 254, 276 (1964).

But what about stirring up sedition? There is evidence that this offense was equally condemned by the newly elected Jefferson. In his first inaugural address, he appealed to Republicans and Federalists alike to stand by their revolutionary convictions:

> *If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.*

The Russian Revolution

The Jeffersonian view prevailed in the United States until the beginning of the 20th century. Chafee, *Free Speech in the United States* 506-07 (1941). On September 6, 1901, President William McKinley was assassinated in New York by a self-styled anarchist. This led the New York legislature to enact the first of what would become a string of state laws against the "advocacy of criminal anarchy" or against the "advocacy of criminal syndicalism." Chafee, *Freedom of Speech* 187-194 (1920).

Both types of these new statutes were politically charged. Instead of waiting for an act of violence to occur, the state legislatures decided to nip the threat of anarchy or syndicalism in the bud. The New York law made it a felony to "advocate, advise, or teach the duty, necessity, or propriety of

overthrowing [organized] government by force or violence, or by assassination of [any] executive officials of government, or by any unlawful means."

This law lay dormant for almost 20 years until Benjamin Gitlow, a former Socialist member of the New York state Assembly, was prosecuted for calling for a general strike and sentenced to five to ten years by a trial judge who characterized the call as "camouflaged revolution." *Id.* at 188.

It was not World War I that gave rise to the prosecution of Gitlow, but the Russian Revolution. As had been the case with the French Revolution just a century and two decades earlier, America' s political leaders panicked, but this time there was no major political party or political leader to wage a counterattack.

The *Gitlow* case reached the United States Supreme Court in 1925. Justice Edward Sanford wrote the majority opinion upholding the law. He affirmed that the freedom of speech protected the academic discussion of any political doctrine that called for the overthrow of the government, but that it did not protect the political advocacy of such a doctrine. He maintained that the State had the "primary and essential right of self-preservation," and that, therefore, its legislature could make unlawful the political advocacy of any doctrine that it deemed to create a clear and present danger to the established form of government. *Gitlow v. New York,* 268 U.S. 652, 668-70 (1925).

Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis dissented. But they limited their remarks to the question whether the legislature could decide that political advocacy of the violent overthrow of the government created a clear and present danger *per se*, or whether the clear and present danger issue was to be determined case by case. *Id.,* 268 U.S. at 672-73.

In 1951, the Court upheld the federal government's Smith Act which made it unlawful for any person "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government." *Dennis* v. *United States,* 341 U.S. 494 (1951).

By so ruling, the majority reaffirmed the *Gitlow* doctrine that the freedom of speech clause did not prevent a law designed to preserve the present government order. In his concurring opinion, Justice Felix Frankfurter explicitly endorsed the *Gitlow* view that a civil society had the duty to preserve itself. *Id.,* 341 U.S. at 520.

The Court, however, agreed with the Holmes/Brandeis dissent in *Gitlow,* ruling that the question of clear and present danger was a mixed issue of law and fact to be resolved in each case. They decided that the ultimate constitutional question was for the judge. *Id.,* 341 U.S. at 513-15.

Eighteen years later, the High Court refined its position once again. In *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969) it ruled that the freedom of speech clause required proof that the outlawed political advocacy was designed to incite or produce imminent lawless action and that the advocacy was likely to incite or produce such action.

Justices Hugo Black and William Douglas disagreed with the majorities in both the *Dennis* and *Brandenburg* cases. As was true of Justices Holmes and Brandeis before them, however, neither

questioned the constitutional legitimacy of a policy designed to preserve the form of government established by the constitutions of the United States and the several states. *Dennis,* 341 U.S. at 579-91; *Brandenburg,* 395 U.S. at 449-57.

Right of Revolution

In his concurring opinion in *Dennis,* Justice Felix Frankfurter wrote with great confidence:

> *Of course no government can recognize a "right" of revolution, or a "right" to incite revolution if the incitement has no other purpose or effect. Dennis* v. *United States,* 341 U.S. at 549.

Frankfurter claimed that the people's right was limited to reform and that their representatives had the right to protect the people from advocacy of revolution if those representatives thought it was necessary to preserve the government. *Id.,* 341 U.S. at 550-51.

This view prevails today, but it was not the view of America's founders. Both the Declaration of Independence and some of the early state constitutions proclaimed that the people had the right "to reform, alter, or abolish" any government if that government was found to have become a tyranny. Moreover, those documents affirmed that the people could take up arms, if necessary, to restore the rule of law and to change the form of government. *Sources of Our Liberties* 311, 319, 329 (1978).

America's founders understood that the civil sovereignty of the nation was vested in the People who were the only legitimate source of civil power. Because governments were instituted among men, "deriving their just powers from the consent of the governed," the governed had the right to withdraw their consent upon proof of breach of the covenant by their leaders.

It was, therefore, for the people to decide, not any civil ruler - not even a judge - whether conditions justified a call to revolution. If the civil rulers in power had that right, then they possessed civil sovereignty, not the people.

In England, the battle over civil sovereignty had been fought between the crown and the Parliament. The Parliament prevailed and, to protect its sovereignty claim, it secured to its members the freedom of speech. In America, the battle was fought between the people and the Parliament. The people prevailed and, to protect their sovereignty claim, they secured for all the people the freedom of speech. *Sources of Our Liberties* 425-26 (1978).

A law, the purpose of which is to protect the government from an aroused populace cannot, therefore, be legitimate under the freedom of speech guarantee. This does not mean that the government cannot protect the peace. See Chafee *Freedom of Speech* 161-80, 207- 28 (1920). It does mean, however, that civil rulers cannot protect the peace in the name of protecting the nation from political unrest, including revolution.

While the Supreme Court has never so ruled, it did come close when it decided *Terminiello* v. *Chicago,* 337 U.S. 1 (1949). In that case Mr. Terminiello had been convicted of disorderly conduct. The trial judge had instructed the jury that the conviction could be based upon any "misbehavior ... [that] stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a

disturbance ..." *Id.,* 337 U.S. at 3.

Justice Douglas ruled that this instruction abridged the freedom of speech because

> *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. Id.,* 337 U.S. at 4.

From this statement one could infer that any law, the policy of which is to preserve the current form of government, is a law abridging the freedom of speech and therefore, is unconstitutional.

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