

# The Breakfast Club

## Constitutional Minute for 18 January 2022

### Is There a Right to Protest?

On August 26, 1765, a group of angry Bostonians converged on the home of Thomas Hutchinson, the lieutenant governor of Massachusetts.<sup>i</sup> They smashed through his front door with an ax and poured into the house through all available doors and windows. Once inside, they took everything they could move: clothes, silver, paintings. Alerted to the approach of the mob, Hutchinson had to scamper through the gardens to a house down the street when he learned the mob were still searching for him. By four in the morning, Hutchinson later wrote, *“one of the best finished houses in the province has nothing remaining but bare walls and floors. Gentlemen of the army, who have seen towns sacked by an enemy, declare they never saw such fury...Not contented with tearing off all the wainscot and hangings and splitting the doors to pieces they beat down the Partition walls...Though that alone cost them two hours, they cut down the cupola (on the roof) and lantern and began to take the slate and boards from the roof...The garden fence was laid flat and all my trees &c broke down to the ground. Such ruins were never seen in America.”*<sup>ii</sup> Only the approaching sunrise prevented the rioters from leveling Hutchinson’s home to the ground.

What was the catalyst for this destruction of a private home, here in America? A protest of the Stamp Act, signed by the King in March of that year and scheduled to go into effect on the first of November.

Fast forward to the summer of 2020. Described by main-stream media pundits as “mostly peaceful,” demonstrations across America after the shooting of Jacob Blake, a black man, by a white policeman in Kenosha, Wisconsin, caused \$50 million in damage and left one person dead. But the Kenosha riots would only be the 11th costliest civil disorders in U.S. history. “Protests” in 140 U.S. cities in 20 states in May following the death of George Floyd in Minneapolis were the costliest civil disorder ever in the United States, replacing the 1992 Los Angeles “protests” which had followed the acquittal of police officers accused of beating Rodney King.

Americans love to protest; but is protesting a constitutionally protected right?

It should come as no surprise that there is no mention of protests or protesting in the Constitution. The Framers had seen plenty of these, they certainly knew what a protest was, and they made no mention of it; what do we make of that?

What we do find in the Constitution is a “right of the people peaceably to assemble.” Combined with the right to free speech, the right to assemble has become a “right” to protest. Protests were used by the civil rights movement to great effect. Protesting the Jim Crow laws that had segregated the South, civil rights activists finally realized their dreams with passage of the landmark Civil Rights Act in 1964.

Courts have determined that requiring a permit to hold a protest is an acceptable limitation, but a protest permit cannot be denied simply based on the content or subject of the protest.<sup>iii</sup>

Protests on private property must have the permission of the property owner; courts have decided you have no right to protest in front of someone's house on their private property. Violating disturbing the peace laws will also get your planned protest (in a public street or on a public sidewalk) disrupted.

In my opinion, municipalities and courts have been far too lenient with protestors. Today's "protests" have taken a decidedly darker turn, with destruction of property often seeming to be the primary goal. As we've discussed previously, the primary purpose of government is the secure our rights. But that means *everyone's* rights: protestors and non-protestors. But how does government secure the right of a group to "assemble" on a public street to "speak" of what they perceive as injustice, while at the same time protecting the right of other citizens to use that same public street for travel? And obviously there is no "right" to damage or destroy private property as you are protesting. It is a delicate balancing act – protecting all persons' rights -- and governments and their police forces have not shown much adroitness in handling these of late.

Kyle Rittenhouse would have had nothing to do that night if there had not been private property damaged by "protestors" on previous nights. For police to allow "protestors" to damage property unmolested is, I think, unconscionable and a dereliction of duty. It suggests to the average citizen that the laws are only passed to hinder the law-abiding, not criminals and law-breakers.

Another interesting aspect of protests concerns the Supreme Court. The Court is where the "rules" for protests are often finally determined, so how to you protest AT the Supreme Court? Are there special rules for that? As you might have guessed, yes there are.

A law<sup>iv</sup> originally enacted in 1949<sup>v</sup> says, in effect, that the combined freedom of speech and assembly does not apply in front of the Supreme Court the same way as it would at, say, a public park. The 45-word law states: "*It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.*"

"The 'grounds' have come to include the low steps leading from the sidewalk to the pill-shaped plaza, the plaza itself, the steps leading to the columns and the main entrance, and the lawn and landscaped areas, among others. But the grounds do not include the sidewalks abutting the streets that surround the Court on its city block."<sup>vi</sup> (emphasis added). So this is where "lawful" protests can take place. Those who test the resolve of Capitol police to maintain decorum in front of the court are arrested.

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<sup>i</sup> Later elected Governor.

<sup>ii</sup> William Gordon, *History of the Independence of America*, 1788.

<sup>iii</sup> *Ward v. Rock Against Racism* (1989), *Shuttlesworth v. Birmingham*, (1969)

<sup>iv</sup> <https://www.law.cornell.edu/uscode/text/40/6135>

<sup>v</sup> <http://legisworks.org/congress/81/publaw-250.pdf>

<sup>vi</sup> <https://blog.harvardlawreview.org/protesting-on-the-supreme-courts-front-porch/>