FIGURES OF SPEECH

FIRST AMENDMENT HEROES AND VILLAINS

WILLIAM BENNETT TURNER

Foreword by Anthony Lewis

An Excerpt From

Figures of Speech: First Amendment Heroes and Villians

By William Bennett Turner
Published by Berrett-Koehler Publishers

CONTENTS

FOREWORD

The First Amendment has become the hottest battlefront of American constitutional law. Libel, campaign spending, publication of government secrets, hateful speech: these and a dozen other subjects have tested the amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The very words "First Amendment" have become a rallying cry for the press and other interests arguing that their freedom outweighs other public concerns. As a result of First Amendment litigation, activities commonly regulated or prohibited in other democracies—denunciation of religious groups, leaks of military records, political advertising—are now protected by the Constitution.

The literature of the First Amendment has grown apace. Books on interpretation of the fourteen words in its speech and press clauses are numerous; I have added to the pile myself. But this book is different. It does not have the smell of the lamp, of theorizing at a distance. It is a report from the front lines.

Here are men and women whose often eccentric lives led to great courtroom tests of freedom: Yetta Stromberg, who

had a red flag when she was a counselor at a summer camp for young Communists in 1929 and was sentenced to prison for displaying that symbol of radicalism. And Dannie Martin, a longtime criminal who wrote articles for the *San Francisco Chronicle* about the federal prison he was in until the authorities stopped him.

Bill Turner is a First Amendment lawyer. (I use the nickname because I have known him for many years.) He shows what goes on in a case before a court hands down a decision. He gives intimate and fascinating details of lawsuits that he personally tried and argued, and of others going back into history.

Yetta Stromberg's case, for example. What anyone is likely to know about it is the decision of the United States Supreme Court in 1931. Chief Justice Charles Evans Hughes, writing for the Court, tells us that Ms. Stromberg was convicted of violating a California law that made it a crime to display a red flag "as a sign, symbol or emblem of opposition to organized government." Hughes said that "a fundamental principle of our constitutional system" is that there should be opportunity for "free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means." The California law violated that principle.

Turner fills in the picture of Yetta Stromberg—and of what we might think was the naïve radicalism of her summer camp. Yetta, 19 years old, and the other counselors were all volunteers. At seven every morning red flags were raised, and Yetta led the campers in reciting: "I pledge allegiance to the workers' red flag, and to the cause for which it stands. . . ."

Then Turner gives us a glimpse of the political context that produced this case. Yetta's camp was raided by a California district attorney, accompanied by carloads of vigilantes—American Legion members looking for subversives. They arrested Yetta and six others, including Bella Mintz, the camp cook. A jury convicted Yetta and five others, and she was sentenced to prison for one to ten years.

In short, Yetta was a victim of the Red Scare that gripped much of America in the 1920s. California and dozens of other states passed laws condemning the red flag and criminalizing what they called "syndicalism"—Communism or socialism by another name. A succession of challenges to these laws reached the Supreme Court, but through that decade they were rejected by a conservative majority of the Court. The contrary case—the case that unpopular speech must be allowed in a constitutional democracy—was made by two dissenting justices, Oliver Wendell Holmes Jr. and Louis D. Brandeis. The supreme example of their logic and their rhetoric was Brandeis's opinion in the 1927 case of Anita Whitney, who had been convicted in California of belonging to an organization that advocated "criminal syndicalism." Brandeis wrote:

"Those who won our independence . . . believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think what you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law. . . ."

The dissents of Brandeis and Holmes finally became the voice of the majority on the Supreme Court in the case of

Yetta Stromberg. In his opinion reversing her conviction, Chief Justice Hughes did not rise to the eloquence of Holmes and Brandeis. But his conclusion that the California red flag law violated the constitutional principle of free political discussion was a decisive victory for the First Amendment. It was, as Turner points out, the first time ever that a claim of free speech had won a constitutional test in the Supreme Court. And it was the beginning of a steady expansion of that freedom by the Court over the following decades.

We must not be too romantic, however, about judges as defenders of our freedom. The Red Scare of the 1920s was by no means the only time large numbers of Americans gave way to fear. Fear of Communism gripped the country during the Cold War, when Senator Joseph McCarthy and other demagogues thrived on Communist-hunting. And the Supreme Court was slow to stand against the threat to freedom.

The lowest ebb of First Amendment protection during the second Red Scare came in 1951, when the Supreme Court upheld the conviction of American Communist Party leaders for conspiring to teach the necessity of overthrowing the government. The party was a feeble remnant by then, and it posed no imaginable threat. Justice Hugo L. Black, dissenting, said: "Public opinion being what it is now, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred placed where they belong in a free society."

Later Supreme Courts did exactly that, breathing new life into the First Amendment. But Turner reminds us that the law

of freedom is not made only by those nine justices in Washington. It is made by nasty characters like Larry Flynt of *Hustler* magazine. It is made by reporters like Earl Caldwell of the *New York Times,* who resisted the government's demand that he appear before a grand jury to be questioned about his coverage of the Black Panthers. And it is made by lawyers like Bill Turner, guiding clients through the toils of official resistance to the uplands of freedom.

Anthony Lewis

INTRODUCTION

Dramatis personae

This is a strange cast of characters: Communists, Jehovah's Witnesses, Ku Klux Klansmen, prison wardens, James Madison, dogged reporters, federal judges, the world's leading pornographer, a computer whiz, and others. Some of them are First Amendment heroes. Some are First Amendment villains. Some of them are famous; most are obscure. All played a role in a controversy contributing to our modern understanding of freedom of speech.

First Amendment controversies are often started by colorful characters. Many of them are not nice or polite; nor do they have noble motives. They say, or want to say, mean or disturbing things, speech that people don't want to hear. Some want to speak truth to power, but the powerful want them silenced. Very few people are pure First Amendment heroes, that is, people who want to advance the cause of free speech for everyone. We all say we believe in free speech—in the abstract, or when it's our own speech or a point of view we agree with. We're not so sure when it's speech that expresses ideas that we loathe.

Most would-be First Amendment speakers—people who claim constitutional protection—have their own agendas, and those agendas are often at odds both with majoritarian sentiment and with societal values other than freedom of speech. Nothing is wrong with that: a free country is supposed to work that way.

First Amendment heroism and villainy, as in the rest of life, are about courage and cowardice. The heroes are those who say what they believe, insist on saying it even when people (and governments) don't want to hear it, and have the courage to face the consequences. Villains are those who want to suppress speech they disagree with or are fearful of, or who give in too easily to competing values and go along with the idea that this is speech people shouldn't have to hear.

This book is about people who intentionally or accidentally became First Amendment heroes or villains. These are my idiosyncratic selections. Undoubtedly others are worthy of the honor or the badge of infamy. I chose some of the heroes and villains from my personal experience with them, and to that extent this book is a memoir. The book also sums up most of what I have learned from working on and teaching First Amendment cases.

▪ ▪ ▪

For the last quarter century, I have taught the First Amendment at the University of California at Berkeley, the home of the Free Speech Movement in the 1960s. These days, however, fewer Berkeley undergraduates seem to care about free speech. They seem too ready to embrace the competing values offered to restrict speech, and many seem too respectful of authority in

general. Being respectful of authority is of course at war with First Amendment values. We don't need a First Amendment to protect our right to read White House press releases. We do need one to uncover and disclose abuses of power, to protect speech that most people don't want to hear, and to debate what kind of country we want to be.

Indifference to how and why we protect civil liberties is distressingly widespread. A recent study found that only half of high school students say newspapers should be allowed to publish freely without government approval of stories. One-third say the First Amendment goes "too far" in guaranteeing free speech. Former Supreme Court Justice Sandra Day O'Connor recently gave a speech lamenting young people's ignorance of how our fundamental values are protected. She said, "Knowledge about our government is not handed down through the gene pool. Every generation has to learn it, and we have some work to do." O'Connor complained that "Two-thirds of Americans know at least one of the judges on the Fox TV show 'American Idol,' but less than 1 in 10 can name the Chief Justice of the United States Supreme Court." I have tested this in my class, and the situation is a little worse than O'Connor thought: almost all 110 Berkeley students in the class knew the American Idol judges, and only a couple could name Chief Justice John Roberts.

▪ ▪ ▪

Speech in the United States has always been relatively free, but it has never been an absolute freedom. You don't in fact have the right to say whatever you want, whenever and wherever. Libel and perjury are pure speech but illegal. Govern-

ment has always imposed restrictions and always asserts that competing values require suppression of particular speech. For example, the information, if made public, will endanger national security; the hate speech will incite violence; the online sexual material will harm our children; tabloid journalism will destroy privacy, and so on. In other words, every time government tries to restrict speech, it does so in the name of competing values. Free speech is not the only important value in our society. It frequently collides with other values, important interests that we all care about. That's what makes First Amendment controversies so hard, and so interesting.

The accepted wisdom is that free speech deserves Constitutional protection because it serves three purposes: it advances knowledge and the ascertainment of truth, facilitates self-government in a democracy, and promotes individual autonomy, self-expression, and self-fulfillment. Truth-seeking occurs when everyone can speak freely in a marketplace of ideas, a marketplace in which the government must remain neutral; government can't be allowed to suppress what it considers bad ideas—we don't get to the truth by muzzling dissenters. Free speech is essential to self-government, a system in which we the people are sovereign, for we must be able to criticize government and the officials whom we elect to serve us. Bill Clinton once said, wistfully, "It's almost a citizen responsibility to criticize the President. . . . Why be an American if you can't criticize the President?" Free speech makes it possible nonviolently to change the government, the laws, and those who govern (just as Watergate reporting brought down President Nixon). Individual self-fulfillment is a basic human value and

is good in itself, apart from the utility of free speech in helping to find the truth and in facilitating democracy.

A couple of reminders about the First Amendment: *First*, only government can violate it. Our Constitution is a series of constraints on the power of government, and government alone. It does not bind corporations, labor unions, churches, or private entities of any kind. No matter how vague and oppressive Facebook's or Yahoo's "terms of use" are, no matter how much they restrict free speech, they do not violate the First Amendment. That's because these corporations are not the government. No matter how much corporations insist on conformity to the corporate "culture" and forbid employees from publicly saying what they think, this does not violate the First Amendment.

People who should know better sometimes fail to understand First Amendment basics: especially that only government is barred from abridging free speech. Sarah Palin got it upside down during the 2008 presidential campaign. Feeling that the mainstream media were unfairly criticizing her for negative statements about Barack Obama (like his relationship with Rev. Jeremiah Wright), she complained, "I don't know what the future of our country would be in terms of First Amendment rights and our ability to ask questions without fear of attacks from the mainstream media." But the media can't violate her First Amendment rights, and media "attacks" on political candidates are the exercise of First Amendment rights, not their abridgment. The First Amendment doesn't protect candidates from press criticism—it encourages it.

Second, what the First Amendment means is what the

Supreme Court says it means. The simple text of the amendment ("Congress shall make no law . . . abridging the freedom of speech, or of the press") does not provide the answers to any modern free-speech controversies. The answers come from the Court when it rules on the issues that are brought to it by the parties in concrete cases. The question for the Court in a First Amendment case is whether the particular speech comes within "the freedom of speech" protected by the amendment. This decision essentially involves evaluating whether some competing societal value justifies restricting the speech in question.

Case in point: *Citizens United*

The Supreme Court's 2010 decision on corporate speech and campaign finance reform is a vivid example of the collision of competing values and the Court's role as decider. *Citizens United v. Federal Election Commission* was the most important First Amendment decision of the 21st century so far.

The 5–4 decision threw out, on its face, part of the McCain-Feingold package of reforms, specifically the federal campaign finance law that prohibited corporations and unions from using their funds on communications—mainly television advertising—that support or oppose a candidate for office. The case pitted the value of unrestricted political speech against the need to keep corporate money from contaminating elections. The decision came down squarely on the free-speech side, or the corporate side, depending on how you look at it.

The liberal establishment was outraged. There were calls for a constitutional amendment, and the *New York Times* printed

a nearly hysterical editorial. Bloggers warned that the ruling unleashed corporations to buy whatever candidates and legislation they like and lamented that electoral power would be shifted from the promising new grassroots social networking innovators to reactionary corporate interests. An altered formal portrait of the Court circulated on the Internet, showing the robes of the five majority justices festooned with corporate logos as if they were NASCAR drivers. People for the American Way said the Court "staged a hostile takeover of American democracy on behalf of corporations."

I too have long been disgusted with the influence of money on politics. Elected officials and office-seekers seem to devote more time and energy to fund-raising than to governing, and clearly their positions on legislation are influenced by the interests that back them financially (whether through direct contributions, PACs, or lobbyists). I'm unhappy with any decision that increases the dominant role of money in the political system.

On the other hand, I teach and believe in the First Amendment as one of the most distinctive and important values of our society. I view suspiciously any restriction on political speech. Any restriction should be rigorously tested, not given the benefit of the doubt.

Justice Anthony Kennedy's opinion for the Court brushed aside all procedural obstacles to the broadest possible decision. The case involved a conservative nonprofit corporation, Citizens United, that produced a 90-minute documentary, "Hillary: The Movie," and wanted to make it available for video-on-demand. The film was an attack on then-Senator Clinton, intended to sabotage her in the 2008 presidential pri-

maries. As characterized by the Court, the film was "a feature-length negative advertisement that urge[d] viewers to vote against Senator Clinton for President." Citizens United sued the Federal Election Commission (FEC), contending that the federal law did not *apply* either to it, to video-on-demand, or to the documentary. It formally *stipulated* in the district court that it did not challenge the law *on its face*.

The Supreme Court, however, refused to interpret the law narrowly, rejected any "as applied" approach, overruled two of the Court's recent precedents, and declared the federal law invalid *on its face*. It was a decision of breathtaking scope. Campaign finance reformers were livid.

Many critics of the decision focused on the conservative majority's hypocrisy in abandoning all judicial restraint to reach a decision broadly condemning the law. Justice John Paul Stevens, then almost 90 years old, observed in his 90-page dissenting opinion that the majority had improperly "manufactured" a facial attack on campaign finance laws: "Essentially, five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law." Reminiscent of his dissent from the similar judicial power grab in *Bush v. Gore* (awarding the presidency to George W. Bush), Stevens said of the majority, "[The] path it has taken to reach its outcome will, I fear, do damage to this institution." Advocating judicial restraint while practicing raw, unadorned, result-oriented judicial activism will earn the public's distrust.

Apart from the majority's activism, what seemed to bother people about the merits of the *Citizens United* decision was its

supposed reliance on two fictions: that "money is speech" and that "corporations are persons" with free-speech rights. But these turn out to be more complicated subjects. Obviously money is not speech, but the Court did not in fact say that it is. Quoting its earlier decision in *Buckley v. Valeo*, it said that a "restriction on the amount of money a person or group can spend on political communication during a campaign . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." This seems self-evident. To "speak" in an election campaign requires you to spend money: to print pamphlets and mail them to voters; to design and print posters and distribute them to locations where they will be seen; to rent space on billboards; to advertise on radio and television, and so on. Banning expenditures on electioneering communications, or restricting the amount that can be spent, unquestionably silences political speech. This does not necessarily mean that spending money must be treated as the exact equivalent of standing on a soapbox for all purposes. But condemning the Court for having said or decided that "money is speech" is misleading and more slogan than analysis.

But should *corporations* have free-speech rights? Corporations are not people, don't think, don't have beliefs, and can't vote. Why should they be able to claim a First Amendment right to "speak" in elections? Justice Kennedy pointed out how broadly the prohibitions swept. The law applied not just to Fortune 500 giants with billions in assets but to all 5.8 million for-profit corporations, most of which are relatively small businesses, many with a sole shareholder. It applied to labor unions

large and small. Equally sobering, it applied to all *non*profit corporations, including advocacy organizations, making it a crime for any of them to run an ad supporting or opposing a candidate. As Kennedy put it,

> The following acts would all be felonies: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union (ACLU) creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

The prevailing theme of Justice Kennedy's opinion was that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." The emphasis is on the speech, not on the speaker. *If* it is true that corporations have the same speech rights as natural persons, the Court's decision that they can't be restricted from spending on core political speech was clearly correct.

The human need for self-expression, one of the values served by free speech, of course has no application to corporations: they can't, by "speaking," satisfy this human need and, conversely, denying them the benefit of free speech does not impair this interest. If their right to speak is to be recognized, it must be because it serves different First Amendment purposes, such as encouraging free and critical debate about government and leading citizens to the truth by exposing them to diverse points of view in a marketplace of ideas. The majority in *Citi-*

zens United certainly thought allowing corporate speech served these purposes.

Having emphasized that free political *speech*, not the corporate identity of the speaker, is what the First Amendment is about, Kennedy concluded that the federal prohibitions were not narrowly tailored to serve the campaign reform interests that the government claimed. Indeed, at one point Kennedy virtually said reformers might as well give up: "Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws." Kennedy said that while an "appearance of influence or access" may stem from corporate political spending, this "will not cause the electorate to lose faith in our democracy." (Perhaps he had his fingers hopefully crossed on this one.) Justice Stevens saw it very differently: "The Court's blinkered and aphoristic approach to the First Amendment" will promote corporate domination of the election process. He added that "Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today. . . . While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of money in politics."

Putting aside the unseemly route the Court took to get to its sweeping decision, the uncritical endorsement of corporate speech, and the likely exacerbation of the problem of money in politics—does the decision have redeeming First Amendment values? On the merits the decision is a very strong statement of fundamental First Amendment principles. Justice Kennedy, who in my view has been the strongest member of the current Court on the First Amendment, used his opinion to reaffirm and expand on several bedrock tenets of the freedom of speech.

Many of the tenets emerged from First Amendment battles waged by the heroes whose stories are told in this book and benefit all of us. It is good to be reminded of them:

- Kennedy proclaimed, "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." Further, "[The First Amendment] has its fullest and most urgent application to speech uttered during a campaign for public office." To attack or support a candidate is of course core political speech.
- Kennedy almost said political speech can't be restricted at all "as a categorical matter" but backed off to say that at least any restriction is subject to "strict scrutiny," which requires the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." This tough standard is virtually the kiss of death for whatever legislation is under scrutiny, as it was in *Citizens United*.
- "More speech, not less, is the governing rule." This proposition harks back to Justice Louis Brandeis's classic 1927 opinion in *Whitney v. California*. The idea is that if government is concerned about subversive, erroneous speech that may mislead the people, "the remedy to be applied is more speech, not enforced silence."
- Justice Kennedy's emphasis throughout his opinion was on the importance of protecting political *speech* regardless of who the *speaker* may be. The reasoning was that in a democracy we the people are entitled to hear all points of view and that government should not be allowed to disfavor

speech based on who is speaking. This idea is "premised on mistrust of governmental power."

- Justice Kennedy declared, "Prolix laws chill speech for the same reason that vague laws chill speech: people of common intelligence must necessarily guess at the law's meaning and differ as to its application." This is new. The Court had long recognized that *vague* speech regulations, especially those that carry criminal sanctions, improperly chill speech. But "prolix" laws? The campaign finance law thrown out by the Court was a mess; it was exceedingly complex, and would-be speakers had to confront not only the less-than-crystalline language of the statute but 568 pages of FEC regulations, 1,278 pages of explanations, and 1,771 FEC advisory opinions. Treating prolixity as a subspecies of vagueness is good for the First Amendment and for all of us.
- In the same vein, the Court said that as a practical matter, a speaker who does not want to risk criminal or civil liability for campaign speech is effectively forced to seek an advisory opinion from the FEC. Justice Kennedy said having to "ask a government agency for prior permission to speak" is "the equivalent of prior restraint"; it gives the FEC "power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." This was somewhat overstated, but it was nice to see the Court reaffirm the free-speech principle first recognized in the classic 1931 case of *Near v. Minnesota* that "prior restraints"—government censorship of speech before it is uttered—are unconstitutional.

- Finally, for those who would expand First Amendment freedoms regardless of competing values, it actually was good that the Court bulldozed its way through all the procedural obstacles to declare the law invalid on its face and was willing to overrule precedents that restricted speech. The Court previously had said that invalidating a law passed by Congress on its face is "strong medicine" to be sparingly used, even in free-speech cases. *Citizens United* will be a strong precedent for future challenges to various kinds of speech regulation.

The *Citizens United* result is distressing because this impressive catalog of fundamental First Amendment principles was put to the service of corporate interests rather than to assist the lonely individuals who invoke the amendment to *challenge* the power structure. The dispossessed, eccentrics, minorities, and dissidents are the ones who need the First Amendment's help, not society's established institutions.

A cynic might plausibly consider *Citizens United* a *faux* First Amendment decision, a pro-business effort dressed up in free-speech clothes. Justice Kennedy himself allowed some pro-business leaning to show through, remarking that the restriction on corporate spending "muffled the voices that best represent the most significant segments of the economy." Referring to candidates' electoral speech, he said, "On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors." Except for Kennedy, the other members of the conservative majority have not previously exhibited great attachment to free-speech values. (Eight days before its *Citizens United* decision, the very same five-justice majority intervened on an emergency basis in

another case with First Amendment implications. The Court summarily prohibited streaming television coverage of the Proposition 8 same-sex marriage trial in San Francisco to other federal courthouses. The disingenuous ground it gave for its ruling was that the district court had allowed only 5 days for public comment on a change in its local rules instead of the 30 days that was usually given. This departure from the local rules was trivial and inconsequential. In fact, the court had received 138,574 public comments, all but 32 favoring transmission. The Supreme Court recognized that district courts can adopt and amend local rules governing how they do business. The majority's rationale for reversing the district court, however, was this: "If courts are to require that others follow regular procedures, courts must do so as well." How quickly the five majority justices forgot about "regular procedures" in *Citizens United* and threw off the bonds of judicial restraint to rule for business interests.)

The four conservatives who joined Kennedy to decide *Citizens United* all came to Washington as part of the Reagan revolution and have been fully committed to its anti-government regulation ideology: getting government off the backs of business. They all subscribed to the Federalist Society agenda of free enterprise unlimited by nettlesome government restrictions. Intrusive and detailed campaign finance laws and regulations must have seemed repugnant to their beliefs. The cynic might suspect that their real allegiance was to the Reaganesque agenda of freeing business from government regulation rather than to the loftier values of free speech. At any rate, they are very different from the kinds of First Amendment heroes we meet in this book.

▪ ▪ ▪

First Amendment freedoms are fragile, since they are always threatened by competing values—from campaign finance reform to national security to public decency—and those values change over time. The freedoms that we now have—as exhibited by the principles recited and reinforced in the *Citizens United* case—were not created yesterday out of whole cloth. Nor did they spring into being upon the ratification of the First Amendment in 1791. Our current freedoms are the products of the kinds of First Amendment controversies, mostly in the last few decades, described below. Recognizing that every First Amendment dispute involves the collision of competing values—else there would be no dispute—let's turn to the First Amendment heroes and villains to see how their stories inform the contemporary meaning of the First Amendment.

· 1 ·

YETTA STROMBERG

Yetta Stromberg was 19 years old when she was a counselor at a summer camp for young Communists. It was 1929. The camp was in the mountains near San Bernardino, California. The campers came from working-class Communist families from Los Angeles. The 40 or so boys and girls ranged in age from 6 to 16. The parents paid only $6 a week per camper, as all the adults at the camp, including Stromberg, were volunteers.

At 7:00 every morning, Stromberg led a flag-raising ceremony for the campers. As the children stood by their beds, one of them would raise a red flag while the others recited in unison this pledge:

> I pledge allegiance to the workers' red flag,
> And to the cause for which it stands,
> One aim throughout our lives,
> Freedom for the working class.

On August 3, 1929, the camp was raided by several carloads of American Legion members from nearby Redlands, led by George H. Johnson, the district attorney of San Bernardino County. The raid was prompted by the Better America Fed-

eration of Los Angeles and the Intelligence Bureau of the Los Angeles Police Department, who were keeping a close eye on radical activities. The Federation, backed by business interests, believed the republic was being undermined by a subversive conspiracy directed by Bolsheviks in the Soviet Union.

When the raiders arrived, some children were playing baseball, some were off hiking, and some were studying economics under the leadership of Yetta Stromberg, who had been a student at UCLA. On the hillside, the raiders found a flagpole and a homemade triangular red flag on which someone had painted a black hammer and sickle. They also discovered a cardboard box labeled "Please do not touch," which contained some sheet music and some Communist literature. It belonged to Stromberg but was for her own reading and use, and the children did not know about it. The raiders confiscated the flag and the literature, and they arrested six women and one man. Besides Stromberg, those arrested were Emma Schneiderman, who played the piano; Sarah Cutler, Emma's mother who was visiting the camp for the day; Jennie Wolfson, the camp manager; Esther Karpeliff, who washed and cleaned up; Bella Mintz, the cook; and Isadore Berkowitz, the handyman.

The arrestees were taken to jail in San Bernardino. They were charged with violating a California law enacted in 1919, during the Bolshevik scare, that made it a felony to display a red flag in a public or meeting place "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character."

The California law was not an aberrant outlier. Thirty-two states passed similar laws in the Red-Scare era following World

War I. The proponents of this kind of legislation were not concerned about any infringement of First Amendment freedoms. They were consumed by fear of anarchists, Communists, and radical labor leaders. The values that inspired these laws were patriotism, loyalty, and national unity. Opposition to government and these "American" values was to be punished by the criminal law.

At the trial of the *Stromberg* case in October, 1929, the centerpiece of the prosecution's case was the box of Stromberg's Communist literature. Though no testimony was presented indicating that anyone but she knew what was in the box, Judge Charles L. Allison allowed the prosecutor to read all of the literature to the jury. The Legionnaire raiders testified about finding the flag.

The jury returned a verdict of guilty against all the defendants except Sarah Cutler, the visiting mother. Yetta Stromberg was convicted of both conspiring to display the red flag and actually displaying it. Before sentencing, a steel heiress named Kate Crane Gartz of Altadena, who was a champion of unpopular causes, wrote Judge Allison a letter asking, "Could you not tell as you listened to Yetta that she was a young woman of high principles and ideals and not a criminal fit only for crucifixion?" She also asked the judge to "go easy with these young enthusiasts." Allison cited Gartz for contempt of court and fined her $75. (For this act alone, the judge qualifies as a First Amendment villain.)

Stromberg was sentenced to prison for a term of one to ten years. She and the others appealed. The American Civil Liberties Union (ACLU), which the Better America Federation considered a front for Soviet interests, handled the appeal. The

California Court of Appeal set aside the conspiracy convictions but affirmed the judgment against Stromberg alone for displaying the flag. The ACLU took her case to the United States Supreme Court.

On May 18, 1931, the Court handed down its decision. Led by Chief Justice Charles Evans Hughes, the Court focused on the California law's prohibition of flying a red flag as a symbol of opposition to organized government. Hughes emphasized that a "fundamental principle of our constitutional system" is the opportunity for "free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means." In other words, Americans *do* have the right to oppose our government, and the ability to advocate change is integral to what makes us a free people. Chief Justice Hughes concluded that the law was so vague and indefinite that it permitted punishment of those who use the opportunity to oppose government. The statute was therefore "invalid upon its face," and Yetta Stromberg's conviction was set aside.

▪ ▪ ▪

Stromberg might have been surprised to learn that her case, *Stromberg v. California,* was the first time in American history that the Court had struck down a law on First Amendment grounds. Why did this take almost a century and a half? One reason is that until the Fourteenth Amendment was added to the Constitution after the Civil War, the First Amendment did not apply to the states. The First Amendment says that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press," and this was deemed to apply only to the fed-

eral government, not the states. Any state and local laws that restricted speech therefore did not violate the First Amendment. Although the states had their own constitutions with protections for speech and press, the federal Constitution left them free to restrict speech if they wished. Southern states, for example, criminally prosecuted those who advocated the abolition of slavery, and no one suggested that this violated the First Amendment.

The adoption of the Fourteenth Amendment in 1868 had no immediate effect. It expressly applied to the states and prohibited them from depriving any person of "life, liberty or property" without due process of law. But not until 1925, in another of the Red-Scare cases, did the Court first interpret the term "liberty" in the Fourteenth Amendment to include the freedom of speech and press as protected by the First Amendment. In other words, First Amendment freedoms were incorporated into the Fourteenth Amendment and became applicable to the states in the same way they are applicable to the federal government. The decision in the 1925 case, *Gitlow v. New York,* was bittersweet for Benjamin Gitlow, its hero or victim. He was a leader in the Socialist Party who was prosecuted under a New York state "criminal anarchy" law for publishing "The Left Wing Manifesto." The manifesto called for overthrowing organized government and establishing a "revolutionary dictatorship of the proletariat." Gitlow won the vitally important constitutional point that applied the First Amendment to the states. Unfortunately for him, however, the Court's majority decided that advocacy of radical action was not within the freedom of speech protected by the First Amendment, and Gitlow went to prison. Although the constitutional precedent

was small consolation for Gitlow, it opened the door for Yetta Stromberg to win her case in the next decade.

Another reason why other speech-restricting laws had not been thrown out by the Court before *Stromberg* was that between the infamous Sedition Act of 1798 and the First World War, Congress had not passed any. The Sedition Act, enacted in an excess of patriotism on the Fourth of July, made it a crime to defame the president or Congress. The act was an attempt by the Federalist administration under President John Adams to muzzle the Republican press and prevent the party led by Thomas Jefferson and James Madison from taking power. Fourteen men, mostly editors of Jeffersonian newspapers, were prosecuted and jailed under the act. But its constitutionality was never decided by the Court. The act expired by its own terms on March 3, 1801, the day before the next president, Jefferson, was inaugurated. Jefferson promptly pardoned all the convicted editors, and none of the cases had reached the Court. But as the Supreme Court said more than a century and a half later in *New York Times v. Sullivan*, the Sedition Act was condemned "in the court of history." Jefferson explained that he pardoned the convicted men because he considered the act "to be a nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image." In addition to the Jefferson pardons, Congress passed legislation compensating the editors' families. A consensus developed that the act was antithetical to First Amendment values. The experience with the act taught the lesson that criticizing government was an American right, not a reason to punish a citizen. Congress apparently learned its lesson and did not again attempt anything like the Sedition Act until the First World War. Wartime

pressures, combined with hysteria about Bolshevik revolution, led to a rash of federal and state loyalty laws, like those used to prosecute Yetta Stromberg and Benjamin Gitlow. These laws ushered in a wave of litigation about the extent to which government can suppress subversive speech. Thus began the process of defining the modern First Amendment.

▪ ▪ ▪

Yetta Stromberg's case was unusual in another way and made an important contribution to the scope of First Amendment freedoms. Flying a flag was not, on the face of it, "speech." It was not words. It was conduct. Yet it was expressive. It was clearly meant to convey ideas. In Stromberg's case, flying the flag was meant to express solidarity with the working class, support for the Communist system, and opposition to the capitalist system. Indeed, the California statute itself singled out displaying a red flag as a symbol of opposition to organized government; this was the basis for treating this conduct as a felony. The Supreme Court in the *Stromberg* decision, with hardly any discussion, concluded that Stromberg's expressive conduct should be treated as "speech" protected by the First Amendment.

Stromberg's case thus expanded First Amendment freedoms. The seed planted by *Stromberg* sprouted and grew into the "symbolic speech" doctrine used decades later in cases involving burning draft cards, the American flag, and crosses, and students flying a banner proclaiming "Bong Hits 4 Jesus."

In the 1960s, when David Paul O'Brien burned his draft card on the steps of the South Boston courthouse to protest the Vietnam War, the Supreme Court recognized that the "com-

municative element" in O'Brien's conduct implicated First Amendment speech values. But the Court ruled against him because it found valid the argument that the nonspeech elements of destroying his draft registration document frustrated government purposes (such as identifying and keeping track of draft-eligible young men). When high school students in Des Moines wore black armbands to show their opposition to the war and were suspended, the Court ruled that the discipline violated the First Amendment. It treated the armbands as symbols of political significance and said school officials could not single out the wearers for punishment: "[In] our system, state-operated schools may not be enclaves of totalitarianism."

When Gregory Lee Johnson burned an American flag at the Republican National Convention in Dallas to protest Reagan administration policies, the Court treated his act as "expressive conduct," noting that it had "long recognized that [First Amendment] protection does not end at the spoken word," citing *Stromberg*. The Court said Johnson "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." The Court rejected the state's argument that burning the flag undermined support for a competing value, national unity, proclaiming, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Yetta Stromberg would have been proud (though, ironically, she could not have expected such a result under a Communist system).

When some St. Paul teenagers sneaked into the yard of an African American family and burned a cross (that's not First

Amendment heroism), they were charged with violating an ordinance making it a crime to display a "symbol," including a burning cross or a Nazi swastika, knowing that this would arouse alarm or anger on the basis of race or religion. Once again the Court, in a surprising opinion by Justice Antonin Scalia, reminded everyone that government cannot outlaw speech "or even expressive conduct, because of disapproval of the ideas expressed." Justice Scalia added that "nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." The Court concluded that while burning a cross on someone's lawn may be illegal under other laws (such as those that prohibit trespassing), government cannot outlaw an act because it disapproves of the racial or religious ideas it is meant to express.

When Joseph Frederick, a Juneau, Alaska, high school student, unfurled a banner across the street from the school as the 2002 Olympic torch parade passed by—a banner that said "Bong Hits 4 Jesus"—and then was suspended by the principal, no one questioned that waving the banner was an example of free "speech." But Chief Justice Roberts found for the Court that the banner conveyed the wrong message; it was neither core political or religious speech, nor just harmless nonsense. Roberts decided that the principal could reasonably conclude that the banner promoted illegal marijuana use, and public school officials had the power to suppress this message.

So disputes about the extent of protection for symbolic speech or expressive conduct continue. Stirring spirited and provocative discussion about public issues is one of the purposes of the First Amendment. Yetta Stromberg's little red flag admirably served that purpose.

this material has been excerpted from

Figures of Speech:
First Amendment Heroes and Villians

By William Bennett Turner
Published by Berrett-Koehler Publishers

For more information, or to purchase the book,
please visit our website
www.bkconnection.com