

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

Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)

Walter Chaplinsky frequently proselytized on the streets in Rochester, New Hampshire, urging passersbys to join Jehovah's Witnesses. On April 6, 1940, Chaplinsky angered a gathering crowd by condemning Catholicism and refusing to salute the American flag. After Chaplinsky was attacked by a mob, he was escorted to a police station by several officers, nominally for his own protection. After a police officer told him, "Shut up you dumb bastard and come along," Chaplinsky responded, "You are a damn fascist and a racketeer." Chaplinsky was promptly arrested for violating a state law that declared:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Four days later, he was convicted, sentenced to twelve days in prison and required to pay \$24.78 in court costs. After the Supreme Court of New Hampshire sustained the conviction, Chaplinsky appealed to the Supreme Court of the United States, insisting that his conviction violated his constitutional right to free speech.

The Supreme Court unanimously ruled that Chaplinsky was constitutionally convicted. Justice Murphy's unanimous opinion held that fighting words were one of many categories of utterances not protected by the First Amendment. Justice Murphy was generally considered the most liberal justice on the Supreme Court during the 1940s. His Chaplinsky opinion, however, seems remarkably illiberal, both given the actual facts of the case and for the long list of exceptions to the First Amendment. Compare Chaplinsky to other cases decided in this era. Why was the court less protective of speech in this instance? Chaplinsky is presently known for the "fighting words" doctrine. Is Justice Murphy's claim that "'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation" a product of time and gender? Consider the following. What words would provoke you and your friends to fight? Would any words provoke you or your friends to fight? Does the answer to these questions depend on race, gender, ethnicity, and other demographic matters?

JUSTICE MURPHY delivered the opinion of the Court.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. . . .

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict

injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .

. . . [T]he state court declared that the statute's purpose was to preserve the public peace, no words being 'forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed'. It was further said: 'The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . .'

We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. . . .

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

. . .



OXFORD
UNIVERSITY PRESS