ARTICLES

The Right to Rage: Free Speech and Rage Rhetoric in American Political Discourse

JONATHAN TURLEY*

TABLE OF CONTENTS

And now, I pray you, sir,
For still 'tis beating in my mind, your reason
For raising this sea-storm?[1]

I. INTRODUCTION

These words of Miranda to Prospero in *The Tempest* capture the dichotomy between reason and rage. The difficulty is that both reason and rage are on a single spectrum of thought. Rage can be reason amplified into a rave or it can be reason atrophied to the point of madness. For pedestrians, including courts, these "sea storms" often appear threatening and inexplicable. The anger seems to invite violence in others and courts often are asked to separate those who merely agitate from those who incite. It is difficult to see beyond the "sea storm" itself. For many, rage rhetoric is low-value speech with high costs for society. The resulting

* © 2023, Jonathan Turley. The J.B. and Maurice C. Shapiro Chair of Public Interest Law, The George Washington University.

1. WILLIAM SHAKESPEARE, THE TEMPEST act I, sc. 3 (1611).

line drawing has occurred for centuries without rendering a clear distinction. Indeed, this is a question that continues to occupy courts and commentators as political violence increases in the United States. Courts are once again facing claims of sedition by the government, and other charges raise questions of the criminalization of speech.

We are living in an age of rage.[2] Few historical periods match the current level of violent and hateful speech from both the left and the right.[3] This "sea storm" includes threats from political leaders as well as advocacy groups against those with opposing views. After the January 6 riot at the U.S. Capitol, rage rhetoric is again not just shaping our politics but testing our laws.[4] More than fifty years after the Supreme Court's decision in *Brandenburg v. Ohio*,[5] there are again legislative and litigation efforts to push for greater criminalization of violent speech. In the free speech community, this environment could not be more dangerous for protecting free expression and associated rights. These fights occur at the far extremes of our society, where free speech erosion first appears. Groups ranging from Antifa on the left to the Proud Boys on the right routinely supply new outrage to fuel the calls for a crackdown on speech ranging from censorship to criminalization. The value of such hateful speech is hard to see but essential to defend. Indeed, violent speech is often treated as the exception to principles of free

2. I first used this phrase soon after the election of Donald Trump to capture a notable shift in tenor and content of both advocacy and media coverage. Despite working as a legal analyst and columnist for various networks and newspapers for thirty years, I had never seen the level of violent speech and protests that became the norm. By 2017, I was noting how this rage over Trump's controversies was making legal analysis more challenging in explaining the difficulty in prosecuting Trump or his family for a myriad of claimed crimes. *See, e.g.*, *What The Law Says About Donald Trump Jr.'s Meeting With A Russian Lawyer*, NPR (July 16, 2017), https://www.npr.org/2017/07/16/537509422/what-the-law-says-about-donald-trump-jr-s-meeting-with-a-russian-lawyer [https://perma.cc/P3EK-UZKJ]. Since that time, the phrase has been used to refer to the rising level of violent speech and anger in our political discourse. In a separate article, I explore the Trump controversy in more depth and the continued use of sedition conspiracy charges in light of the history discussed here. *See* Jonathan Turley, *Rage Rhetoric and the Revival of American Sedition*, 65 WM. & MARY L. REV. (forthcoming 2024) [hereinafter Turley, *Rage Rhetoric*]. The historical and legal discussion of rage rhetoric in this article is part of a broader discussion in my forthcoming book, *The Indispensable Right: Free Speech in an Age of Rage* (Simon & Schuster 2024) [hereinafter Turley, *The Indispensable Right*].

3. *See generally*, Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J. L. & PUB. POL'Y 571 (2022); *see also Censorship Laundering: How the U.S. Department of Homeland Security Enables the Silencing of Dissent"*: *Hearing before the Subcomm. on Oversight, Investigation, and Accountability of the H. Comm. on Homeland Security*, 118th Cong. (2023) (testimony of Professor Jonathan Turley); *The Weaponization of the Federal Government: Hearing Before the Select Subcomm. on the Weaponization of the Federal Gov't*, 118th Cong. (2023) (testimony of Professor Jonathan Turley); *Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack*: *Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Professor Jonathan Turley); *Fanning the Flames: Disinformation and Extremism in the Media: Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Com.*, 117th Cong. (2021) (testimony of Professor Jonathan Turley); *The Right of The People Peaceably To Assemble: Protecting Speech By Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Professor Jonathan Turley).

4. *See 'Metastasizing'* (testimony of Professor Jonathan Turley), *supra* note 3.

5. 395 U.S. 444 (1969).

speech protection, framed as a category that straddles the line between thought and action. Yet, as discussed in this article, "rage rhetoric" often manifests in periods of deep and bitter division in our society. It is the manifestation of social, political, and religious grievances that are boiling just under the surface of our political discourse. There is no serious debate that speech used to plan or further a specific crime can be prosecuted, including under a myriad of conspiracy crimes. Rage rhetoric can ignite others to action, a view later adopted in the United States as words holding a "bad tendency" for public discord.[6] Many of us have denounced rage rhetoric on both sides of our political divide. Yet, there is also a value to rage in a free society that is found in the act of speaking and the signaling of deeper discord. Condemning rage rhetoric does not mean that such speech should not be protected under the First Amendment.

Rage is often a matter of perspective. It is a word that can mean "violent and uncontrollable anger" or "intense feeling" or "passion."[7] Rage is justified and even celebrated in some circumstances. It is often used to express utter rejection of the status quo or power structures. We can "rage against the machine" in music[8] or "rage against racism" in politics.[9] Rage is often viewed as the final definitive stage of opposition or defiance—such as when Dylan Thomas inspired others with his words, "Do not go gentle into that good night . . . Rage, rage against the dying of the light."[10] For Dylan, it was defiance of old age and surrendering to the inevitability of death. Rage rhetoric often espouses the same "rage against the dying of the light" sentiment towards ideals or values. It is often expressed in the same extremist terms, calling for not just defiance but at times the destruction of opposing systems. When we are enraged, we use rage rhetoric to convey an absolute opposition or rejection. It offers clarity of cause and, for some, license for extreme forms of protests.[11]

Rage rhetoric is all around us, saturating our political and social discourse. It is often meant to shock or to motivate others. For decades, protests have chanted "Burn Baby Burn" as a way of calling for radical change or a societal reckoning.[12] On January 6, rage fueled rage with comments like those of former President

---

6. *See generally* Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411 (2002).

7. Rage, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rage [https://perma.cc/3AHZ-HKUS] (last visited Feb. 24, 2023).

8. RAGE AGAINST THE MACHINE, https://www.ratm.com/home/ [https://perma.cc/K8CU-5B2Y] (last visited Feb. 24, 2023).

9. *Rage Against Racism*, FACEBOOK, https://www.facebook.com/rarfestival/ [https://perma.cc/JTH9-P6HJ] (last visited Feb. 24, 2023).

10. DYLAN THOMAS, *Do Not Go Gentle into That Good Night*, *in* THE POEMS OF DYLAN THOMAS 239 (Daniel Jones ed., 2003).

11. As Virgil stated, "Their rage supplies them with weapons." CHARLES NOEL DOUGLAS, FORTY THOUSAND QUOTATIONS PROSE AND POETICAL 75 (1937).

12. Sylvester Monroe, *'Burn Baby Burn': What I Saw as a Black Journalist Covering the L.A. Riots 25 Years Ago*, WASHINGTON POST (Apr. 28, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/04/28/burn-baby-burn-what-i-saw-as-a-black-journalist-covering-the-l-a-riots- 25-years-ago/ [https://perma.cc/NT74-2PY2].

Donald Trump's counsel Rudy Giuliani that "If we're wrong, we will be made fools of. But if we're right, a lot of them will go to jail. So let's have trial by combat."[13] As a riot developed in Minneapolis, Rep. Maxine Waters (D., Cal.) called on supporters to "get confrontational" if a police officer was not convicted.[14] On the steps of the Supreme Court, Senate Majority Leader Chuck Schumer (D., N.Y.) declared, "I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released the whirlwind and you will pay the price! You won't know what hit you if you go forward with these awful decisions."[15] Rep. Paul Gosar (R., Ariz.) edited an animated video to show him killing Rep. Alexandria Ocasio-Cortez (D., N.Y.),[16] while Trump edited a video showing him assaulting a CNN figure.[17] Even writers like the *Washington Post*'s Jennifer Rubin have declared that "[w]e have to collectively, in essence, burn down the Republican Party. We have to level them because if there are survivors, if there are people who weather this storm, they will do it again."[18] Politicians on both the right and the left commonly voice a "call to arms" for supporters to resist their opponents.[19] These examples are all forms of rage whether they were meant to enrage or humor supporters. The list is endless. Rage can be addictive. It can give people license to say (and, in the most extreme cases, do) things that would ordinarily be verboten.

In some ways, rage rhetoric reflects a failure of one of the defining purposes of the Madisonian system: to push factions toward majoritarian compromises. Ideally, our divisions are vented in Congress, where they can be subjected to the moderating influences of the legislative process in a representative democracy. Rage rhetoric often reflects a rejection of the existing political structure as a vehicle for meaningful change. It reflects a crisis of faith in the system. In writings, rage can invite a reader to dispense with preexisting assumptions or inhibitions to consider radical changes. In actual protests, it can vent unreleased pressures in

---

13. Ed Pilkington, *Incitement: A Timeline of Trump's Inflammatory Rhetoric Before the Capitol Riot*, GUARDIAN (Jan. 7, 2021), https://www.theguardian.com/us-news/2021/jan/07/trump-incitement-inflammatory-rhetoric-capitol-riot [https://perma.cc/MUB9-VQRY].

14. Steven Nelson, *Biden Praises Polarizing Rep. Maxine Waters, Says He Agrees with 'Whatever' She Says*, N.Y. POST (Oct. 13, 2022), https://nypost.com/2022/10/13/biden-praises-maxine-waters-says-he-agrees-with-whatever-she-says/ [https://perma.cc/93PN-6M5D].

15. Jonathan Turley, *From Court Packing to Leaking to Doxing: White House Yields to National Rage Addiction*, RES IPSA (May 9, 2022), https://jonathanturley.org/2022/05/09/from-court-packing-to-leaking-to-doxing-white-house-yields-to-a-national-rage-addiction/ [https://perma.cc/Z8T3-7QRM].

16. Lisa Hagen, *Paul Gosar Censured, Removed from Committees Over Violent Post About Democrats*, US NEWS (Nov. 17, 2021), https://www.usnews.com/news/politics/articles/2021-11-17/paul-gosar-censured-removed-from-committees-over-violent-post-about-democrats [https://perma.cc/XJ9Z-E6PV].

17. *Donald Trump Posts Video of Him Beating CNN in Wrestling*, BBC (July 2, 2017), https://www.bbc.com/news/world-us-canada-40474118 [https://perma.cc/2BVJ-35E3].

18. Doug Ernst, *Jennifer Rubin Says U.S. Must "Burn Down Republican Party"; Leave No "Survivors,"* WASHINGTON TIMES (Aug. 21, 2019), https://www.washingtontimes.com/news/2019/aug/26/jennifer-rubin-says-us-must-burn-down-the-republic/ [https://perma.cc/QF5D-6P7N].

19. Jonathan Turley, *Insurrection or Advocacy? Chicago's Lori Lightfoot Issues "Call to Arms,"* RES IPSA (May 10, 2022), https://jonathanturley.org/2022/05/10/insurrection-or-advocacy-chicago-mayor-lightfoot-issues-call-to-arms-after-leaked-abortion-ruling/ [https://perma.cc/9Z9Z-FFBV].

much the same way individuals do in expressing their anger in personal relations: "People obtain psychological release through the simple process of recounting their grievances . . . . Letting off steam may make it easier to talk rationally later."[20] Indeed, Sigmund Freud advanced the theory that expressing anger and rage can be healthy due to its ability to bring a level of catharsis.[21] Rage has long been a manifestation of political or social pressures that are not being addressed through the political system. When expressed as speech rather than criminal acts, we have a right to rage. Indeed, rage rhetoric can capture parts of our society isolated or underrepresented in the political system. While rage rhetoric can be viewed as the rejection of Madisonian principles of deliberative debate and compromise in the constitutional system, it is a part of our political discourse that goes back to our very founding.

The issue of liability for extremist speech has occupied—and at times perplexed—leading legal figures for centuries. Free speech demands bright lines to avoid the chilling effects of uncertainty on individual speakers. Within that context, extremist or seditious speech is often dangerously vague in distinguishing from rage rhetoric. That difficulty is captured in the Holmesian mantra of "shouting fire in a crowded theater." Speech prosecutions are often based upon the same notion of preventing public unrest or disorder based on a fluid and highly subjective standard of what speakers or what words present imminent threats. In recent years, we have seen a return to the "bad tendency" rationale for speech prosecutions. As discussed below, it is possible to move beyond sedition and still avoid stampedes in theaters. This, however, requires a new emphasis on overt acts and a bright-line rule of protection for advocates. The bad tendency rationale continues to invade the analysis for courts not just on seditious speech but cases applying the "integral-speech exception." There remains an accommodation for the government in seeking to criminally sanction speech that tends to produce social ills or unrest.

This article explores the treatment and value of rage rhetoric. It will challenge the continuing hold of functionalist rationales, including the Court's view that some speech can be more susceptible to criminalization than others because it is more "virulent" or has a greater influence toward criminal conduct. These underlying rationales can be traced back to early seditious libel cases. This article explores how rage rhetoric has been treated historically and legally, including recent efforts to criminalize "toxic ideologies." The article briefly explores our history of rage rhetoric in the English and colonial periods, including defining moments in United States history like the Boston Tea Party. It then explores how rage rhetoric has been addressed by the courts from the eighteenth to twenty-first centuries. The article looks at the rationales applied by courts in criminalizing

20. ROGER FISHER & WILLIAM URY, GETTING TO YES 31 (1991).

21. Others have questioned or rejected this catharsis theory. Stephen Diamond, *Anger and Catharsis: Myth, Metaphor, or Reality*, PSYCH. TODAY (Sept. 28, 2009), https://www.psychologytoday.com/us/blog/evil-deeds/200909/anger-and-catharsis-myth-metaphor-or-reality [https://perma.cc/48BV-LRMU].

rageful or radical rhetoric within First Amendment jurisprudence. Many of these decisions continue limiting principles articulated in early English law by figures like William Blackstone. The residual or lingering elements of those views continue to be expressed in judicial opinions. Finally, the article explores how the January 6th riot revived those residual elements in calls for new legislation and prosecutions. We continue to struggle with the role of rage rhetoric and rely on the same "bad tendency" rationales to curtail "toxic ideologies." We continue to try to arrest the "sea storms" of speech without understanding their place in political expression, historically or constitutionally. As discussed below, those who rage against the sea have historically not been as great a threat as those who seek to quell the storm by suppressing such speech.

II. RAGE RHETORIC AND AMERICAN DISSENT

Extremist speech has a long history in the United States as different groups have called for revolutionary change. Such violent speech, at times, has led to violent acts. Thus, the line between violent speech and violent acts has been an uncomfortable part of our history since before the ratification of the First Amendment. Indeed, the legendary Boston Tea Party involved many of the issues still being debated regarding what is permissible and what is criminal advocacy. It shows how rage rhetoric can become riotous action. Angry citizens engaged in property damage as part of violent protest before seeking outright rebellion.[22] However, most of those advocating actions were not seeking an insurrection. In *Defiance of the Patriots*, Benjamin Carp wrote, "The Boston Tea Party wasn't a rebellion, or even a protest against the king—but it set in motion a series of events that led to open revolt against the British Crown."[23] Yet, rage rhetoric was heard with "war whoops" in the Old South Meeting House and the protest quickly turned into direct and violent criminal conduct.[24] Groups like the Sons of Liberty knew well how this tinderbox could ignite. However, that tension had long existed. In 1770, Nathaniel Coffin observed that "a storm in this Town is raised in the twinkling of an Eye, without you having the least Warning. Such an absolute Sway have our leaders over the Minds of the Common people, that in an instant they will raise you a Tempest, that would threaten Destruction to the Globe."[25] It would take years for that Tempest to arrive in full force, but rage rhetoric continued among colonists who increasingly resisted British taxes and restraints. Yet, on the night of the Boston Tea Party, the conditions were right for rage to turn to riot.

---

22. BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY & THE MAKING OF AMERICA 2–5 (2011).

23. *Id.* at 2.

24. *Id.* at 5. While some praised the act, "others called it ruinous, disorderly and disturbing[;] . . . . [t]hey saw a pack of rebels who had disobeyed the law, destroyed private property, and threatened anyone who stood in their way." *Id.* at 123 (describing war cries and unease at the Old South Meeting House).

25. Letter of Nathaniel Coffin to Charles Steuart (May 22, 1770), *reprinted in* CARP, *supra* note 22, at 25.

British Parliament denounced the property destruction and newspapers condemned the "seditious as well as turbulent and insolent behavior of the Bostonians."[26] However, leaders on both sides saw the defiance as holding far greater meaning in challenging the authority of the Crown. Governor Hutchinson called it "the boldest stroke that had been struck against British rule in America."[27] The most interesting response came from John Adams (whose cousin, Samuel Adams, participated in the dumping). On December 17, 1773, Adams wrote this entry into his diary after witnessing the broken crates and globs of tea upon his return to Boston:

> This is the most magnificent movement of all . . . . There is a dignity, a majesty, a sublimity in this last effort of the Patriots I greatly admire. The people should never rise without doing something to be remembered—something notable. And striking. This destruction of the tea is so bold, so daring, so firm, intrepid and inflexible, and it must have so important consequences, and so lasting, that I cannot but consider it as an epocha [sic] in history.[28]

Adams marveled at the property destruction as fulfilling the need of "doing something to be remembered—something notable." The violent act of property destruction remains one of the most revered moments in American history. As William Pitt observed, "if that mad and cruel measure should be pushed. . . England has seen her best days."[29] What began as an economic form of protest became a revolutionary act. As Loyalist Peter Oliver remarked, "they had past the Rubicon, it was now, Neck or Nothing."[30]

The Boston Tea Party reminds us that the country was born in a period of violent speech. It was born in an age of rage. The question is distinguishing between rage and rebellion, between speech and sedition. The years of a looming described by Coffin was realized three years later. The rage rhetoric during that period was not directly related to a rebellious act until the mob descended upon Griffin's Wharf and tossed 342 chests of tea into the harbor. The status of the speech can be defined retroactively by what occurred at the Wharf or it can be attributed contemporaneously to rising political opposition to Royal rule. Looking at our history, from the Tea Party to the January 6 riot, reveals that we have achieved little clarity along that line. Rage itself, as opposed to rioting or other acts of violence, is expressive and protected speech. That spectrum from rage to rioting is clearer when viewed at either extreme. In the middle, however, is the concept of incitement and the notion of speech that causes violent acts (which includes seditious libel). This blurred line between protected and

---

26. *Id*. at 187.

27. HARLOW GILES UNGER, AMERICAN TEMPEST: HOW THE BOSTON TEA PARTY SPARKED A REVOLUTION, ch. 12 (2011).

28. *Id*.

29. *Id*.

30. *Id*. at 182.

criminalized speech has remained murky throughout our history. Indeed, as discussed below, John Adams and others quickly latched onto seditious libel as a charge to wield against their political opponents. Yet, there have long been revolutionary or extremist groups that dance along the line between rage and rebellion.

With the Great Depression came an array of groups from anarchists to Communists seeking radical change in the United States. Anarchists were some of the most outspoken and often used rage rhetoric. Despite Emma Goldman's advocacy of "anarchism without adjectives," there were plenty of adjectives and invectives in speeches by anarchists.[31] There was also violence, including the assassination of President William McKinley in 1901.[32] The decentralized and defused structure of the anarchist movement only made them more menacing for many in government and society. Individual acts of violence without central leadership extended an anarchist creed: "[o]nly unorganized individuals . . . were safe from coercion and domination and thus capable of remaining true to the ideals of anarchism."[33] The assassination of McKinley captured those elements. Leon Czolgosz was an anarchist and disciple of Goldman.[34] He acted alone but notably said that Goldman's words set him "on fire."[35] In response to the assassination, a "war on anarchy" was declared and anarchists were attacked throughout the country.[36]

Anarchists were a diverse group that included both "philosophical" anarchists and violent anarchists. Their rhetoric was often the same in denouncing institutions and the government. Goldman defined the movement broadly as following "the philosophy of a new social order based on liberty unrestricted by man-made law; the theory that all forms of government rest on violence, and are therefore wrong and harmful, as well as unnecessary."[37] Goldman was not a pacifist and often equivocated on the subject of political violence. In her essay, *The Psychology of Political Violence*, she wrote:

---

31. Kathy E. Ferguson, *Emma Goldman's "Anarchy without Adjectives*," PUB. DOMAIN REV. (Jan. 12, 2011), https://publicdomainreview.org/essay/emma-goldmans-anarchism-without-adjectives [https://perma.cc/6ZT3-Q3FF].

32. *See generally* Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 AM. HIST. REV. 777 (1955).

33. Paul Avrich, *The Anarchists in the Russian Revolution*, 26 RUSS. REV. 341, 343 (1967); *see also* D. Novak, *Anarchism and Individual Terrorism*, 20 CAN. J. ECON. & POL. SCI. 176 (1954).

34. Goldman was later deported as a "radical" alien. *Deportation of Emma Goldman as a Radical "Alien,"* JEWISH WOMEN'S ARCHIVE, http://jwa.org/thisweek/dec/21/1919/emma-goldman [https://perma.cc/Z8AV-D7J9] (last visited May 15, 2023).

35. *The Assassin Makes a Full Confession*, N.Y. TIMES, Sept. 8, 1901, at A1; *see generally* Julia Rose Krause, *Global Anti-Anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOB. LEG. STUD. 169 (2012).

36. *Nation's War on Anarchy Begins*, CHI. DAILY TRIB., Sept. 11, 1901, at 2.

37. EMMA GOLDMAN, *Anarchism: What it Really Stands for*, *in* ANARCHISM AND OTHER ESSAYS 53, 56 (3d rev. ed. 1917).

> TO ANALYZE the psychology of political violence is not only extremely difficult, but also very dangerous. If such acts are treated with understanding, one is immediately accused of eulogizing them. If, on the other hand, human sympathy is expressed with the *Attentäter*, one risks being considered a possible accomplice. Yet it is only intelligence and sympathy that can bring us closer to the source of human suffering, and teach us the ultimate way out of it.[38]

Goldman complains that the government and reactionary elements continue to blame anarchists for an array of crimes that she blames on capitalists or imposters. However, in the end, she excuses violence by those driven to it: "High strung, like a violin string, they weep and moan for life, so relentless, so cruel, so terribly inhuman. In a desperate moment the string breaks. Untuned ears hear nothing but discord. But those who feel the agonized cry understand its harmony; they hear in it the fulfillment of the most compelling moment of human nature. Such is the psychology of political violence."

Goldman's rationalization of political violence was not lost on violent anarchists, but also contributed to the rage rhetoric of philosophical anarchists. The distinction between the two groups was lost on many at the time. One such figure was Johann Most, a well-known anarchist writer and editor of the German anarchist newspaper *Freiheit* (Freedom).[39] In one issue, Most published parts of an essay by a German revolutionary figure titled "Mord contra Mord" ("Murder versus Murder"), including the statement that "[d]espots are outlaws . . . to spare them is a crime . . . [w]e say murder the murderers. Save humanity through blood and iron, poison and dynamite."[40] Soon after that publication, Most heard the news of the assassination of McKinley and rushed to pull the edition. He could not, however, retrieve all the copies. In a case that should have been dismissed under the First Amendment, Most was arrested and convicted for disturbing the peace. Most was clearly advocating revolutionary change, but he was not engaging in violent acts. In the aftermath of the assassination, such nuanced distinctions were incomprehensible or irrelevant.

This period is notable in that there was rage rhetoric on both sides. President Theodore Roosevelt denounced anarchism as "a crime against the whole human race" and stated that "all mankind should band against the anarchist."[41] There was also violence on both sides. Indeed, Goldman's claim of the scapegoating of anarchists appears well-founded in accounts of the infamous Haymarket Riot in 1886 where at least eight people died. The comparison between the Haymarket Riot and the Boston Tea Party are telling. Both involve economic grievances and fundamental objections to the system of governance. The difference is that the

38. EMMA GOLDMAN, ANARCHISM AND OTHER ESSAYS (1910).

39. Krause, *supra* note 35, at 176.

40. *Id.*

41. *State of the Union Address: Theodore Roosevelt (December 3, 1901)*, INFOPLEASE (May 14, 2020), https://www.infoplease.com/primary-sources/government/presidential-speeches/state-union-address-theodore-roosevelt-december-3-1901 [https://perma.cc/5VDE-VB7P].

carnage of the Haymarket Riot may have been caused by the government itself. The confrontation followed a call for a general strike to demand an eight-hour workday by the Workingmen's Party. The "Workies" sought sweeping reforms, from the end of the military draft to improved educational and working conditions. They were not violent anarchists, but were often met with violence from police and private security forces. That was the case on the night before the riot when the police fired into a crowd of striking workers, killing and wounding protesters. The fatalities added to the tension on May 4 in Haymarket Square. However, editor and anarchist August Spies spoke to the crowd and encouraged peaceful protest. That call was short lived, however, as an unknown person threw a bomb into the line of police officers.[42] The police responded with live fire, killing and wounding many in the crowd. Later investigations showed that every wounded officer was shot by other officers. Eight individuals, including Spies, were charged. They found themselves before a judge who was openly hostile to them and their views. Judge Joseph Easton Gary declared "'the people whom they loved' they deceived, deluded, and endeavored to convert into murderers; the 'cause they died in' was rebellion, to prosecute which they taught and instigated murder; their 'heroic deeds' were causeless, wanton murders done."[43] Not surprisingly, all were convicted. While seven were sentenced to death, two later had their sentences commuted. One died just before his execution and four were hanged.

Coming roughly 100 years after the American Revolution, Haymarket Square exhibited the same mix of political advocacy and violent acts. Both incidents also showed how the government used sedition charges as a type of government rage rhetoric; to lash out at those who challenged the fundamental precepts of the government. In the case of the anarchists, the advocacy of radical change was then interpreted as a call for unrest and violence for all members of the movement. While relatively few anarchists engaged in violence, they were also treated collectively as violent revolutionaries. The result were dozens of state laws criminalizing sedition and anarchy.[44] These laws were direct abridgments of free speech —including a 1902 New York law stating that to "advocate[]" anarchism or publishing or distributing anarchist literature was likewise a felony.[45]

Rage rhetoric continued to be part of our political discourse in the Twentieth Century as desegregation and other major conflicts caused social and political upheavals. White supremacist groups from the KKK to neo-Nazis are the

---

42. The Chicago mayor described the event as peaceful, but a commander decided toward the end of the day to clear the square. That is when the bomb was thrown. *See generally* PAUL AVRICH, WHEN JUSTICE FAILS: THE HAYMARKET TRAGEDY 204–10 (1984).

43. Joseph E. Gary, *The Chicago Anarchists of 1886: The Crime, The Trial, and The Punishment,* 65 CENTURY MAG. 803, 837 (1893).

44. ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1910–1920, at 233–34 (1955).

45. N.Y. Penal Law §§ 160–61 (1909). *See generally* Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Speech from the Eighteenth to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773 (2008).

prototypical examples of groups with violent acts that match violent rhetoric. Other groups had more peaceful records, but engaged in periodic violence—often justified on the same rationales as Goldman's essay. For example, the Stonewall Riot has been called an "uprising" but treated as a righteous use of force after an anti-gay raid by New York police on the Stonewall Inn in 1969. Protesters chanted "occupy—take over, take over."[46] A firebomb was thrown, and a few officers were injured during the protests. Notably, the Library of Congress stresses that "While the events of Stonewall are often referred to as 'riots,' Stonewall veterans have explicitly stated that they prefer the term Stonewall uprising or rebellion."[47] Like the Boston Tea Party, the riot is viewed today as part of a freedom movement rather than a violent movement.

In the 1960s, racial divisions also fueled rage rhetoric. Some groups like the Black Panthers opposed segregation and racist policies while also calling for the arming of followers. A good example is the aftermath of the "Summer of Rage" in Chicago in October 1969, where some like the Weather Underground pushed for direct action beyond the mere protests of other groups like the Students for a Democratic Society (SDS).[48] The Symbionese Liberation Army (SLA) and the Black Liberation Army (BLA) are other examples of the move from violent speech to violent action.[49] In his book, *Days of Rage*, Bryan Burrough documents the violent culture in these groups, quoting one radical, Sam Melville, as telling his girlfriend "the revolution ain't tomorrow. It's now. You dig?"[50] That was not hyperbole for many of these radicals who saw violence as the only way of changing society. However, millions supported radical groups and echoed such rhetoric without taking overt violent action. While many Black Panthers brandished arms, relatively few were accused of violent acts despite crackdowns in various states.[51] Black Panther and writer Stokely Carmichael spoke in terms of self-defense which were interpreted as calls for violent action:

> Those of us who advocate Black Power are quite clear in our own minds that a 'non-violent' approach to civil rights is an approach black people cannot afford and a luxury white people do not deserve. It is crystal clear to us—and it must become so with the white society—*that there can be no social order*

46. Garance Franke-Ruta, *An Amazing 1969 Account of the Stonewall Uprising*, ATLANTIC (Jan. 24, 2013), https://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467 [https://perma.cc/S8LQ-78TE].

47. *1969: The Stonewall Uprising*, LIBR. OF CONG., https://guides.loc.gov/lgbtq-studies/stonewall-era [https://perma.cc/J6UD-UPLA].

48. BRYAN BURROUGH, DAYS OF RAGE: AMERICA'S RADICAL UNDERGROUND, THE FBI AND THE FORGOTTEN AGE OF REVOLUTIONARY VIOLENCE (2015).

49. *Id.*

50. BRYAN BURROUGH, DAYS OF RAGE (2016).

51. My colleague Bob Cottrol has written extensively on the history of black activists and guns. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?,* 70 CHI.-KENT L. REV. 1307 (1995); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO L.J. 309 (1991).

> *without social justice*. White people must be made to understand that they must stop messing with black people, or the blacks will fight back![52]

It was common to condemn such language as fueling rioting and other violence in the 1960s and 1970s. At the same time, the FBI's infamous COINTELPRO effort targeted a wide array of groups and individuals deemed threatening, including Civil Rights leaders like the Rev. Dr. Martin Luther King Jr. who called for peaceful protests.[53] Again, rage rhetoric was treated as a sufficient basis for criminal investigation.

Such rhetoric continued into the Twentieth Century. Even before the unrest surrounding the presidency of Donald Trump, extreme groups on the left and right emerged, such as Antifa and the Proud Boys. Antifa originated in European anarchist movements. It represents one of the most anti-free speech movements in United States history and regularly engages in violent protests. However, many of its loosely associated members are not violent. For that reason, I have opposed efforts to declare Antifa a terrorist group because such actions would create their own free speech concerns and actually further anti-free speech agendas.[54] The group captures the use of rage rhetoric that can easily be construed as "bad tendency" speech. It also shows how such violence can be fully addressed by prosecuting overt acts, such as assault or property damage, rather than violent speech.

The origins of the Antifa movement can be traced to Europe and the violent clashes between fascist groups on one side, and Marxist and anarchist forces on the other.[55] The anarchist roots of the group may have influenced its rejection of formal structures and leadership.[56] As with the anarchist groups of the early twentieth century, the lack of structure not only appealed to the anarchist elements in the movement but served the practical benefit of evading law enforcement and

---

52. KWAME TURE & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 52–53 (1992).

53. David J. Garrow, *The FBI and Martin Luther King*, ATLANTIC, July/Aug. 2002.

54. *See Fanning The Flames* (testimony of Professor Jonathan Turley), *supra* note 3; *The Right of The People Peacefully To Assemble* (testimony of Professor Jonathan Turley), *supra* note 3. *See also* Jonathan Turley, *Declaring Antifa A Terrorist Organization Could Achieve Its Own Anti-Speech Agenda*, RES IPSA (June 4, 2020), https://jonathanturley.org/2020/06/04/declaring-antifa-a-terrorist-organization-could-achieve-its-anti-free-speech-agenda/ [https://perma.cc/S7D9-77F9] (reprinting *L.A. Times* column by the same name).

55. The name is widely credited to the shortening of the German word *antifaschistisch* and traced to Antifaschistische Aktion, a Communist group that arose during the Weimar Republic before World War II. In the United States, the modern movement emerged through the "Anti-Racist Action" (ARA) groups, which were dominated by anarchists but included Marxists and other groups like the anarchist organization "Love and Rage." Founded by former Trotsky and Marxist followers, Love and Rage also has an international footprint, including Mexico's *Amor Y Rabia*.

56. Perhaps the oldest reference to "Antifa" in the United States is the Rose City Antifa (RCA) in Portland, Oregon. In 2013, various groups that were part of ARA, including RCA, formed a new coordinating organization referred to as the "Torch Network." *The Right of The People Peacefully To Assemble* (testimony of Professor Jonathan Turley), *supra* note 3.

lawsuits.[57] Many organizations have targeted critics and retaliated against the exercise of free speech, from the KKK to the John Birch Society to the Proud Boys to Neo-Nazi groups. However, Antifa was expressly founded as a movement at war with free speech, defining the right itself as a tool of oppression.[58] For many years, the targets of Antifa were white supremacists and Neo-Nazis.[59] Antifa members have justified their use of violence to combat the Alt-Right, arguing that "[if more people] brawled . . . with actual Nazis then Hitler and the Nazi party would have never risen to power."[60] Like its counterparts in right-wing groups (like the Proud Boys), Antifa has a long and well-documented history of such violence.[61] Antifa has also attacked journalists.[62] The group has gradually expanded its targets for violent opposition from white supremacists to those who are deemed supportive of the system of white supremacy, authoritarianism, or other social ills.[63] Like the Black Panthers and other groups, Antifa has emphasized that violence is an act of self-defense. Professor Mark Bray explained that the militarism of Antifa was the result of a simple violent logic: "when pushed, self-defense is a legitimate response to white supremacist and neo-Nazi violence."[64] This "self-defense" also includes violence against police. In a *Washington Post* opinion article criticizing President Trump's attacks on Antifa as "delegitimizing militant protest," Bray stated:

---

57. Shane Dixon Kavanaugh, *Conservative writer sues Portland antifa group for $900k, claims 'campaign of intimidation and terror,'* OREGONLIVE (June 4, 2020), https://www.oregonlive.com/news/2020/06/conservative-writer-sues-portland-antifa-group-for-900k-claims-campaign-of-intimidation-and-terror.html [https://perma.cc/27YB-KRHG].

58. In what is called the "bible" of the Antifa movement, *Antifa: The Anti-Fascist Handbook*, Rutgers Professor Mark Bray calls Antifa "social revolutionary self-defense" and "pan-left radical politics uniting communists, socialists, anarchists and various different radical leftists together for the shared purpose of combating the far right." MARK BRAY, ANTIFA: THE ANTI-FASCIST HANDBOOK (2017). Bray emphasizes the struggle of the movement against free speech: "At the heart of the anti-fascist outlook is a rejection of the classical liberal phrase that says 'I disapprove of what you say but I will defend to the death your right to say it.'" *Id.*

59. *See* Seth G. Jones, *Who Are Antifa, and Are They a Threat?*, CTR. FOR STRATEGIC & INT'L STUD. (June 4, 2020), https://www.csis.org/analysis/who-are-antifa-and-are-they-threat [https://perma.cc/MAU7-UHUJ].

60. Robin Young & Serena McMahon, *What is Antifa? Separating Fact From Fiction*, WBUR (June 11, 2020), https://www.wbur.org/hereandnow/2020/06/11/what-is-antifa-trump-protests [https://perma.cc/LW7W-GXWX].

61. *See generally Fanning The Flames* (testimony of Professor Jonathan Turley), *supra* note 3.

62. Kavanaugh, *supra* note 57.

63. *See Who are Antifa?,* ANTI-DEFAMATION LEAGUE (Aug. 30, 2017), https://www.adl.org/resources/backgrounders/who-are-antifa [https://perma.cc/P976-6RFP].

64. Derek Hawkins, *A Dartmouth antifa expert was disavowed by his college president for 'supporting violent protest,' angering many faculty*, WASHINGTON POST (Aug. 29, 2017, 6:00 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/a-dartmouth-antifa-expert-was-disavowed-by-his-college-president-for-supporting-violent-protest-angering-many-faculty/ [https://perma.cc/5L5N-52HY]. *See also* Ana Radelat, *Author of antifa handbook defends antifascist violence*, CONN. MIRROR (Aug. 18, 2017), https://ctmirror.org/2017/08/18/author-of-antifa-handbook-defends-antifascist-violence/ [https://perma.cc/66PW-FMF4] ("[Antifa] members are justified in using violence, even to the point of arming themselves, to combat 'fascist violence.'").

> I believe it's true that most, if not all, members do wholeheartedly support militant self-defense against the police and the targeted destruction of police and capitalist property that has accompanied it this week. I'm also confident that some members of antifa groups have participated in a variety of forms of resistance during this dramatic rebellion.[65]

It is not violence, but violence without discipline and purpose, that Bray appears to abhor in the *Antifa Handbook*.[66] Bray emphasizes the group's strong anti-free-speech foundation and remains focused on fighting voices on the right of the political spectrum.[67] "De-platforming" or cancelling opposing views is justified in the cause of creating "a classless, post-capitalist society . . . where methods of restorative justice should replace police and prisons in addressing conflicts that persist."[68]

Antifa followers refuse to recognize their opponents' views as legitimate or "a difference of opinion." Their goal is not co-existence but, as stated in the *Antifa Handbook*, "to end their politics."[69] That is evident in violent attacks across the country. In 2023, for example, Antifa members assaulted peaceful pro-life demonstrators.[70] A video captures the classic elements of such Antifa attacks with black hooded or masked individuals shielding the culprits from pursuing police as they quickly leave the area. Bray and other academics are liberating students from the confines of what they deem the false "allegiance to liberal democracy." Once freed of the values of free speech and democratic values, violence becomes merely politics by other means. It is the very mindset that was once used against Communists and Marxists in the 1950s.

---

65. Mark Bray, *Antifa isn't the problem. Trump's bluster is a distraction from police violence*, WASHINGTON POST (June 1, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/06/01/trump-antifa-terrorist-organization/ [https://perma.cc/84TA-NQUL].

66. BRAY, *supra* note 58, at 193 ("Any movement that engages with violence must remain vigilant against the tendency for the violence to overtake political goals.").

67. Bray maintains:

> Anti-fascism is pan-revolutionary left politics applied to fight the Far Right. Therefore, a number of socialist traditions coexist under this umbrella. Since the establishment of ARA and its growth in the nineties, most Americans in antifa have been anarchists or antiauthoritarian communists. Certainly, some have been Stalinists and other kinds of authoritarians who have supported the efforts of the Soviet Union and similar regimes to very narrowly delineate the range of acceptable speech. From that standpoint, 'free speech' as such is merely a bourgeois fantasy unworthy of consideration.

Id. at 148.

68. *Id*. at 148–49. Notably, Antifa bears striking resemblance to groups that emerged during earlier periods of attacks on free speech. Simply replacing anti-communism with anti-fascism does not materially change the same anti-free-speech purpose of these movements. The purpose of governmental or non-government threats are the same in seeking to not only silence opponents, but to deter others from joining them. Specifically, Antifa's categorical rejection of opposing views as worthy of protection is strikingly similar to the view of anti-Communists during the Red Scare.

69. *Id*.

70. *See* Jonathan Turley, *Antifa Attacks "Protect the Kids" Protesters Opposing Drag Show*, RES IPSA (Apr. 27, 2023), https://jonathanturley.org/2023/04/27/antifa-attacks-protect-the-kids-protest-against-drag-show/ [https://perma.cc/F4JV-GM8B].

Antifa straddles the line between rage rhetoric and violent acts. However, the group (and its right-wing counterparts like the Proud Boys) illustrate how penalties for overt acts, as opposed to the underlying speech, can address violence. Many Antifa followers engage in rage rhetoric or violent speech, but a small percentage engages in violent acts. This is similar to the earlier anarchist movement culminating in the Haymarket Square attack. They reflect how rage rhetoric is often an organizing and cathartic element in politics. The question is whether advocating violence is akin to actual violence. These groups and their followers became the subject of prosecutions that would force courts to define and redefine sedition. Throughout these cases, the struggle over criminalizing "bad tendency" speech continued to perplex courts and undermine any continuity in the rulings—a problem that continues to this day.

III. "PANIC POLITICS," "TOXIC IDEOLOGIES," AND SPEECH CRIMINALIZATION

The earliest speech cases show how rage rhetoric has bedeviled the courts as they strived to define the scope and meaning of the right of free speech. The concept of the freedom of expression can be traced back to some of the earliest writings on the foundations for social order. However, the most formulative period for free speech values came with the Enlightenment. A natural-rights foundation for free speech emerged from the writings of John Locke, who described how individuals yielded total freedom in leaving the state of nature but treated the state as premised on the protection of inalienable fights, including the freedom of thought. Free thoughts clearly do not exist in a communicative vacuum. They require expression of thought to allow every person to frame their values and viewpoints. Locke posited that the purpose of government was to allow for the open exchange of ideas rather than the imposition of approved viewpoints.[71] John Milton also tied the very legitimacy of the state to protecting free thought and free debate:

> Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter? . . . Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.[72]

There was also a contemporary distinction drawn between words and action. The French philosopher Montesquieu believed in the distinction between speech and overt action. In *The Spirit of the Laws*, Montesquieu stressed that "[t]he laws do not take upon them to punish any other than overt acts. . . . Words do not

71. JOHN LOCKE, A LETTER CONCERNING TOLERATION 45–46 (Oskar Piest ed., 1950).

72. JOHN MILTON, AREOPAGITICA: AND, OF EDUCATION: WITH AUTOBIOGRAPHICAL PASSAGES AND OTHER PROSE WORKS 50, 45 (George H. Sabine ed., 1951).

constitute an overt act; they remain only an idea."[73] That clarity, however, would be lost in the rise of sedition prosecutions of those who voiced objections to the government.

A. Blackstone and "Schismatical" Speech

The emergence of the view of free speech as a natural right was one of the most remarkable developments in the American colonies. Colonists were familiar with only a limited tradition of free speech in England and other countries. England had long recognized freedom of expression, but the right to expression was qualified in functionalist terms. It developed in tandem with the protections of the free press[74] or the right to petition.[75] Yet, even with the Enlightenment, the European view of free speech was balanced against other social interests. Article 11 in the Declaration of the Rights of Man and the Citizen captured this limited view in declaring that "[t]he free communication of ideas and opinions is one of the most precious of the rights of man."[76] Yet, the very next line would tie this essential right to practical limits: "Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."[77] The qualifying language at the end of the article would perfectly capture the European model of free speech as limited by countervailing social and political priorities. The reservation was equally evident in England, where Sir William Blackstone noted that "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law."[78] That included seditious conspiracy when speech was deemed a danger to public order "by stirring up the objects . . . to revenge, and perhaps to bloodshed."[79]

The First Amendment can be read as more of a Lockean than Blackstonian defense of the right to free thought and free expression. Some writers of the period embraced a broader autonomous view of free speech. This included the writings of John Trenchard and Thomas Gordon in England under the pen name Cato.[80] In Number 15 of *Cato's Letters,* "Of Freedom of Speech: That the same is inseparable from Publick Liberty," Cato wrote:

---

73. CHARLES-LOUIS DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent, trans., Batoche Books 2001) (1748).

74. 5 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150–51 (St. George Tucker ed., William Birch and Abraham Small 1803) (1765) [hereinafter 5 BLACKSTONE].

75. The Bill of Rights: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689 1 W. & M. c. 2 (Eng.) ("That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.").

76. DECLARATION DES DROITS DE L'HOMME ET DU CITOYEN [Declaration of the Rights of Man and of the Citizen] art. 11 (Fr. 1789).

77. 1791 CONST. 11 (Fr.), *reprinted in* FRANK MALOY ANDERSON, THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789–1901, at 58, 60 (1904).

78. 5 BLACKSTONE, *supra* note 74, at 151.

79. *Id*. at 150.

80. JOHN TRENCHARD & THOMAS GORDON, 1 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS (1724) [hereinafter 1 CATO'S LETTERS]. *See generally* David Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983).

> [w]ithout Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech: Which is the Right of every Man, as far as by it he does not hurt and controul the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know.[81]

Cato amplified the importance of free speech as not just a protection of good government but the purpose of good government:

> By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, so far as by it he hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys. . . .
>
> . . . .
>
> The entering into political Society, is so far from a Departure from his natural Right, that to preserve it was the sole reason why Men did so; and mutual Protection and Assistance is the only reasonable Purpose of all reasonable Societies. . . .
>
> . . . .
>
> True and impartial Liberty is therefore the Right of every Man to pursue the natural, reasonable and religious Dictates of his own Mind; to think what he will, and act as he thinks, provided he acts not to the Prejudice of another. . . .[82]

This natural-rights model found expression in early American documents like the Virginia Declaration of Rights and Declaration of Independence.[83] Those views were in stark contrast to the French Declaration of the Rights of Man and the Constitution on free speech. Where the Declaration conditioned the right on the express limit that speakers "shall be responsible for such abuses of this freedom as shall be defined by law," the First Amendment is stated in absolute terms: "Congress shall make no law . . . abridging the freedom of speech." That language led some, like Justice Hugo Black, to declare that "I read 'no law abridging' to mean no law abridging."[84] For figures like Zechariah Chafee, the Framers made a clear break with the English tradition to "make further prosecution for criticism of the government . . . forever impossible in the United States of America."[85]

---

81. 1 CATO'S LETTERS, *supra* note 80, at 96.

82. JOHN TRENCHARD & THOMAS GORDON, 2 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 248 (1724).

83. Bogen, *supra* note 80, at 451.

84. Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring).

85. ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES ch. XIII (1941); *see* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 21 (1970) ("[G]overnmental control which may involve infringement upon freedom of belief include . . . the use of criminal penalties or other official sanction to punish those who hold certain beliefs.").

The language of the First Amendment was only a passing moment of clarity for free speech. The fact is that many in the new Republic continued to display the same abridged view of free speech that existed under English rule. Despite the strong Lockean hold on many Framers, a natural-rights basis for free speech had relatively little time to take hold in the colonies. Figures like Adams continued to view seditious libel laws as a means to punish critics of the government or ruling politicians. Accordingly, figures like Leonard Levy challenged the view that the Framers of the First Amendment evidenced a natural rights or a libertarian view of free speech.[86] Notably, the principal basis for this critique is the unresolved definition and applicability of sedition charges that continued after the ratification:

> If . . . a choice must be made between two propositions, first, that the [freedom of speech and press] clause substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the evidence points strongly in support of the former proposition.[87]

Levy does not see the language of the First Amendment as an implied rejection of the Blackstonian approach, particularly since it refers to "Congress" not abridging free speech rather than the courts through the common law.[88] For Levy, the failure to bar the common law practice expressly meant that "[t]he security of the state against libelous advocacy or attack was always regarded as out-weighing any social interest in open expression."[89] Levy's analysis suggests an accommodation for seditious libel that is not borne out in the historical sources. Madison discussed seditious libel authority as an example of how such abuses were barred constitutionally under the "actual meaning of the instrument."[90] Yet, this history shows that the courts failed to conform the common law to the constitutional standard. Instead, courts allowed for the very same tension that existed in England despite the fact that England lacked the clarity of the constitutional standard placed in the First Amendment. As Mill noted, free speech largely relied on the beneficent attitude of the government, rather than clear lines of protection and prohibitions:

> Though the law of England, on the subject of the press, is as servile to this day as it was in the time of the Tudors, there is little danger of its being actually

---

86. *See generally* LEONARD LEVY, LEGACY OF SUPPRESSION (1960); LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985); *see also* David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985). *But see* Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 A.B.A. RES. J. 521 (1977).

87. LEVY, EMERGENCE OF A FREE PRESS, *supra* note 86, at 281.

88. *Id*. at 269–71.

89. *Id*. at 269.

90. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569–73 (J. Elliot ed., 1866).

> put in force against political discussion, except during some temporary panic, when fear of insurrection drives ministers and judges from their propriety; and, speaking generally, it is not, in constitutional countries, to be apprehended, that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public.[91]

Of course, the history of free speech in the United States has careened between periods of "temporary panic."[92]

After the ratification of the First Amendment, courts adopted more limited and functionalist interpretations. That allowed room for seditious libel prosecutions. Despite its discretionary authority, the Crown actually afforded the colonists a fair degree of free speech. Whatever the intent of the Framers, there is no debate that the criminalization of speech found fertile ground in the new Republic. While John Adams personified the hypocrisy of some of the Founders over free speech, he was not alone. Thomas Jefferson supported the use of state sedition prosecutions of his opponents.[93] In a letter to Abigail Adams, Jefferson distinguished a federal and state sedition law, noting that the former was unconstitutional:

> [I]t was reserved to [the states], and was denied to the general government, by the constitution according to our construction of it. While we deny that Congress have a right to controul [sic] the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.[94]

In a letter to Thomas McKean, Jefferson supported the prosecution of Federalists, noting that he "long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses."[95] As for Madison, his views on such prosecutions seemed to evolve in the early years of the Republic.[96] Yet, it would be Madison who would voice

---

91. J. STUART MILL, ON LIBERTY 22–23 (George Routledge and Sons 1975 (1895)); *see generally* William W. Van Alstyne, *Congressional Power and Free Speech: Levy's Legacy Revisited*, 99 HARV. L. REV. 1089, 1091 (1986).

92. Turley, *Harm and Hegemony*, *supra* note 3, at 600–01.

93. WILLIAM DUDLEY, THE BILL OF RIGHTS: OPPOSING VIEWPOINTS 54 (1994).

94. This letter was later referenced by Felix Frankfurter to support his own narrowing of the protections under the First Amendment in *Dennis v. United States*, 341 U.S. 494, 521–22 (1951) (Frankfurter, J., concurring).

95. Letter from Thomas Jefferson to Thomas McKean (Feb. 19, 1803), *in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 327, 364 (Leonard W. Levy ed., 1966).

96. For example, in a statement during the Virginia Resolutions debate, Madison assured his opponents "every libelous writing or expression might receive its punishment in the state courts." Address of the General Assembly to the People of the Commonwealth of Virginia, *in* 6 THE WRITINGS OF JAMES MADISON 334 (Gaillard Hunt ed., 1908).

the most powerful argument against speech crimes in his Report on the Alien and Sedition Acts.[97]

It was Adams who became the most prominent figure to use sedition charges to punish rage rhetoric. The same man who praised the Sons of Liberty for their Tea Party destruction sought to suppress dissenting views with sedition laws. Much of this rage rhetoric was directed at Adams who showed a remarkable sensitivity and intolerance for such speech. The most illustrative example is the case of Democrat-Republican Thomas Cooper,[98] who alleged that the Federalists were trying "to stretch to the utmost the constitutional authority of our Executive, and to introduce the political evils of those European governments whose principles we have rejected."[99] Adams showed little concern for free speech in supporting such prosecutions, stating "[a]s far as it alludes to me, I despise it; but I have no doubt it is a libel against the whole government, and as such ought to be prosecuted."[100] Yet, there was no arrest until Cooper refuted a rumor that clearly came from Adams. It was just one example of what Jefferson would later refer to as the "reign of the witches."[101]

The attacks on dissenting political views would continue and peak during periods of war or political unrest, from the Civil War in the Nineteenth Century to the Palmer Raids in the Twentieth Century.[102] Rage rhetoric continued to be treated as a threat to public order. The *Most* anarchist case is again a good example of the Blackstonian bad tendency approach's hold on courts. The appellate court upholding the conviction not only rejected the need for overt acts but further speculated as to why Goldman was allowed to escape punishment for enflaming such followers:

> The evil is untouched if we stop there. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words . . . . It is the power of words that is the potent force to commit crimes and offenses in certain cases.[103]

---

97. 17 THE PAPERS OF JAMES MADISON 205, 336 (Robert A. Rutland et al. eds., 1977).

98. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 307–333 (1956); *see also* James Morton Smith, *President John Adams, Thomas Cooper, and Sedition: A Case Study in Suppression*, 42 MISS. VALLEY HIST. REV. 438 (1955).

99. SMITH, FREEDOM'S FETTERS, *supra* note 98, at 308; Smith, *President John Adams*, *supra* note 98, at 439.

100. SMITH, FREEDOM'S FETTERS, *supra* note 98, at 311; Smith, *President John Adams*, *supra* note 98, at 443.

101. Letter from Thomas Jefferson to John Taylor (June 4, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON (Barbara B. Oberg ed., 2003) ("A little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its true principles.")

102. EDWIN P. HOYT, THE PALMER RAIDS, 1919–1920: AN ATTEMPT TO SUPPRESS DISSENT 6 (1969); *see generally* Turley, *The Indispensable Right*, *supra* note 2.

103. People v. Most, 73 N.Y.S. 220, 222 (Ct. Spec. Sess. 1901).

With America's entry into World War I, there was yet another crackdown on political dissenters with the same relish as the Adams administration.[104] Rage rhetoric was treated as a threat to the survival of the nation. Attorney General Charles Gregory promised the public that he would be unrelenting and unmerciful in his pursuit of those who opposed the war: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[105]

As with the earlier periods, the courts turned a blind eye to First Amendment protections and focused on the harmful messages being espoused by dissenters. These cases often involved rage rhetoric: advocates condemned wars, the government, or capitalism as exploitation or evil.[106] Just as rage gives a sense of license for extreme speech and conduct for citizens, periods of panic politics give license for the government to take extreme measures against citizens. That was certainly the case during World War I and the Court enabled that erosion of free speech through a rehashed Blackstonian notion of "stirring up the objects . . . to revenge, and perhaps to bloodshed."[107] Instead of allowing for prosecution of "schismatical" speech, the Court embraced a standard that offered only superficial improvements over Blackstone. Indeed, the decision in *Schenck v. United States* captures the illusion of objective criteria in criminalizing speech.[108] It would produce one of the most flawed doctrines in history and without question the single most damaging line ever uttered by the Supreme Court in a free speech case.

Schenck showed how narrow functionalist views of free speech allowed courts to simplify cases by dismissing countervailing values or interests. The case involved two leading socialists in Philadelphia—Charles Schenck and Elizabeth Baer—who opposed the draft in World War I. They distributed fliers that merely encouraged men to "assert your rights" in refusing conscription as a form of involuntary servitude. The analogy under the Thirteenth Amendment was fundamentally flawed, but opposing the wars or military service is clearly a protected political viewpoint.

As a leading critic against natural law, it is not surprising that Oliver Wendell Holmes failed to offer a natural-rights or an autonomy-based view of free speech.[109] Indeed, Holmes' solution avoided the free speech issues entirely by focusing the case on the inchoate crime itself. Holmes focused on the alleged violation of the Espionage Act and then further weighed down the analysis by recognizing greater deference to the government in times of war. The issue was

---

104. Jack A. Gottschalk, *"Consistent with Security": A History of American Military Press Censorship*, COMMC'N & L., at 38 (1983).

105. Gregory, *All Disloyal Men Warned*, N.Y. TIMES, Nov. 21, 1917, at 3. For a discussion of this period *see* Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939 (2009).

106. *See, e.g.*, Shaffer v. United States, 255 F. 886 (9th Cir. 1919). *See generally* Turley, *The Indispensable Right*, *supra* note 2.

107. 5 BLACKSTONE, *supra* note 74, at 150.

108. Schenck v. United States, 249 U.S. 47, 47–49 (1919).

109. *See generally* Turley, *The Indispensable Right*, *supra* note 2.

the impact of the flyers on conscription, and that impact was deemed detrimental by the government. In this way, speech can be criminal or non-criminal, depending on the audience and the context if the words "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about" a crime like obstructing the draft.[110] It was a test that would become outcome determinative in wartime and minimally protective in peacetime. The ill-defined "danger" is little more than the prospect of committing the underlying crime. With the added wartime deference and focus away from the free speech interests, it amounts to criminalizing schismatical speech. Holmes then magnified a judicial soundbite that is still repeated mantra-like by those seeking to curtail the free speech of others:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been in their constitutional rights. But the character of every act depends on the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantiative evils that congress has a right to prevent.[111]

"Shouting fire in a crowded theater" quickly became the last refuge for the speech phobic.[112] Holmes later appeared to recognize that his treatment of free speech in *Schenck* was too narrow and his analogy too broad.[113] However, the damage was done and, even though *Schenck* was later set aside, the crowded theater rationale lived on.

Putting aside the dubious *Schenck* standard itself, the wartime deference is a striking component to the analysis. Schismatical speech is often treated as a national security risk. That has consistently been the case throughout our wars, including the Civil War when the Lincoln Administration regularly pursued writers and newspapers for voicing dissenting views. The First Amendment contains no such allowance or qualification. Indeed, dissenting opinions would seem most

---

110. *Schenck*, 249 U.S. at 51–52 (citation omitted).

111. *Id*. at 52.

112. Jonathan Turley, *How the Western world is limiting free speech*, WASHINGTON POST (Oct. 12, 2012), https://www.washingtonpost.com/opinions/shut-up-and-play-nice-how-the-western-world-is-limiting-free-speech/2012/10/12/e0573bd4-116d-11e2-a16b-2c110031514a_story.html [https://perma.cc/S2NH-XBCW]. *See also* Carlton F.W. Larson, *Shouting Fire in a Crowded Theater: The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181 (2015). The only judicial soundbite that rivals Holmes' line as a rationalization for the erosion of constitutional rights is Justice Jackson's statement that "the Constitution is not a suicide pact" in *Terminiello v. Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).

113. This proved a point of contention between Holmes and Learned Hard. The latter wrote to Ernst Freund that "I have so far been unable to make [Holmes] see that he and we have real differences." *See* Douglas Ginsburg, *Afterword to Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 243, 244 (1973) (quoting directly from a letter from Hand to Freund).

valuable as part of a national debate when lives are being lost. What emerges from these periods is a type of state rage rhetoric in rallying citizens against those who fail to support "the cause" or the country. Officials often declare how a nation must be unified and unyielding in war. It must, in other words, be enraged. That affords a type of license under *Schenck* to silence those who would debate or deplete that winning rage factor. Thus, in *Frohwerk v. United States*, Holmes simply noted that being opposed to the means of war was a clear and present danger to the nation: "Whatever might be thought of the other counts on the evidence, if it were before us, we have decided in *Schenck v. United States* that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion."[114] "Words of persuasion" are the danger to be deterred through criminal punishment. Holmes casually relates clearly protected speech like calling for the combatants to "cease firing."[115] There is the usual hyperbolic language or rage rhetoric noted by Holmes in calling the war "murder" and objecting that in order for "a few men and corporations might amass unprecedented fortunes we sold our honor, our very soul."[116] Notably, Holmes still turns a blind eye to the free speech implications even when noting that the actual speech may not have had a measurable impact since "it does not appear that there was any special effort to reach men who were subject to the draft." Yet, Holmes moves beyond that problem by noting that "[i]t is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[117] As a result, the Court allowed for a ten-year sentence to an individual voicing his opposition to war and conscription.

In the case of Eugene Debs, the Court extended this anti-free speech analysis to one of the leading political dissents as well as a candidate for the presidency. This was a direct criminal sanction against a socialist leader voicing opposition to a war. However, under the outcome determinative standard from *Schenck*, even Debs could be imprisoned for schismatical speech. Again, Holmes highlighted the danger that people might be persuaded by Debs' arguments against conscription. Writing for a unanimous Court in *Debs v. United States*,[118] Holmes again ruled for the government, stating that these words had the "natural tendency and reasonably probable effect" of deterring people from supporting or enlisting in the war.[119] It is hard to distinguish this logic from the raw partisan prosecutions under President Adams. He too sought to prevent others from being persuaded by "breath [that] would be enough to kindle a flame" of dissension.[120] In later cases like *Abrams v. United States*, Holmes struggled with an approach that lacked a

114. Frohwerk v. United States, 249 U.S. 204, 206 (1919).
115. *Id.*
116. *Id.* at 207.
117. *Id.*
118. Debs v. United States, 249 U.S. 211 (1919). The defendant was sentenced to ten years in prison.
119. Schenck v. United States, 249 U.S. 47, 216 (1919).
120. Frohwerk v. United States, 249 U.S. 204, 209 (1919).

single coherent underlying theory. Holmes would dissent from upholding the conviction by adopting a narrowing distinction between *Abrams* and his prior opinions. This case was brought under the 1918 Espionage Act rather than the 1917 Espionage Act. The later amendments are commonly referred to as the Sedition Act of 1918 and capture the thrust of the provision to punish speech in its own right. Holmes previously ignored the deprivation of free speech by focusing on the inchoate crimes themselves. In this case, even that pretense was gone. *Abrams* was speech criminalization, plain and simple. The four counts of the indictment charged such offenses as using "disloyal, scurrilous and abusive language about the form of government of the United States" and language "intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute." The *Abrams* case was a prototypical example of rage rhetoric. The Court noted that the men were avowed "rebels," "revolutionists," and "anarchists."[121] They were convicted of throwing pamphlets from a window in New York condemning President Woodrow Wilson for his "shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity." It repeated the common chants of "Workers of the World! Awake! Rise! Put down your enemy and mine!" and "Yes! friends, there is only one enemy of the workers of the world and that is CAPITALISM."[122] The Court upheld the conviction under the prior rulings, but Holmes drew what was a precious distinction given those previously sent away for longer prison terms due to speech. This was consistent with the punishment of "bad tendency" speech. However, Holmes balked and stressed "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force."[123] Holmes belatedly offers a defense of the value of speech in the marketplace of ideas, and states that "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[124]

Putting aside Holmes' painful evolution, the Court itself had come full circle in reaffirming seditious libel and criminalizing anti-government speech. Functionalists like Justice Frankfurter would continue to maintain that the First Amendment is malleable to meet the needs of the moment: the First Amendment "is not self-defining and self-enforcing[, which] neither impairs its usefulness nor compels its paralysis as a living instrument."[125] Yet the moments of accommodation for the government consistently outweighed those calling for accommodations of free speech. The fact is that rage rhetoric like the speech of the *Abrams* defendants is designed to alarm and to arouse. In that context, the "usefulness" of

121. Abrams v. United States, 250 U.S. 616, 618–619 (1919).
122. *Id.* at 620.
123. *Id.* at 630.
124. *Id.*
125. Dennis v. United States, 341 U.S. 494, 523 (1951).

free speech can easily be set aside in light of its costliness. In periods of "temporary panic," this abridged view of free speech would allow the arrests of thousands of communists and dissenters during the Cold War and "Red Scare." By removing the threshold protection of the First Amendment, the Court also enabled the Justice Department to use the grand jury process to target and coerce political dissidents.[126] While most everyone denounces the work of "Un-American Activities" committees, they often ignore how the underlying abuses were facilitated by the lack of protections afforded by the Court, and by the adoption of the Blackstonian model.[127] This anemic view of free speech was supported by intellectuals like Professor Carl Auerbach, who maintained that allowing constitutional protections for speech was itself a threat to the Constitution.[128] If the function of free speech is to advance the constitutional system as whole (as opposed to a natural or liberty-based right), speech that challenges that system loses its protections. Under this view, it is antithetical to interpret the amendment "to curb the power of Congress to exclude from the political struggle those groups which, if victorious, would crush democracy and impose totalitarianism."[129]

The post-*Schenck* case law includes efforts to encompass dissenting views within the protections of the First Amendment. *Whitney v. California* is particularly celebrated for Brandeis' concurrence on how important free speech is to our constitutional system.[130] At issue was a defendant who sought to create a communist group in California. Notably, the Court unanimously upheld the abusive conviction under the Criminal Syndicalism Act of California. It was another application of the "bad tendency" speech logic amidst a "clear and present danger." Brandeis spoke eloquently of the value of dissent while agreeing to send Whitney to prison for exercising that right:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as

126. Note, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

127. As Professor Stone observed:

> The long shadow of the House Committee on Un-American Activities (HUAC) fell across our campuses and our culture. . . . In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and association; and direct prosecution of the leaders and members of the Communist Party of the United States.

Stone, *supra* note 105, at 939, 949–50, 954.

128. Carl Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 184 (1956); *see also id.* at 189.

129. *Id.*

130. Whitney v California, 274 U.S. 357 (1927).

> an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[131]

Brandeis's language is both penetrating and poetic. Still, he concurred in the result. Many have cited Brandeis' jurisdictional views as the reason for this "curious concurrence."[132] His solution would foreshadow the *Brandenburg* test in opposing criminalization where there is still "time to respond." Yet, he agreed that Whitney could be sent to prison for merely seeking to create a communist group. There remained the right of the government to prosecute a woman[133] who merely sought to establish a Communist Labor Party. Brandeis's failure to focus on the overt acts themselves added to a morass of uncertainty in an area that demands bright-line rules. The "evil" was still the potential for public unrest or even unease; tweaking the specific standard kept the Supreme Court's jurisprudence tethered to mere speech crimes as in cases like *Dennis v. United States* and *Whitney*.

After the fractured decision in *Dennis* (and the abuse of the McCarthy period), the Court would reach relative *terra firma* with a new standard in *Brandenburg v. Ohio*.[134] It would come in a case that again embodied rage rhetoric. In the case, Clarence Brandenburg, an Ohio KKK leader, was charged after holding a televised rally in which he railed against "our President, our Congress, our Supreme Court" for their effort "to suppress the white, Caucasian race." He called for sending African Americans to Africa and Jewish Americans to Israel. It was hateful

131. *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring).

132. Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in* Whitney v. California, 2005 SUP. CT. REV. 333 (2005).

133. Charlotte Anita Whitney came from a prominent family, whose illustrious members included the American Supreme Court Justice Stephen Johnson Field.

134. 395 U.S. 444 (1969) (per curiam).

and unhinged. The value of these ideas is clearly negative for society. However, it is not the content of the ideas but the right to express them that is valued in a free society. He was charged under an Ohio law criminalizing the advocacy of crime or violence or to assemble with a group for that purpose.[135] The Court unanimously declared the law unconstitutional and established that criminal liability for "advocacy of the use of force or of law violation" cannot be charged absent words "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[136] The abandonment of the *Schenck* standard was welcomed and long overdue. *Brandenburg* created a more challenging standard, but it still allowed the criminalization of speech for incitement to vague "lawless action." The problem is that the Court changed the standard but offered little in terms of breaking away from the functionalist approach to free speech.

The standard is the outgrowth of Holmes' effort to confine prosecution to speech causing "a clear and present danger." It removed any question about criminalizing the mere advocacy of future unlawful acts. The added requirement of imminency further narrowed the permissible range of criminality that existed under the "clear and present danger" standard. Criminal liability for "advocacy of the use of force or of law violation" cannot be charged absent words "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[137]

In *Hess v. Indiana*, an anti-war activist was again accused of inciting lawless conduct.[138] In May of 1970, Gregory Hess was with roughly 150 other antiwar protesters at Indiana University when he was overheard telling others, "We'll take the fucking street later" or "We'll take the fucking street again."[139] Hess was convicted in Indiana state court of disorderly conduct.[140] In this case, there was an underlying state law seeking to prevent the "evil" of public disorder. The state criminalized "loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting."[141] The Court overturned his conviction on the basis of *Brandenburg*. The holding, however, illuminated the still fluid line of protected advocacy and criminal advocacy:

> Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or

135. *Id.* at 444–45.
136. *Id.* at 447.
137. *Id.*
138. *Id.*
139. *See* Hess v. Indiana, 414 U.S. 105, 107 (1973).
140. *Id.* at 107–08.
141. *Id.* at 105 n.1.

> rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had 'a tendency to lead to violence.'[142]

Putting aside that Hess was advocating retaking the street as "an action," the Court simply declared that his advocacy would not produce "imminent disorder."[143] The obvious import is that, under other circumstances, a court could find that those same words sufficiently threatened imminent disorder and thus could be criminally charged. The correct result, therefore, was mired in the same uncertainty. The Court did not adopt one bright-line option: to reject charges based on how third parties might react to such advocacy and to charge any overt actions of rioting. As the dissent noted, it seems clear that there was already public disorder:

> By contrast to the majority's somewhat antiseptic description of this massing as being 'in the course of the demonstration,' the demonstrators' presence in the street was not part of the normal 'course of the demonstration' but could reasonably be construed as an attempt to intimidate and impede the arresting officers.[144]

The Court offered no explanation for the different treatment between the rage rhetoric cases. In a case like *Whitney*, the defendant sought to create a political party.[145] In *Hess*, there were demonstrators in the street.[146] The dissent is right to accuse the majority of an "antiseptic description" even if it was wrong on the ultimate conclusion on the underlying free speech rights.[147] The Court's refusal to create a bright line with a focus on overt acts and the conspiracy to bring about those acts leaves lingering elements of the "clear and present danger" standard. That residual element would again become magnified after January 6, 2021.

B. "Toxic Ideology": History Repeating Itself in Speech Legislation and Regulation

Despite the widely shared and bipartisan outrage over the riot on January 6, such terrible events produce secondary risks for free speech in the ensuing "panic politics." That backlash historically has included sedition prosecutions that serve powerful political purposes. However, there is an even greater concern over direct efforts to curtail speech and particular ideologies in the United States.

After January 6, there was a revival of ideology as the basis for criminal investigations and potential criminal charges. The Justice Department charged a small

142. *Id.* (emphasis added).
143. *Id.* at 109.
144. *Id.* at 110 (Rehnquist, J., dissenting).
145. *See* Whitney v. California, 274 U.S. 357 (1927).
146. *See Hess*, 414 U.S. at 106.
147. *Id.* at 109 (Rehnquist, J., dissenting).

number of these cases as sedition conspiracies. The legitimacy and continued use of this charge is addressed in other work.[148] However, the riot rekindled congressional interest in passing new measures targeting groups based on their ideology under the Domestic Terrorism Prevention Act.[149] The legislation specifically mandates a domestic terrorism category that includes "White-supremacist-related incidents or attempted incidents."[150] Thus, the use of the mandatory "shall" would suggest that Congress is ordering the Executive Branch to "focus" on specific domestic terrorism subjects.

On its face, the law runs counter to the separation of powers. As the Supreme Court stated in *United States v. Nixon*, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[151] That authority is based on the Take Care Clause and the inherent Article II powers over the enforcement of federal law.[152] It is not simply the power to prosecute but to make all the decisions identifying and developing prosecutorial cases. That includes "[t]he Executive's charging authority[, which] embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought."[153] Courts have stressed that, while Congress has its own investigatory powers, "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our constitution to the Executive and the Judiciary."[154] The Justice Department and related agencies have a robust investigative system that targets violent extremists in the United States as they have significantly increased in

---

148. *See generally* Turley, *The Indispensable Right*, *supra* note 2.

149. *See generally 'Metastasizing'* (testimony of Professor Jonathan Turley), *supra* note 3. Under Section 3(d), Congress stipulates that:

> The domestic terrorism offices authorized under paragraphs (1), (2), and (3) of subsection (a) shall focus their limited resources on the most significant domestic terrorism threats, as determined by the number of domestic terrorism-related incidents from each category and subclassification in the joint report for the preceding 6 months required under subsection (b).

Domestic Terrorism Prevention Act of 2022, H.R. 350, 117th Cong. §3(d) (2021).

150. *Id.*

151. 418 U.S. 683, 693 (1974); *see also* United States v. Armstrong, 517 U.S. 456, 467 (1996) ("[O]ne of the core powers of the Executive Branch of the Federal Government [is] the power to prosecute.").

152. Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict—decision which has long been regarded as the special province of the Executive Branch" comes from U.S. Const., Art. II, § 3, which charges the Executive "to take Care that the Laws be faithfully executed.").

153. United States v. Fokker Service B.V., 818 F.3d 733, 737 (D.C. Cir. 2016).

154. Quinn v. United States, 349 U.S. 155, 161 (1955). Likewise, Justice Douglas stressed that "Congress is not a law enforcement agency; that power is entrusted to the Executive. Congress is not a trial agency; that power is entrusted to the Judiciary." United States v. Welden, 377 U.S. 95, 117 (1964) (Douglas, J., dissenting); *see also* Trump v. Mazars USA, LLP, 940 F.3d 710, 755 (D.C. Cir. 2019) (Rao, J., dissenting), *vacated* 140 S. Ct. 2019 (2020) ("[C]ongress cannot prosecute and decide specific cases against individuals. Such powers properly belong to the executive branch and the independent judiciary—a division essential to maintaining fundamental aspects of our separation of powers and protecting the rights of individuals accused of illegal actions.").

recent years.[155] The Justice Department announced the creation of a special domestic terrorism unit and has shifted resources to increase investigations in that area.[156] The Biden Administration also implemented a National Strategy for Countering Domestic Terrorism that coordinates the work of not just the FBI and the U.S. Attorney's office, but the National Security Division, the Civil Rights Division, the Tax Division, and the Criminal Division.[157] The underlying cases all concern extremist violence, and are prioritized by the government according to the severity and immediacy of the risk to the public. White supremacists are a legitimate focus of the federal government. However, the category of Racially or Ethnically Motivated Violent Extremists (REMVE) includes the full range of racial groups. Indeed, Buffalo[158] and other mass-casualty incidents (like the one in Waukesha[159]) often reveal views that are a wicked brew of racist and other hateful ideologies. The Justice Department must sort through such violent extremist chatter to identify the most serious threats to public safety.[160]

---

155. *See* Luke Barr & Alexander Mallin, *FBI More Than Doubles Domestic Terrorism Investigations: Christopher Wray*, ABC NEWS (Sept. 21, 2021), https://abcnews.go.com/Politics/fbi-doubles-domestic-terrorism-investigations-christopher-wray/story?id=80145125 [https://perma.cc/P8CU-GA76].

156. *See Justice Department Announces the Creation of a Unit Focusing on Domestic Terrorism*, ASSOC. PRESS (Jan. 11, 2022), https://www.pbs.org/newshour/politics/watch-live-senate-judiciary-committee-hearing-on-domestic-terrorism-following-the-jan-6-attack [https://perma.cc/HM9Z-XFE2].

157. *Domestic Terrorism Threat One Year After January 6: Hearing before the S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Matthew G. Olsen, Assistant Att'y Gen., Department of Justice & Jill Sanborn, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation). Joint Terrorism Task Forces are tasked with the investigation and prosecution of a wide array of Domestic Violent Extremists ("DVEs"), Homegrown Violent Extremists ("HVEs"), Racially or Ethnically Motivated Violent Extremists ("RMVEs"), Anti-Government or Anti-Authority Violent Extremists ("AGAAVEs"), Militia Violent Extremists ("MVEs"), and Anarchist Violent Extremists ("AVEs"). This alphabet soup reflects the mix of motives and threats posed by extremist groups from the left and the right.

158. Payton Gendron's manifesto was a vile mix of racist and anti-Semitic views. He discussed how he was radicalized on social media. Justin Ling, *How 4Chan's Toxic Culture Helped Radicalize Buffalo Shooting Suspect*, GUARDIAN (May 18, 2022), https://www.theguardian.com/us-news/2022/may/18/4chan-radicalize-buffalo-shooting-white-supremacy [https://perma.cc/M76D-N9MS]. It included attacks on Fox New figures as well as other media. David Meyer, *Payton Gendron's Manifesto Featured Anti-Semitic Memo Attacking Fox News*, N.Y. POST (May 15, 2022), https://nypost.com/2022/05/15/payton-gendrons-manifesto-featured-anti-semitic-fox-news-meme/ [https://perma.cc/8YEL-CSDC].

159. Darrell Brooks Jr. posted racist diatribes on his social accounts that showed deeply disturbed and hateful views. Brad Hunter, *Accused Hunter Waukesha Parade Driver Posted Toxic Anti-White Rhetoric*, TORONTO SUN (Nov. 21, 2021), https://torontosun.com/news/world/accused-killer-waukesha-parade-driver-posted-toxic-anti-white-rhetoric [https://perma.cc/DD45-AWWC]; Karen Ruiz, *Waukesha Suspect Shared Social Media Posts Promoting Violence Towards White People and Claiming Black People were the 'True Hebrews'*, DAILY MAIL (Nov. 23, 2021), https://www.dailymail.co.uk/news/article-10235869/Waukesha-suspect-shared-social-media-posts-promoting-violence-white-people.html [https://perma.cc/J4N9-JD29].

160. The DTPA focuses on white supremacy and neo-Nazi elements in legislating domestic terrorism measures. It is certainly true that such groups have been repeatedly identified by the FBI as a major security threat to our country. Moreover, our fight against white supremacy groups like the KKK has left deep and still unhealed wounds in our country. FBI Director Christopher Wray has repeatedly reaffirmed that targeting white supremacy groups is a priority of the department.

The most prominent element in recent proposals is the attempt to use ideology as the basis for enhanced targeting for criminal investigation and prosecution.[161] As discussed above, this country has a long history of targeting unpopular groups as inherently threatening to the nation, from anarchists to socialists to communists. The effort to base the initiation of criminal investigations on ideology is based on the same "bad tendency" judgment. The alternative is to focus on groups with specific violent agendas, which has been the focus of the FBI. The KKK and neo-Nazi groups have been targeted due to their active sponsorship of violent attacks as opposed to rage rhetoric. These proposals often target hate speech.

Rage rhetoric and hate speech often overlap. Despite being protected under the First Amendment, efforts continue to criminalize such speech directly or based on ill-defined influence over criminal acts. For example, another bill, the "Leading Against White Supremacy Act of 2023,"[162] would specifically target "white supremacy ideology" and anti-immigration views for criminalization. Under the LAWS Act, the key provision states:

> A person engages in a white supremacy inspired hate crime when white supremacy ideology has motivated the planning, development, preparation, or perpetration of actions that constituted a crime or were undertaken in furtherance of activity that, if effectuated, would have constituted a crime.[163]

Thus, anyone who is accused of white supremacy ideology (as opposed to other extremist ideologies) can be charged if such views "motivated" others to plan or perpetrate criminal acts. It makes clear that the accused does not actually have to support or conspire in a crime. Even being accused of espousing "replacement theory" is enough to generate a federal charge. It further allows postings on social media to be the basis for criminal charges:

> (B) at least one of whom published material advancing white supremacy, white supremacist ideology, antagonism based on "replacement theory", or hate speech that vilifies or is otherwise directed against any non-White person or group, and such published material—
>
> (i) was published on a social media platform or by other means of publication with the likelihood that it would be viewed by persons who are predisposed to engaging in any action in furtherance of a white supremacy inspired hate crime, or who are susceptible to being encouraged to engage in actions in furtherance of a white supremacy inspired hate crime;
>
> (ii) could, as determined by a reasonable person, motivate actions by a person predisposed to engaging in a white supremacy inspired hate crime or by a

161. These proposals include mandating specific reporting of white ideology investigations. *See* White Supremacy in Law Enforcement Information Act of 2021, H.R. 1031, 117th Cong. (2021).

162. Leading Against White Supremacy Act of 2023, H.R. 61, 118th Cong. (2023).

163. *Id.*

> person who is susceptible to being encouraged to engage in actions relating to a white supremacy inspired hate crime; and
>
> (iii) was read, heard, or viewed by a person who engaged in the planning, development, preparation, or perpetration of a white supremacy inspired hate crime.[164]

Such legislation remains thankfully without sufficient support in Congress. However, they reflect a familiar and dangerous view of certain speech that is so hateful that it falls outside of the First Amendment. Indeed, leading politicians have declared that hate speech generally is unprotected.[165]

These proposals track laws and opinions in other countries that are criminalizing particular ideologies and forms of rage rhetoric. Again, the United Kingdom has taken the lead in such thought-crime prosecutions. The United Kingdom passed the Terrorism Act 2000,[166] which criminalizes a wide array of not just speaking but reading dangerous ideas. The key provision states:

> (1) A person commits an offence if—
> (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism,
>
> (b) he possesses a document or record containing information of that kind or
>
> (c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.[167]

The law has been used to punish dangerous views, including the case of Nicholas Brock, a neo-Nazi who was given a four-year sentence for what the court called his "toxic ideology."[168] Police searched Brock's room and found a montage of hateful symbols as well as weapons, including SS memorabilia and a KKK recognition certificate.[169] Brock was charged with three counts of possession of material likely to be useful to a person committing or preparing a terrorist act. Judge Peter Lodder QC denounced Brock for his room decorations, tattoos, books, and photographs, declaring "you are a right-wing extremist, your enthusiasm for this repulsive and toxic ideology is demonstrated by the graphic and racist

---

164. *Id.*

165. *See, e.g.*, Jonathan Turley, *Sen. Carson: Hate Speech is Not Protected Under First Amendment*, RES IPSA (Dec. 31, 2022), https://jonathanturley.org/2022/12/31/sen-cardin-hate-speech-is-not-protected-by-first-amendment/ [https://perma.cc/49CG-CZM8].

166. Terrorism Act 2000, c. 11 (UK).

167. *Id.*

168. Jonathan Turley, *"Toxic Ideology": English Neo-Nazi Given Four Years For His Extremist Views*, RES IPSA (May 26, 2021), https://jonathanturley.org/2021/05/26/toxic-ideology-english-neo-nazi-given-four-years-for-his-extremist-views/ [https://perma.cc/3WXF-V2AB].

169. Dan Sales, *Neo-Nazi With Far-right Items is Jailed for Four Years*, DAILY MAIL (May 25, 2021), https://www.dailymail.co.uk/news/article-9617127/Neo-Nazi-52-lived-bedroom-far-right-items-jailed-four-years.html [https://perma.cc/2JZE-GEWA].

iconography which you have studied and appeared to share with others . . . ." Merely harboring these views, without dissemination or other overt acts, was found to be sufficient for a criminal charge:

> It is submitted on your behalf that these are not obscure documents, are not specialist material and that two of them can be purchased on-line. That there was no preparation for any act, and that you are in your 50s, walk with a stick there was no evidence of disseminating to others. I do not sentence you for your political views, but the extremity of those views informs the assessment of dangerousness.[170]

Detective Chief Superintendent, Kath Barnes, Head of Counter Terrorism Policing South East (CTPSE) acknowledged that others might collect such items for historical or academic purposes. Brock crossed the line because he agreed with the underlying views:

> From the overwhelming evidence shown to the jury, it is clear Brock had material which demonstrates he went far beyond the legitimate actions of a military collector . . . . Brock showed a clear right-wing ideology with the evidence seized from his possessions during the investigation . . . . We are committed to tackling all forms of toxic ideology which has the potential to threaten public safety and security.[171]

The Brock case, and the underlying law, shows how criminalizing speech quickly morphs into cracking down on "toxic ideologies." The rationalization for this extension is not just that the speech has low value but has a high cost due to how others receive it.

While hate speech is protected in the United States, many scholars have argued that some speech should fall outside of the scope of the First Amendment.[172] States have sought to evade First Amendment protection of hate speech by declaring harmful speech akin to assault. For example, an Oregon statute criminalized harassment by "publicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response."[173] An example is *State v. Johnson*,[174] where actual (road) rage rhetoric was at issue. The defendant was arrested after a traffic dispute during which he shouted racial and anti-gay epithets at two women in another car. Astonishingly, both the trial and appellate courts rejected free speech challenges, but the Oregon Supreme Court

---

170. Turley, *Toxic Ideology*, *supra* note 168.

171. *Id.*

172. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO (1994); RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997); CATHARINE A. MACKINNON, ONLY WORDS (1993).

173. OR. REV. STAT. § 166.065(1)(a)(B) (2023).

174. 345 Or. 190 (2008).

struck down the provision as violative of free speech. Though it found the statute overbroad, the court worryingly accepted the state's argument that "the gravamen of the offense is not in the prohibition of expression *per se,* but in the prevention of a type of 'harm' that the legislature believes can be caused by expression."[175] The court noted that the law does not require any act, let alone any crime:

> There is no requirement that the hearer actually respond violently, or respond at all. And, finally, there is no requirement that any possible violence be imminent. The offense is complete if the offender speaks the words or makes the gestures in public in a manner intended (and likely) to provoke a violent response by *someone* at *some time* and the hearer is 'harass[ed]' or 'annoy[ed].'[176]

The Court held that "[t]he harm that the statute seeks to prevent—harassment or annoyance—generally is one against which the Oregon Constitution does not permit the criminal law to shield individuals when that harm is caused by another's speech."[177] This was a case of pure rage. However, it is still rightfully protected as an individual right of expression.[178] The pernicious Oregon law is a valid example of the need for this free speech rule. It shows how the criminalization of speech becomes so subjective as to be undefinable beyond the inclinations and sensibilities of the prosecution.

Notably, these laws are designed to create chilling effects. By creating uncertainty over what constitutes toxic or harmful speech, legislators hoped citizens will self-censor. The Supreme Court has long identified this chilling effect as a danger to free speech.[179] Putting aside the constitutional questions for such efforts in the United States, the practical question is whether jailing people like Brock is worth the cost to free speech. It is unlikely that these prosecutions will seriously reduce the support for extreme viewpoints any more than Germany's prosecution of a man with a Hitler speech as a ringtone reduced the appeal of neo-Nazism.[180] To the contrary, it is more likely to reaffirm victimization and the extreme narratives of these fringe groups. The English law has targeted rage rhetoric (or "toxic

175. *Id.* at 195.

176. *Id.*

177. *Id.* at 197.

178. This was not the result in other countries like Canada where even a trash-talking comedian was criminally charged for an exchange from the stage with a table of lesbian audience members. Jonathan Turley, *The Death of Free Speech*, WASHINGTON POST (Oct. 12, 2012), https://www.washingtonpost.com/opinions/shut-up-and-play-nice-how-the-western-world-is-limiting-free-speech/2012/10/12/e0573bd4-116d-11e2-a16b-2c110031514a_story.html [https://perma.cc/Q7AC-FFP3].

179. Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) ("This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like school teachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason.").

180. Jonathan Turley, *Mein Ringtone: Man Arrested For Having Hitler Speech As Ringtone,* RES IPSA (July 2, 2010), https://jonathanturley.org/2010/07/02/mein-ringtone-man-arrested-for-having-hitler-speech-as-ringtone/ [https://perma.cc/PF63-SDRT].

ideology") rather than conventional hate speech, but the thrust is the same: it criminalizes "low-value, high-cost" speech.

C. The Right of Rage: The Constitutional Value of "Low-Value Speech"

Rage rhetoric is often treated as part of an amorphous category of "low value" speech. The courts have long struggled with the protection of false or hateful speech. Rage rhetoric is often both hateful and based on false claims. For functionalists, that makes the protection of rage rhetoric less compelling under the First Amendment. However, for those of us with a broader view of free speech, the value of the speech is not in its content but its exercise.[181] Yet, even a largely functionalist Supreme Court has recognized both hate and false speech are protected. *Brandenburg* itself is an example of hate speech that was protected. In *Virginia v. Black*[182] the Supreme Court struck down a state law criminalizing cross burning. Likewise, in *U.S. v. Alvarez*, the government pushed the rationale of "low value" speech in defending the Stolen Valor Act.[183] Even though the Court agreed that "false representations have the tendency to dilute the value and meaning of military awards," it refused to narrow the scope of the First Amendment by excising false statements from the category of protected free speech.[184] Rage rhetoric can also be placed under definitions of "disinformation" and "malinformation." When not denounced as hate speech, rage rhetoric can be defined as harmful disinformation on subjects ranging from gender identity to climate change. Evidence of government programs and grants to blacklist or target "disinformation" sites can raise similar issues. The close coordination on censorship programs can constitute a form of agency to trigger First Amendment protections as what I have called "censorship by surrogate."[185] Notably, in hearings on the government censorship efforts, Democratic members opposed further investigation by quoting *Schenck* and Holmes' crowded theater line.[186] The underlying speech was denounced as voices of racists and insurrectionists.

The Supreme Court has rejected the notion that there is a spectrum of speech protections that track the underlying value of the content of the views.[187] However, even with political or religious speech considered "high value," there are collateral efforts to sanction viewpoints deemed harmful to society. These

---

181. *See generally* Turley, *The Indispensable Right*, *supra* note 2.

182. 538 U.S. 343 (2003).

183. United States v. Alvarez, 567 U.S. 709 (2012).

184. *Id.*

185. *See generally Weaponization of the Federal Government* (testimony of Professor Jonathan Turley), *supra* note 3.

186. Jonathan Turley, *"Free Speech for Whom?": Former Twitter Executive Makes Chilling Admission on the "Nuanced" Standard Used for Censorship*, RES IPSA (Feb. 9, 2023), https://jonathanturley.org/2023/02/09/free-speech-for-whom-former-twitter-executive-makes-chilling-admission-on-the-nuanced-standard-used-for-censorship/ [https://perma.cc/KKW7-9R6X].

187. Clearly, the Court's jurisprudence is not without contradicting elements on this point. While the Court in *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942), seemed to qualify the protection of profanity, later cases often contradicted that notion particularly when obscenity is tied to political expression. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971).

efforts came to a head in *303 Creative LLC v. Elenis*,[188] where the United States Court of Appeals for the Tenth Circuit upheld sanctions for a web designer who refused to work on projects for same-sex marriages. The court rejected challenges both to the state's censorship of the web designer's public statements as well as compelled speech in being forced to prepare the website.[189] While recognizing that the designer's speech was protected under the First Amendment, the court held that it could be sanctioned in the balancing of interests since "[e]liminating . . . ideas is [the law's] very purpose."[190] The Supreme Court reversed and held that "tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands."[191]

The value of rage rhetoric is difficult to articulate when most of us recoil at the underlying viewpoints. However, beyond the protection of a natural-rights or autonomy-based right, rage can also have a cathartic effect. While many of us have objected to this age of rage and the loss of real discourse in our politics, rage is often the expression of fundamental grievances in our society. The rage of the Tea Party members, the anarchists, and the Black Panthers reflect real economic, social, or racial injuries. Such inflammatory speech is meant to shock or shame an audience. It forces to the surface passions that are simmering just below the public discourse. That allows these views to be addressed and these passions (ideally) to be funneled into more deliberative forums. That is obviously not always the case. We have seen violence from the Boston harbor to Haymarket Square to the U.S. Capitol. Yet, these incidents remain fairly exceptional in our history given the level of rage that is often expressed during periods of great division or discord.

Protecting rage rhetoric does not mean one believes that the underlying views have merit, but that the cost of censoring or prosecuting such views comes at an even greater cost to the individual right to free expression. Reckless or rageful language can undoubtedly fuel others. The speech of former President Donald Trump on the Ellipse preceding the January 6 riot is paradigmatic of this reality.[192] While Trump faces an array of criminal charges, they are generally focused on alleged overt acts of fraud, illegality, or obstruction.[193] While some

188. 6 F.4th 1160 (10th Cir. 2021).

189. *See generally* Jonathan Turley, *The Unfinished Masterpiece: Compulsion and the Evolving Jurisprudence Over Free Speech*, 83 MD. L. REV. (forthcoming 2023).

190. *303 Creative LLC*, 6 F.4th at 1178.

191. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2333 (2023).

192. Recently, President Biden has been accused of inflammatory speech directed at Trump supporters including calling them "semi-fascists" and threats to the nation. Shannon Pettypiece, *Biden attacks Trump, MAGA Republicans as a threat to democracy in blistering speech*, NBC NEWS (Sept. 1, 2022), https://www.nbcnews.com/politics/joe-biden/biden-give-prime-time-speech-battle-soul-nation-stepped-attacks-republ-rcna45766 [https://perma.cc/E2Q7-9AUY].

193. For example, in August 2022, his home at Mar-a-Lago was the focus of an unprecedented FBI raid to seize classified material allegedly held by Trump in violation of federal laws, including the Presidential Records Act. Jonathan Lemire, Kyle Cheney & Nicholas Wu, *Trump's Mar-a-Lago home*

of the allegations like the 2023 case in Manhattan raise dubious legal claims,[194] it is the January 6 prosecution by Special Counsel Jack Smith that presents the question of where to draw the line between protected rage and criminalized extremist rhetoric.[195] The second federal Trump indictment acknowledges that candidates are allowed to make false statements, but Smith proceeded to charge Trump for making "knowingly false statements." It notably does not charge Trump with sedition, seditious conspiracy, or insurrection. Instead, Trump is charged with four counts: conspiracy to defraud the United States, conspiracy to obstruct an official proceeding, obstruction of and attempt to obstruct an official proceeding, and conspiracy against rights. Yet, it is still a threat to free speech in criminalizing false statements as the basis for these claims.[196]

Unsurprisingly, Donald Trump could prove a key case for criminalizing rage rhetoric. Trump has built his political career on unleashing the rage of his supporters by attacking various groups, from the media to establishment Republicans. He often uses inflammatory and reckless rhetoric, though he is not unique in that respect. If there is a right to rage, it would hardly be surprising if Trump emerged as the case to establish that right. Yet, the case against Trump is a unique combination of many of the most salient characteristics of the early sedition cases.

The gist of the January 6 allegations remains incitement, encouragement to riot, or insurrection. However, at the heart of the allegations linger reckless and potentially violent speech. Any appeal would return the Court to the earlier logic of cases like *Gitlow*, where the Court embraced the notion that some speech can be criminalized if it invites anarchy: "A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."[197] The Court held that the government does not have to wait until a spark "has enkindled the flame or blazed into the conflagration."[198] This description is prophetic for many critics of Trump's Ellipse speech and its role in

---

searched by FBI in unprecedented move, POLITICO (Aug. 8, 2022), https://www.politico.com/news/2022/08/08/trump-fbi-maralago-search-00050442 [https://perma.cc/9TAM-AHEV]. A charge under Section 2071 presents a "clean" criminal framing for prosecution for anyone who "willfully and unlawfully conceals, removes, mutilates, obliterates or destroys . . . any record, proceeding, map, book, paper, document, or other thing, filed or deposited . . . in any public office." That crime requires a showing of not just negligence but that "an act is . . . done voluntarily and intentionally and with the specific intent to do something the law forbids." 18 U.S.C. § 2071.

194. Jonathan Turley, *Yielding to Temptation: Why the Trump Case is a Test Not Just for the President but the Legal System*, RES IPSA (Apr. 5, 2023), https://jonathanturley.org/2023/04/05/yielding-to-temptation-why-the-trump-case-is-a-test-for-not-just-for-the-president-but-the-legal-system/ [https://perma.cc/ZPF5-TNNR].

195. Kevin Johnson, *AG Merrick Garland appoints special counsel to oversee Trump criminal investigations*, USA TODAY (Nov. 18, 2022), https://www.usatoday.com/story/news/politics/2022/11/18/ag-merrick-garland-trump-special-counsel/10712493002/ [https://perma.cc/B5J3-58GA].

196. Jonathan Turley, *Indicting Trump for 'Knowingly False Statements' about Election Sets US on Dangerous Path*, USA TODAY, Aug. 2, 2023.

197. Gitlow v. New York, 268 U.S. 652, 669 (1925).

198. *Id.*

enflaming the rage before the riot at the Capitol. Yet, the *Gitlow* approach is untethered even from the "clear and present danger" standard.[199]

The Trump Ellipse speech represents a type of stress test for the post-*Schenck* cases—particularly the effort to ameliorate the damage of the "clear and present danger" standard. It will expose the current foundation of free speech in the courts. One of the most intriguing aspects of the Trump allegations is that they fall into two conceptual lines that parallel the strains in the American jurisprudence surrounding sedition. Under the English model, the Court's inquiry focused on the potential effect of speech, not on whether the speech was true or not, or what type of effect it actually caused. In later American cases, courts continued to embrace the "bad tendency" rationale continued this emphasis on the speech itself.[200] However, in other cases, the focus would shift to the intended effect or the resulting action. Those issues have now cycled back into major litigation against January 6 defendants. The Trump speech falls precisely in the middle of the morass of *Schaefer*, *Dennis*, *Gitlow*, and *Whitney* before the adoption of the *Brandenburg* standard.[201] Those cases were emblematic of the Court's struggle to preserve the criminalization of speech while seeking to impose discernible limits on the government. The absence of overt acts led justices to emphasize certain "evils" of extremist speech that raise the risk of anarchy and disorder.[202] While relying on a "clear and present danger" rationale, the Court embraced the "bad tendencies" approach that allows prosecution for "utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow."[203] Citing *Gitlow*, a validating "evil" included speech that "endanger the foundations of organized government."[204]

Trump's speech is clearly protected under *Brandenburg*.[205] Indeed, using the speech itself for a charge (absent some evidence of an actual conspiracy) would erase any line distinguishing simple advocacy for political change from criminal advocacy. While Smith was viewed by some as stretching the criminal code on the January 6 charges, he notably did not believe that he could sustain an

---

199. Indeed, it seems untethered to the First Amendment in accepting an all-encompassing power once Congress has carved out an entire area of seditious speech:

> [W]hen the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

Id. at 670.

200. *See generally* Turley, *The Indispensable Right*, *supra* note 2.

201. 251 U.S. 466 (1920); 341 U.S. 494 (1951); 268 U.S. 652 (1925); 274 U.S. 357 (1927); 394 U.S. 444 (1969).

202. Schenck v. United States, 249 U.S. 47, 52 (1919).

203. *See Whitney*, 274 U.S. at 371.

204. *Id.*

205. 394 U.S. 444 (1969).

incitement or sedition case. Yet, even using obstruction claims, there remains the underlying concern over the lack of a limiting principle in the charges.[206] On January 6, some Republicans joined an effort to challenge the certification of the election. While many of us strongly disagreed with the basis for that challenge, federal law allows for members to do so. Indeed, Democrats have repeatedly organized such challenges, including contesting the elections of George W. Bush and Donald Trump.[207] A court must start this analysis by recognizing that such challenges are not only allowed under the Electoral Count Act, but protected as political speech.[208] If the certification challenge were a lawful course of conduct for opponents to the election in Congress, demonstrations in support of that option were also protected speech. Indeed, such protests have occurred in prior years during certifications or inaugurations. It is a common practice for political groups to go to state or federal capitols to support or oppose efforts by legislators.

The question is whether there were elements in Trump's speech and actions on that day that crossed the line from extreme speech to criminal speech. The existing precedent presents barriers even with the availability of sedition as a charge. Trump's speech repeatedly references going to the Capitol to support those members who are committed to the challenge and to encourage others (particularly Vice President Michael Pence) to join the effort.[209] Again, many of us challenged Trump's claims as he was giving them on the Ellipse.

However, Trump will be able to argue such language fell squarely within the protections of *Brandenburg*. For example:

> And Mike Pence is going to have to come through for us, and if he doesn't, that will be a, a sad day for our country because you're sworn to uphold our Constitution.
>
> Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down.

---

206. The same concern over the lack of a limiting principle is evident in the novel theory that Trump can be barred (with dozens of other Republicans) from the ballot under the 14th Amendment. The text of the amendment offers obvious limiting language by confining its operation to those who "engaged in insurrection or rebellion against the same" as well as those who gave "aid and comfort" to such individuals. January 6th was many things from a desecration of our constitutional process to a violent riot. It was not a rebellion or insurrection. Notably, Trump has not faced such charges in multiple indictments. Jonathan Turley, *The Disqualification of Donald Trump and Other Constitutional Urban Legends*, RES IPSA (Aug. 21, 2023) https://jonathanturley.org/2023/08/21/the-disqualification-of-donald-trump-and-other-legal-urban-legends/ [https://perma.cc/98AZ-DKD8].

207. *See* Jonathan Turley, *The Illegality . . . was Obvious: An Analysis of the Carter Decision on January 6th*, RES IPSA (Apr. 2, 2022), https://jonathanturley.org/2022/04/02/the-illegality-was-obvious-an-analysis-of-the-carter-opinion-on-jan-6th/ [https://perma.cc/MS28-U8RU].

208. Electoral Count Act, 3 U.S.C. § 15 (1994).

209. *Trump's Speech Before Mob Stormed Capitol*, ASSOC. PRESS (Jan. 14, 2022), https://www.marketwatch.com/story/trumps-speech-before-mob-stormed-capitol-familiar-refrains-and-grievances-tall-tales-and-disputed-data-and-an-invitation-to-march-together-down-pennsylvania-avenue-01610604782 [https://perma.cc/PH2R-38NV].

> Anyone you want, but I think right here, we're going to walk down to the Capitol, and **we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them**.
>
> Because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated.
>
> I know that everyone here will soon be marching over to the Capitol building **to peacefully and patriotically make your voices heard**.[210]

The question is how to distinguish those lines from other political protests that turned violent. Under *Brandenburg*, Trump has a strong argument that he did not advocate force and did not ask his followers to violate the law in challenging certification. He can cite his call for peaceful protest and the use of the rally to reinforce allies in the Congress. Absent new evidence of an unknown effort to trigger or support violent action, it would seem clear under *Brandenburg* that the speech itself would not cross the line from extremist to criminal speech.

The immediate calls for Trump to be charged for the speech itself shows again how the "bad tendency" theory continues to live within our constitutional system. It was enough to note the proximity in time and location to the electoral certification to demand an indictment. Ironically, it is now the left that is arguing for the criminalization of advocacy after previously being the victims of such abuse. In the 1950s and 1960s, the Court rejected criminal charges of communists on the basis that they were prosecuted for mere advocacy. That was the case in *Yates v. United States*,[211] where actual Communist party officials were protected under the First Amendment—a striking contrast with *Whitney*.[212] The Court held that

> [w]e are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not.[213]

Likewise, in *Noto v. United States*, the Court rejected a Smith Act charge for advocating the overthrow of the government.[214] Even a call for rebellion was not sufficient. It had to be "present advocacy" to meet what would become the *Brandenburg* standard.[215] Clearly, in the January 6 context, prosecutors can argue that Trump was engaged in "present advocacy" since he was instigating action on

---

210. *Id.* (emphasis added).
211. 354 U.S. 298, 318–27 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978).
212. 274 U.S. 357 (1927).
213. *Yates*, 354 U.S. at 318.
214. 367 U.S. 290, 298–9 (1961).
215. *Id.* at 298.

Capitol Hill. Yet, like all of the *Schenck* progeny, that analysis remains maddeningly circular. We are again left with the "evil" of the speech itself. If the action being instigated was lawful—i.e., protesting to support the certification challenge—it remains protected speech.[216]

Cases like *Noto* still allow for possible prosecution when someone is trying "to instigate action"—the residual effects of *Schenck*. However, this problem remains even if one reframes the charge as a conspiracy to obstruct an official proceeding. The Electoral Count Act of 1887 is designed to be part of that proceeding and allows for a certification challenge.[217] Trump did misinterpret that law in claiming that Vice President Pence had the inherent authority to simply refuse to accept certification. Calling for the Vice President to exceed his authority is arguably not a crime, particularly when lawyers were advising that this is a novel but unanswered question for the courts. In this sense, the obstruction charge seems a warmed-over sedition charge—speech designed to cause disorder or to undermine the legitimacy of the government.

The one judge who has addressed this issue came to the opposite conclusion in *Eastman v. Thompson*.[218] The opinion of Judge David O. Carter in the U.S. District Court for the Central District of California is a modern revival of "bad tendency" rationales for criminalizing speech. Carter ruled against privilege arguments raised by President Trump's private counsel, John Eastman, to withhold documents from the Select Committee to Investigate the January 6th Attack. It was a relatively easy legal question given the overriding congressional interest in the information and the dubious basis for the sweeping claims of privilege raised by Eastman. However, in reinforcing the order to force disclosure, the court found that the evidence could reveal criminality because it concluded that "[t]he illegality of the plan was obvious" on January 6.[219] The court concluded that "it is more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021."[220] Carter rejected any claim based on Eastman's belief (conveyed to President Trump) that Vice President Mike Pence could refuse to certify the election and send the electoral votes back to the states. Carter ruled that such legal advice failed under the "crime/fraud exception" because the president knew there was no basis for such a challenge. Noting that Eastman still believed that the statute is unconstitutional as written, the court simply brushes that aside and states that "ignorance of the law is no excuse" and

---

216. This same line was drawn by Justice Stevens when he wrote:

> "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

217. Electoral Count Act, 3 U.S.C. § 15 (1994).

218. 594 F. Supp. 3d 1156 (C.D. Cal. 2022).

219. *Id*. at 1192.

220. *Id*. at 1193.

"believing the Electoral Count Act was unconstitutional did not give President Trump license to violate it."[221] Once again, many (including the author) agree with Judge Carter's view of the Act and the lack of inherent authority for Vice President Pence. However, Trump is not the first to call for excessive exercise of congressional or executive power. The matter inevitably returns to his right to rally supporters to call for such political action.

Notably, Judge Carter frames the "evil" referenced in the *Schenck* progeny not as the riot as much as the challenge to the election.[222] That is the same purpose as earlier certification challenges, but the court treats this challenge as criminal because it was legally unfounded. Despite the fact that earlier challenges also lacked support, the court treats the lack of merit as framing the protest as a "coup." The opinion is weakened by the court's sweeping dismissals of countervailing views or motives. It reads much like the early sedition cases where anti-war protests or efforts to create a Communist party were defined as undeniably an attack on the government or the Constitution. In *Eastman*, the court renders a factual as well as a legal judgment without the benefit of a trial: "Dr. Eastman and President Trump launched a campaign to overturn a democratic election . . . . Their campaign was not confined to the ivory tower — it was a coup in search of a legal theory."[223] There is an obvious comparison to cases like *Schenck* where the defendant passed out flyers that suggested that citizens could refuse conscription. However, the flyers primarily called for protests. "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."[224] Many civil libertarians have long argued that the Court was blinded by its own contempt for the anti-war sentiments and constitutional claims in upholding the conviction. Judge Carter showed the same conclusory tendency in simply declaring that Trump knew that the election was not stolen and that he secretly knew that to be the case. The court found that "the illegality of the plan was obvious."[225]

The alternative framing is the riot itself or the argument that the certification challenge was merely the pretext for an insurrection. The latter interpretation was the basis for the second Trump impeachment. This argument effectively revives the "bad tendency" line of sedition opinions before the ascendence of the later "clear and present danger" standard: "natural and probable tendency and effect . . . as calculated to produce the result condemned by the statute."[226] That framing is to effectively return to the Blackstonian model where truth is not a defense to speech that undermines the legitimacy of the government. It harkens to prior decisions that emphasized the risk of speech. *Schenck* itself was long opposed as a warmed over

221. *Id.*
222. *Id.*
223. *Id.* at 1198.
224. Schenck v. United States, 249 U.S. 47, 51 (1919).
225. *Eastman*, 594 F. Supp. 3d at 1198.
226. Shaffer v. United States, 255 F. 886, 887 (9th Cir. 1919).

"bad tendencies" decision, the theory that shaped the lower court rulings.[227] The pamphlets clearly engaged in political speech but were deemed "calculated to cause . . . insubordination" and obstruction of the draft.[228] Likewise, in *Frohwerk*, the "circulation of the [newspaper] was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[229] In *Debs*, the Court emphasized the "natural tendency" of words and how they had a reasonably probable effect to obstruct the recruiting service."[230] Indeed, the obvious absence of a "clear and present danger" in *Debs* only highlighted its inherent reliance on a "bad tendency" rationale. As Chaffee observed, these cases allow for criminal prosecution of any speech where there is "some tendency, however remote, to bring about acts in violation of law."[231]

Much of the second Trump impeachment and the claims of potential criminal liability for his Ellipse speech focus on how his speech clearly had the "bad tendency" to fuel unrest. If that is the case, then prior cases would suggest that the government could have prosecuted Trump even without the subsequent riot. After all, it was not necessary that the anti-draft speeches of figures like *Schenck* and *Debs* actually led to draft dodging. It was enough that they threatened to undermine such efforts. Even if framed as obstruction of an official proceeding, the theory is that Trump must have known how his words would be taken by supporters on January 6. However, that leads down the dangerous slippery slope of other speech regulations. It would suggest that others making the same points (and many did before and during that day) were not obstructing the proceeding because they were lower profile or less known. The criminalization of the speech, therefore, depends on who is voicing the very same position. Moreover, it fails to offer a discernible limiting principle for other politicians who have engaged in inflammatory rhetoric at times of rioting.[232] Politicians have routinely supported protests at the federal or state legislatures, including some that resulted in violence. Others have been accused of fueling the answer of rioters. Even some academics have expressed support for violent action[233] or more aggressive forms of

227. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021).

228. *Schenck*, 249 U.S. at 49.

229. Frohwerk v. United States, 249 U.S. 204, 208–09 (1919).

230. Debs v. United States, 249 U.S. 211, 216 (1919).

231. Zechariah Chafee, *Freedom of Speech in Wartime,* 32 HARV. L. REV. 932, 948 (1919).

232. *See, e.g.*, Jonathan Turley, *Insurrection or Advocacy? Chicago Mayor Lightfoot Issues "Call to Arms" After Leaked Ruling*, RES IPSA (May 10, 2022), https://jonathanturley.org/2022/05/10/insurrection-or-advocacy-chicago-mayor-lightfoot-issues-call-to-arms-after-leaked-abortion-ruling/ [https://perma.cc/2JEN-RM78]; Jonathan Turley, *Trump's Surprise Witness: Rep. Waters Becomes a Possible Witness Against Her Own Lawsuit*, RES IPSA (Apr. 19, 2022), https://jonathanturley.org/2021/04/19/trumps-surprise-witness-rep-waters-becomes-a-possible-witness-against-herself/ [https://perma.cc/US72-SUW4].

233. Jonathan Turley, *"Blow Up Republicans": UNC Professor Triggers Firestorm With Call for Killing Republicans*, RES IPSA (June 25, 2021) (detailing other such violent rhetoric), https://jonathanturley.org/2021/06/25/blow-up-republicans-unc-wilmington-professor-triggers-firestorm-with/ [https://perma.cc/3S7R-QP5T].

protests.[234] Such rhetoric has been correctly treated as protected political speech. However, where is the line when the charge is based on the tendencies of a given speech to cause unrest or disorder? This is why Trump could prove the ultimate stress test for the protection of rage rhetoric, exposing the inherent weakness of tests that focus on the potential impact of speech as opposed to actual overt acts.

IV. CONCLUSION

James Baldwin famously observed that "[t]o be a Negro in this country and to be relatively conscious is to be in a state of rage almost, almost all of the time—and in one's work."[235] Rage is often a matter of perspective in terms of its legitimacy or even productivity. It is often used to capture speech beyond the dialogic or even rational. It can often be the expression of political isolation and anger. However, in that sense, rage is the extreme manifestation of passion. It is the tenor that comes with a speaker moving beyond question marks to exclamation points. To criminalize rage rhetoric is to allow such political distemper to shape our constitutional norms, our self-defining values. Yet, after the passage of hundreds of years, we are still debating this line between speech protection and speech criminalization.

Rage rhetoric commonly calls for radical, even violent, change in society. It is often unbridled and unyielding. Yet, it can also constitute speech that is reasoned while extreme, rejecting core social, institutional, or constitutional norms. Ranging from insulting to inciteful against the establishment, rage rhetoric is speech that has commonly been treated as "low value" and inherently threatening to society. In 2023, three members stopped legislative business in the Tennessee House of Representatives with a bullhorn screaming "no action, no peace."[236] Two were later expelled for the conduct, but it was not a criminal matter. American politics has become a matter of simple amplification. While stopping a legislative proceeding, these members were engaged in a protest using rage rhetoric. It may be seditious in the sense of "intending to persuade other people to oppose their government."[237] Yet, the intent remains to alert or alarm fellow citizens.

Rage rhetoric remains a matter of perspective. Rage against racism, for example, is generally viewed as understandable and commendable. Rage against diversity is not. The law in *Johnson* was based on same premise as the effort to ban

---

234. Jonathan Turley, *"When the Mob is Right": Georgetown Professor Supports "Aggressive" Protests at the Homes of Justices*, RES IPSA (May 11, 2022), https://jonathanturley.org/2022/05/11/the-mob-is-right-georgetown-law-professor-calls-supports-aggressive-protests-at-the-homes-of-justices/ [https://perma.cc/FS26-DHQE].

235. *"To Be in a Rage, Almost All of the Time,"* NPR (June 1, 2020), https://www.npr.org/2020/06/01/867153918/-to-be-in-a-rage-almost-all-the-time [https://perma.cc/CQ86-T6J9].

236. Jonathan Turley, *'I was screaming before you interrupted me': American Politics has become amplified rage*, THE HILL (Apr. 8, 2023), https://thehill.com/opinion/judiciary/3940490-i-was-screaming-before-you-interrupted-me-american-politics-has-become-amplified-rage/ [https://perma.cc/M2AC-PY6V].

237. Seditious, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/seditious [https://perma.cc/5RB6-6WQT] (last visited Feb. 24, 2023).

pornography that was rejected in *American Booksellers Ass'n v. Hudnut*.[238] In that case, the Seventh Circuit declared "[t]he Constitution forbids the state to declare one perspective right and silence opponents."[239] When Antifa supporters call for a "night of rage," that rhetoric is not the legal cause of the later arson and other criminal acts.[240] It is registering an intense rejection of legal and social structures; calling for acts of defiance to the status quo. Speakers cross the line when such rage is tied to specific acts—as was the case with members of the Proud Boys and Oath Keepers in the January 6 cases.[241] Those cases combined rage rhetoric with direct criminal conspiracies. Yet, the more general efforts to criminalize speech are often based on a desire not to simply punish criminal acts but the underlying ideology. Whether called "schismatic" or seditious, the prosecution of speech as itself harmful is to place the country on a slippery slope of censorship and criminalization.

The rise in rage rhetoric in contemporary politics is neither new nor unmatched in our history. We live an age of rage, but that rage does not have to define us. It is the protection of speech that defines us.

---

238. 771 F.2d 323 (7th Cir. 1985).

239. *Id.* at 325 (internal citations omitted). Judge Easterbrook further wrote:

> We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters "premised on equality"—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation – is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

Id.

240. *See, e.g.*, Patrick Reilly, *Protesters Torch Police Car, Damage Businesses in Atlanta After Activist Killed*, N.Y. POST (Jan. 21, 2023), https://nypost.com/2023/01/21/protesters-torch-police-car-damage-businesses-in-atlanta-after-activist-killed/ [https://perma.cc/8VDT-C2JL].

241. Office of Public Affairs, *Four Oath Keepers Found Guilty of Seditious Conspiracy*, DEP'T OF JUST. (Jan. 23, 2023), https://www.justice.gov/opa/pr/four-oath-keepers-found-guilty-seditious-conspiracy-related-us-capitol-breach [https://perma.cc/FE52-MAH2].