

Gitlow v. New York, 1925

Historical Background

While the end of World War I brought "the boys back home," the return to normalcy politicians promised failed to materialize. The tranquility of the country's historically "splendid isolationism" had been shattered forever by the Great War.

Caught up in anti-German hysteria during the war, a frightened people braced for a domestic war against new, more insidious threats to the Republic—Russian Bolshevism, radicalism, forces of anarchy and disorder—as the country weathered its first Red Scare (1919–1920). Rumors of plots to undermine the United States Government, encouraged by government officials, spread across the country. Attorney General A. Mitchell Palmer staged notorious raids against "subversive" groups, engaged in the wholesale roundup of "radicals"—many of whom were immigrants and were deported—and set up an anti-radicalism division at the Justice Department. This new department, run by a young assistant, J. Edgar Hoover, would later be transformed into the Federal Bureau of Investigation. Many States passed "anti-revolution" laws which forbade public statements calling for violent revolution against the U.S. government. Public fear of communism and anarchy brought a series of cases before the Supreme Court.

Circumstances of the Case

During the Red Scare, officials in New York State actively sought to enforce a law forbidding "criminal anarchy," passed by the State in 1902. The law imposed criminal penalties on anyone who advocated a violent overthrow of the government.

Benjamin Gitlow was a member of the left wing faction of the American Socialist party, a faction formed in opposition to that party's advocacy of moderate socialism in the United States, rather than revolution. In 1919, the left wing announced their break from the party at a convention in New York City. They advocated more immediate attempts to bring socialism to America, including the use of violence. The left wing convention appointed a writing committee to create a "left wing manifesto" under Gitlow's leadership. Modeled on the *Communist Manifesto* by Karl Marx and Friedrich Engels, the *Left Wing Manifesto* advocated the overthrow of organized government by force, violence, and other unlawful means.

Sixteen thousand copies of the manifesto were printed, wrapped, and mailed under Gitlow's leadership. The June issue of Gitlow's radical pamphlet, *The Revolutionary Age*, reprinted the document. Gitlow signed a card in support of circulating the manifesto among membership of the American Socialist party's left wing, and traveled to different parts of New York to publicly advocate the manifesto and its principles. He was arrested, charged with criminal anarchy, convicted, and sentenced.

Constitutional Issues

Gitlow's case involved the 1st and 14th amendments. Did the New York State law against criminal anarchy deprive Gitlow of his liberty of expression under the Due Process Clause of the 14th Amendment? Was the New York State law unconstitutional? For the first time, the Court was asked to consider whether the 14th Amendment "incorporated" the freedoms of the Bill of Rights into the constitutions of the States. In this case, did the 14th Amendment afford Gitlow, in State court, the same protections provided by the 1st Amendment to a citizen in federal court? What parts of the Bill of Rights were guaranteed by the 14th Amendment?

Arguments

For Gitlow: Gitlow's attorneys argued that New York could not show that any harm had occurred from his exercise of freedom of speech and press, and that the Constitution protected his speech unless it presented a "clear and present danger" to society. In fact, his attorneys argued there was no evidence that anyone had been influenced to any action by Gitlow's pamphlet. They claimed that the New York law was an unconstitutional limit imposed by a State on a right guaranteed in the 1st Amendment. The 14th Amendment's guarantee that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" was, they argued, violated in this case.

For New York: New York's attorneys argued that any State had the authority to prevent violence and disorder. The New York State legislature acted properly and constitutionally in creating laws to ensure the public safety. Gitlow had engaged in actions which threatened great harm to the people of New York. His trial was conducted fairly and his conviction should be upheld. The Supreme Court should not intrude into the internal affairs of a State, for this action would violate the principles of federalism. Gitlow's freedom of speech was adequately protected in the New York State constitution.

Decision and Rationale

In a 7–2 decision, the Court upheld the conviction and ruled the New York State law constitutional. Justice Sanford wrote the majority opinion. "It is a fundamental principle," Sanford wrote, "long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom..."

Sanford wrote that the Court could not "hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press..." The manifesto was "not the expression of philosophical abstraction" but rather "the language of direct incitement." Sanford wrote that New York's "legislative body has determined...that utterances of a certain kind involve such danger of substantive evil that they may be punished...", and Gitlow's manifesto was such an utterance.

Justices Holmes and Brandeis dissented from the majority. In a minority opinion they argued that the New York law was unconstitutional. "Every idea is an incitement," they argued, and "...eloquence can set fire to reason." Nonetheless, they wrote, "whatever may be thought of the...discourse before us, [the manifesto] had no chance of starting a present conflagration..." Therefore, it presented no "clear and present danger," and Gitlow's conviction should be overturned.

Although the Court upheld the State law and Gitlow's conviction, the importance of the case lies in the arguments that Gitlow's lawyers asked the Court to consider. For the first time, the Court considered the implications of what has become known as "incorporation"—that is, how provisions of the 1st Amendment were incorporated into State constitutions by the 14th Amendment. The argument over "incorporation" opened the door to landmark decisions in future years, decisions accepting the idea of the incorporation of the Bill of Rights into State constitutions on the basis of the 14th Amendment.

Questions for Discussion

1. The Due Process Clause of the 14th Amendment states that "No State shall ...deprive any person of life, liberty, or property, without due process of law...." How is this clause relevant to *Gitlow v. New York*?
2. What is the incorporation doctrine? Why is it important?
3. What were the circumstances under which this case led to the incorporation doctrine?