RAGE RHETORIC AND THE REVIVAL OF AMERICAN SEDITION

JONATHAN TURLEY*

ABSTRACT

We are living in what Professor Jonathan Turley calls an age of rage. However, it is not the first such period. Professor Turley explores how the United States was formed (and the Constitution was written) in precisely such a period. Throughout that history, sedition has been used as the vehicle for criminalizing political speech. This Article explores how seditious libel has evolved as a crime and how it is experiencing a type of American revival. The crime of sedition can be traced back to the infamous trials of the Star Chamber and the flawed view of free speech articulated by Sir William Blackstone. That view continues to resonate in "bad tendency" rationales for criminalizing what Professor Turley calls "rage rhetoric." An advocate for a broader theory of free speech, Professor Turley suggests that the United States should break this cycle and reject a crime that it is not only superfluous in many cases, but the product of the anti-free speech theories extending back to the seventeenth century. The elimination of the crime would fulfill what Professor Turley believes is the original and revolutionary view of free speech articulated by some figures at the start of the Republic. It would finally slay what James Madison called the "monster" lurking in our political and legal systems for centuries.

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

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INTRODUCTION

We are living in an age of rage.[1] While few of us can remember when this country has been so divided or angry, the use of "rage rhetoric" runs deep in our history.[2] Not only have we periodically faced extreme and violent speech in our political discourse, but also cyclic government crackdowns on radical and dissenting organizations. It is, therefore, not surprising that, with the violent protests in various cities[3] and the January 6th riot at the U.S. Capitol,[4] there have been calls for the criminalization of violent speech and the use of ideology as a basis for domestic terrorism investigations.[5] While unlawful acts are fully redressable under the criminal code, there is a reluctance to simply charge figures solely based on their acts of assault, property destruction, or other insular crimes. Violent acts like the attack on the Capitol prompt calls for charges that carry greater stigma and connotations as an affront to our system of government. There is a desire for charges to capture the universal outrage over the interruption of the constitutional process for the transfer of power. Perhaps for that reason, there has been a revival

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1. *See generally* Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J.L. & PUB. POL'Y 571, 571-75 (2022); *see also Hearing on the Weaponization of the Fed. Gov't: Hearing Before the Select Subcommittee on the Weaponization of the Fed. 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: Virtual Hearing Before the Subcomm. on Commc'ns and Tech. 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 Subcomm. on the Const. of the S. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Professor Jonathan Turley).

2. I discuss this and prior periods of rage in my forthcoming book. JONATHAN TURLEY, THE INDISPENSABLE RIGHT: FREE SPEECH IN THE AGE OF RAGE (forthcoming 2024). This Article relies on much of that research. *See also* Jonathan Turley, *The Right to Rage in American Political Discourse*, 21 GEO. J.L. & PUB. POL'Y 481 (2023).

3. Jennifer A. Kingson, *Exclusive: $1 Billion-Plus Riot Damage Is Most Expensive in Insurance History*, AXIOS (Sept. 16, 2020), https://www.axios.com/2020/09/16/riots-cost-property-damage [https://perma.cc/92SX-BBF6].

4. *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC (Aug. 2, 2023), https://www.bbc.com/news/world-us-canada-56004916 [https://perma.cc/V3SL-AQZ2].

5. *See Examining the "Metastasizing" Domestic Terrorism Threat After the Buffalo Attack*, *supra* note 1.

of an old and pernicious crime: sedition. Sedition is the crime that James Madison once called the "monster" lurking in our legal system, and it has returned yet again in a period of national discord.[6]

There is no serious debate that speech used to plan or further a specific crime can be prosecuted, including in cases brought under a myriad of conspiracy crimes. Sedition, however, developed to cover speech without such overt acts. Not surprisingly, it has been the favored vehicle for cracking down on dissent since its origin as seditious libel under the Crown in England. Figures like William Blackstone viewed sedition much like "fighting words" directed against the government, warranting punishment for their potential disruptive effect.[7] Rage rhetoric can ignite others to action, a view later adopted in the United States as words holding a "bad tendency" for public discord.[8] It is all seditious in the sense of "intending to persuade other people to oppose their government."[9]

Sedition under federal law is defined broadly to address extremist speech that is deemed a threat to public order or public proceedings.[10] As discussed below, there are a host of laws that cover such seditious speech, including the criminalization of seditious conspiracy. The liability for extremist speech is an issue that has occupied—and at times perplexed—leading legal figures for centuries. Given the preference for bright-line rules in the free speech

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6. *See generally* TURLEY, *supra* note 2.

7. *See* 4 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, 118-20 (Morrison ed., 2001); Richard E. Stewart, *Public Speech and Public Order in Britain and the United States*, 13 VAND. L. REV. 625, 634 (1960) (defining "fighting words" as words whose "threat to the peace so far outweighs their value in communicating ideas").

8. *See* Thomas G. Krattenmaker, *Looking Back at* Cohen v. California*: A 40-Year Retrospective From Inside the Court*, 20 WM. & MARY BILL RTS. J. 651, 658 (2012) (discussing "bad tendency" standard for incitement that permitted the government to "punish any political speech that might have a tendency to lead its hearers to engage in bad conduct").

9. *Seditious*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/seditious [https://perma.cc/PZ74-PVK7].

10. One such definition describes this scope as any

> insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state. The distinction between "sedition" and "treason" consists in this: that though the ultimate object of sedition is a violation of the public peace, or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws or the subversion of the constitution.

Sedition, BLACK'S LAW DICTIONARY (2d ed. 1910).

area, seditious speech occupies an uncomfortable space within our First Amendment jurisprudence. It is often based on fluid or contested government interpretations of words or actions of third parties. That anomaly is embodied in the Holmesian mantra of "falsely shouting fire in a theatre."[11] Sedition prosecutions are commonly premised on preventing public unrest or disorder by applying a subjective standard of which speakers or what words present imminent threats.

In recent years, we have seen a return to the "bad tendency" rationale for speech prosecutions. This flawed rationale continues to invade the analysis of courts, not just on seditious speech, but for cases applying the "integral-speech exception."[12] There remains an accommodation for the government in seeking to criminally sanction speech that tends to produce social ills or unrest.[13] It is the residual hold of early seditious libel cases going back to the seventeenth century.[14] That includes rage rhetoric that rejects core social, institutional, or constitutional norms.[15] Ranging from insulting to inciteful rhetoric against the establishment, it is speech that is treated as "low value" and inherently threatening to society.[16] It is criminalized not for its impact but its intent to lure others into defiance of their government.

This Article will challenge the continuing use of sedition crimes and the underlying premise that some speech can be more susceptible to criminalization as more "virulent" or harmful. These underlying rationales can be traced back to early seditious libel cases, including proceedings before the infamous Star Chamber.[17] The Article will explore an alternative approach that narrows the use of speech as the basis for prosecution. The removal of sedition as a crime would have little impact on actual prosecutions, which often bring alternative charges based on specific inchoate or completed

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

12. *See* Eugene Volokh, *The Speech Internal to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 986-87 (2016).

13. *Id.* at 1028-31.

14. *See* 4 BLACKSTONE, *supra* note 7, at 118-20.

15. *See id.* at 120.

16. *See, e.g.*, Volokh, *supra* note 12, at 1001.

17. *See infra* Part I.A.

crimes.[18] Removing sedition would eliminate a charge that has been historically employed to target unpopular or extreme speech in the United States. The history and continued confusion over speech prosecutions counsel in favor of breaking away from the legacy of the British seditious libel prosecutions after roughly 250 years.

This Article will first explore the history of sedition and the use of seditious conspiracy and seditious libel to stifle political dissent. The origins of these crimes in England were shaped by a desire to create a type of "constructive treason" without the overt acts that define treason. These early cases unabashedly pursued speech that insulted or questioned Crown authority. One case was the trial of Thomas Redhead Yorke around the time of the American Revolution, a seditious conspiracy trial that laid bare the use of this crime to criminalize and chill speech. The Framers were familiar with this history of abuse. Indeed, some were targets of such allegations. They sought to narrowly define treason and to bar the abusive use of criminal prosecution to arrest free thought and expression.

Second, the Article will explore how sedition-related crimes were used historically in the United States. This history reveals the struggle of the Supreme Court with the concept of "bad tendency" speech, a troubling corollary of English sedition theories. Even after the adoption of the *Brandenburg* standard,[19] courts continue to replicate some of the rationales forged in early sedition cases to justify the criminalization of speech.

Third, the Article turns to the revival of sedition prosecutions and the continuing tensions with First Amendment case law, including prosecutions tied to the January 6th attack on the United States Capitol. Even the push to disqualify Donald Trump and other Republicans under the Fourteenth Amendment has incorporated sedition arguments to broaden the meaning of "insurrection or rebellion."[20] The recent use of sedition-related charges only raises renewed questions on the necessity and redundancy of such charges, including inconsistent verdicts on seditious conspiracy as opposed to other crimes like obstruction of a federal proceeding.

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18. *See, e.g.*, Volokh, *supra* note 12, at 1028-31.
19. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
20. *See infra* Part III.C.

Finally, the Article discusses a post-sedition option for limiting the use of speech in prosecutions and the elimination of this ill-conceived and superfluous crime. Even with such changes, violent or rage rhetoric will continue to present difficult questions for the courts and society at large. However, the legacy of the sedition cases since the seventeenth century has been the abusive and selective use of prosecutions to punish unpopular viewpoints. It is possible to adopt a protective approach for rage rhetoric without losing the ability to charge those who conspire to commit criminal acts, including treason. As discussed below, there is "bad tendency" speech, but the tendency toward the criminalization of speech is far more threatening for a free nation.

I. SEDITIOUS LIBEL AND "SCHISMATICAL" SPEECH

The law of sedition is closely related to the law of treason. Treason historically has had a more concrete meaning connected to "levy[ing] war" against a government.[21] Treason was a matter of interpretation for sovereigns in determining what constituted a challenge or attack upon the Crown or state.[22] There was a common law of treason that preceded the Statute of Edward III, later known as the Treason Act of 1351.[23] This was a declaratory act that did not change but affirmed the custom related to treason prosecutions. The Act was viewed as departing from the dangerously undefined crime of treason that emerged from the common law to add specificity to what could be charged as treason.[24] Specifically, the Act limited the ability to use "constructive treason" claims from cases largely involving insulting or disloyal speech.[25] Blackstone described the

21. *See, e.g.*, J.G. BELLAMY, THE TUDOR LAW OF TREASON 9 (1979).

22. *Id.*

23. *See id.*

24. 4 BLACKSTONE, *supra* note 7, at 60 ("[B]y the ancient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason, which never were suspected to be such.").

25. The overt act could also be negated by treating the speech as an act. For example, John Twyn was charged with printing "a seditious, poisonous and scandalous" book that criticized the King. The King's Bench held that "printing and publishing such wicked positions, was an overt act declaring the treason of compassing and imagining the king's

effort as seeking to curtail "the vague notions of treason, that had formerly prevailed in our courts."[26] While later acts would evade the overt act requirements, the Treason Act was an early effort to codify the contours of this crime.[27] Even with the clearly stated overt acts, treason still allowed for an ample range of prosecutions, covering acts ranging from levying war, to imagining the death of the king, to counterfeiting coin with the King's likeness.[28] For example, the core treason definition had room at the elbows for interpretation on offering "Aid and Comfort" to the King's enemies.[29] The ill-defined crime would be replicated in later iterations of the Act. In the 1592 English treason trial of Sir John Perrot, the definition would extend to acts carried out by "the imagination of his heart."[30]

Perrot was once a powerful figure in Tudor England having served as Lord Deputy to Elizabeth I and a member of Parliament. He was accused of having prior knowledge of the failed rebellion of Sir Brian O'Rourke in 1589. Perrot was also known as a "very chollericke" figure who was quick to temper.[31] One such moment arose when he referred to Queen Elizabeth in exclaiming: "God's wounds, this it is to serve a base bastard piss[ing] kitchen woman."[32] The trial record establishing the use of the offensive words was supplied by a "Sergeant Puckering," testimony that captured the fluidity of the crime:

> He told them at the origin of these treasons proceeded from the imagination of the heart; which imagination was of itself high treason, albeit possessed with the abundance of traitorous imagination and not being able so to contain itself, burst forth in vile and traitorous speeches and from thence to horrible and heinous actions.[33]

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death." 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 513 (1810).

26. 4 BLACKSTONE, *supra* note 7, at 67.

27. BELLAMY, *supra* note 21, at 10.

28. EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND (1644), *reprinted in* 2 THE SELECT WRITINGS AND SPEECHES OF SIR EDWARD COKE 952-56 (Steve Sheppard ed., 2003).

29. 25 Edw. 3 St. 5 c. 2 ("[I]f a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies ... giving to them Aid and Comfort in the Realm, or elsewhere.").

30. PETER CHARLES HOFFER, THE TREASON TRIALS OF AARON BURR 59 (2008).

31. ROGER TURVEY, THE TREASON AND TRIAL OF SIR JOHN PERROT 47 (2005).

32. *Id.* at 114.

33. G.B. HARRISON, 1 AN ELIZABETHIAN JOURNAL 125 (2015).

There were few "actions" alleged rather than these treasonous imaginations. Indeed, at one point, Perrot cried out in the courtroom that the prosecutor would "win Men's Lives away with Words."[34] Similarly, in the 1600 trial of Robert Dudley, Earl of Essex, the court maintained that "the thought of Treason to the prince, by the law is death."[35] Such thought crimes were viewed as legitimately punished, since bad thoughts lead to bad speech which lead to bad acts.

The abuse of the English treason prosecutions weighed heavily on the Framers in crafting the American treason standard, but it is also relevant to the use of sedition-related crimes. While treason was crafted as a more limited definition of the crime, sedition became a substitute for the use of this crime as a tool against political opponents and dissenters. The experience with English treason was so negative that the Framers not only wanted to clearly define the crime in the Constitution but to do so as narrowly as possible. To that end, the Committee of Detail proposed "levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them."[36] James Madison praised the "great judgment" of crafting a clear standard but felt that the Committee of Detail's definition was "too narrow" in setting a standard above the Treason Act and that the government might require "more latitude" in dealing with traitors.[37] The compromise language was expressly designed to avoid indeterminate meaning, limiting the crime to "levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[38] It further specified two witnesses to "the same overt Act" or a confession in open court.[39] The language emphasizing an overt act would be a focus in later

34. FRANCIS HARGRAVE, 1 COMPLETE COLLECTION OF STATE TRIALS 193 (1793).

35. 1 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1337 (1600) (describing the case *Reg. v. Robert Dudley, Earl of Essex*).

36. *Defining the Crime of Treason Against the United States, [20 August] 1787*, NAT'L ARCHIVES, http://founders.archives.gov/documents/Madison/01-10-02-0102 [https://perma.cc/X5PD-LTEZ].

37. Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 400, 406-07 n.97 (1945).

38. U.S. CONST. art. III, § 3. The language was later codified by Congress. An Act for the Punishment of Certain Crimes Against the United States of 1790, ch. 9, §§ 1-2, 1 Stat. 112, 112 (1790) (codified as amended at 18 U.S.C. § 2381).

39. U.S. CONST. art. III, § 3.

cases, including in the trial of Aaron Burr. Edmund Randolph argued the case for Burr and emphasized the view shaping the standard: "if the doctrine of treason be not kept within precise limits, but left vague and undefined, it gives the triumphant party the means of subjecting and destroying the other."[40]

These cases remind us that it is the overt act of treason that often serves as the line of separation from protected speech. While claims of incitement to treason or conspiracy to commit treason can blur this line further, sedition was developed to capture speech offenses that encouraged or inspired schismatical conduct.[41] Charges for seditious conspiracy[42] and advocating the overthrow of the government[43] are more menacing given the common law history behind their use to criminalize dissent and criticism of the government.

A. Sedition and the Star Chamber

In *The Indispensable Right*, I explore how early English treason cases influenced the use of sedition as a means for speech prosecutions.[44] The use of treason to prosecute disloyal "imaginations" would lead to an even broader use to combat the disparagement of the Crown and its authority. As English courts began to more clearly delineate (and ultimately limit) treason, sedition would become the primary charge in the suppression of political and social dissent. As noted by Fred Siebert, treason prosecutions proved "too cumbersome to be used to suppress the fleabites of political or religious pamphleteers."[45] The alternative was a crime that would allow for the criminalization of speech without even the pretense of treasonous acts.[46] Shifting to sedition also bypassed the increasingly

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40. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 369-70 (1996).

41. *See Sedition*, BLACK'S LAW DICTIONARY 1479 (9th ed. 2009) (defining sedition as "[a]n agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority").

42. 18 U.S.C. § 2384 (2012).

43. *Id.* § 2385.

44. *See generally* TURLEY, *supra* note 2.

45. FREDERICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, at 117 (1952).

46. Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 819-20 (1984).

troublesome regular courts, which exercised jurisdiction over treason cases. Sedition not only avoided the overt acts of treason, but allowed the hapless defendants to be tried in the Star Chamber.[47]

Notably, the rise of sedition trials occurred in the 1600s as the Crown sought to defy legal process and use the charges to deter dissenters in the Parliament. James Fitzjames Stephen's *A History of the Criminal Law in England* vividly demonstrated the need for the shift from treason to sedition in two cases: the trial of Sir John Eliot and *Pine's Case* in 1629.[48]

The tensions between Parliament and King Charles I had previously come to a head in the infamous *Five Knights' Case* after Parliament was recalled and faced "forced loans" from the Crown. The case would produce a total breakdown of legal process after the dissenters were thrown in jail on warrants that stated no specific offense. When the Chief Justice Sir Randolph Crewe ruled against the King on the loan policy, he was quickly dismissed. The new Lord Chief Justice, Sir Nicholas Hyde, ruled against bail for the knights because the court could not judge the risk without knowing the underlying crime—a maddening circularity of logic. The court just used the abuse as the rationale for denial by holding that the offense must be serious since it could not be revealed.[49]

While the Crown would later release the knights, the incident led to an equally important confrontation as the Parliament pushed through the Petition of Right, requiring an answerable cause of imprisonment with a warrant.[50] That legislation was quickly tested by Charles when legislators, led by Sir John Eliot, demanded an inquiry into the incompetence of his ministers (particularly George Villiers, 1st Duke of Buckingham). The legislators opposed the financial demands of the King and sought to demand legislative approval of new tonnage and poundage regulations in customs.[51]

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47. *See generally* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

48. *See generally* JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND (1983); *see also* MICHAEL HEAD, CRIMES AGAINST THE STATE: FROM TREASON TO TERRORISM 150 (2011).

49. JOHN HOSTETTLER, CHAMPIONS OF THE RULE OF LAW 69 (2011).

50. John Reeve, *The Arguments in King's Bench in 1629 Concerning the Imprisonment of John Selden and Other Members of the House of Commons*, 25 J. BRIT. STUD. 264, 266 (1986).

51. *Id.* at 264.

Charles responded in his signature style by summoning Eliot and others to interrogations before the Privy Council, barring citizens from voicing support for their measures, and eventually incarcerating seven members. Eliot and the other six held firm and Charles pushed for a trial before the Star Chamber.[52] With the Right to Petition in mind, and opposition growing in Parliament, Charles asked the two chief justices and the Chief Baron of the Exchequer to identify an offense for a situation when a member conspires against his government and defames it so as to subvert obedience.[53] The jurists demurred and could name no specific offense.[54] Notably, they did not suggest treason. It was the quintessential English sedition case, which punished political speech without an arguable crime. Indeed, it was punishing speech in the legislative process protected under speech and debate privileges. When Parliament demanded compliance with the right of petition, the Crown produced a warrant issued after the arrest that simply stated the reason as a need for detention.[55] When further challenged, the Crown alleged "notable contempte committed by them against ourselfe and our goverment and for stirreing up sedition."[56] Three of the members were ultimately tried for sedition and Eliot died in prison. The use of the Star Chamber and the sedition charges allowed the King to not only mete out arbitrary punishment for his critics but to deter others who might consider "notable contempt" for authority.

Pine's Case also involved criticism of Charles I's forced loan policy. The case against a barrister, Hugh Pine, produced a strikingly different result due to its prosecution in the regular courts. In the case, Pine called Charles I "as unwise a king as ever was, and so governed as never king was; for he is carried as a man would carry a child with an apple.... less fit to be king than my man Hickwright."[57] Hickwright was Pine's shepherd, and the comparison was clearly not meant to be complimentary. Two witnesses attested to hearing the statements, and although the King's Bench agreed,

52. *Id.* at 266.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 269.
57. David Cressy, *The Blindness of Charles I*, 78 HUNTINGTON LIBR. Q. 637, 646 (2015).

the Bench still balked since "the speaking of the words before-mentioned, though they were as wicked as might be, were not treason."[58] Sedition was a new crime and was not recognized as an overt act under the Statute of Treasons. Prosecuting people like Pine would prove easier under the Star Chamber where the ill-defined crime would not be a barrier and the Crown could also evade the statute of limitations for treason offenses.[59]

The conflict between the Crown and the Parliament in *The Five Knights Case* and the *Eliot Case* can leave the impression that there was a free speech movement in Parliament in the 1600s. That was not the case. After opposing the sedition prosecutions under Charles I, the Parliament would soon strengthen its position vis-à-vis the Crown. Secure in its own authority, the Parliament would later embrace sedition as a crime when used against its own enemies or critics. The conflict was the manifestation of the extreme political struggle between the monarchy and the Parliament amidst swirling religious and social changes. It was not an epiphany on the transcendence of free speech. Instead, the view of free speech in England was deeply functionalist.[60] Rather than a human right, it was a right that was recognized as a means to other ends. The right emerged from the struggle over the free press.[61] One of the earliest writings against prior restraint was published in 1644 as an anonymous pamphlet, *The Compassionate Samaritane*.[62] The author, William Walwyn, premised his opposition to licensing laws by acknowledging the right to punish those engaged in sedition. Walwyn's pamphlet criticized "Licensers (who are Devines and intend their owne interest) most serviceable to themselves ... in the stopping of honest men writings, that nothing may come to the Worlds view but what they please, unlesse men whill runne the hazard of imprisonment."[63] Likewise, John Milton's influential 1644

58. Mayton, *supra* note 47, at 105 (quoting Pine's Case, 79 Eng. Rep. 703, 703 (K.B. 1628)).

59. *Id.* at 105-06.

60. *See* Turley, *supra* note 2, at 496.

61. 4 BLACKSTONE, *supra* note 7, at 151.

62. *See* SIEBERT, *supra* note 45, at 194; *see also* Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 303 (2001).

63. Meyerson, *supra* note 62, at 303.

speech, *Areopagitica*, focused on the enforcement of licensing laws that allowed the state to block dissenting or new perspectives on political, social, and religious concepts.[64] Prior restraint was opposed on functionalist grounds as inimical to an informed populace and accountable government. Yet, Milton allowed for the right of the state to "confine, imprison, and do sharpest justice on them as malefactors" who spread seditious or scandalous ideas.[65]

Walwyn and Milton may well have calculated that defeating licensing schemes was the more attainable goal for the time. For strategic reasons, they may have eschewed the more radical (and precarious) advocacy for sweeping free speech rights even against state interests. It may have also reflected their own incomplete, conflicted, or undeveloped views on this core right. Walwyn and Milton were writing at a nascent stage of still forming ideas of this right. They were undeniably products of that time even if they transcended some of its worst inclinations, including some obvious contradictions and prejudices expressed in their writings. For example, Milton showed an intolerance for "popery, and open superstition."[66] For whatever reason, these early works focused on licensing laws and defended publishers with more cabined and functionalist arguments.

Both the rights of free expression and the free press were deemed important to achieving goals of the democratic process, including the development of values and ideas. However, functionalism lends itself to trade offs with other social or political interests. Functionalism is a view shared by other European countries, even those who referred to free speech as a human right but qualified its use. That is captured in Article 11 in the Declaration of the Rights of Man and the Citizen, which recognizes free speech but also the right of the government to punish the excessive or abusive use of speech.[67] Notably, Article 11 declares "free communication of ideas and opinions is one of the most precious of the rights of man."[68] However,

64. JOHN MILTON, AREOPAGITICA 5 (John W. Hales ed., 1982).
65. *Id.* at 492; *see also* Meyerson, *supra* note 62, at 303-04.
66. MILTON, *supra* note 64, at 560; *see also* TURLEY, *supra* note 2.
67. *Declaration of the Rights of Man and Citizen art. 11* (1789), *reprinted in* FRANK MALOY ANDERSON, CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789-1901, at 58, 60 (1904).
68. *Id.*

it then defines the right in more limited terms: "every citizen then can freely speak, write, and print, subject to responsibility for the abuse of this freedom in the cases determined by law."[69]

For over 150 years after *Pine's Case*, sedition continued to be used to target those with dissenting views of the government. In 1794, the use of sedition to criminalize speech was vividly shown in the arrest of Henry Redhead Yorke. The evolution of free speech principles had continued, though many still focused on the issue of prior restraint in discussing the right. Yet, others were embracing broader concepts of a right inherent and essential to being human.[70] The Yorke case would again put the use of sedition laws into sharp relief at a time when the United States was emerging with a new and sweeping protection for free speech. An Anglo-Creole, Yorke was a powerful speaker who immigrated to England from the Caribbean with a well-articulated view of free speech as an individual right.[71] Notably, one of his influences was none other than Thomas Paine, who he met in Paris.[72] Yorke ran afoul of the Crown when he assisted another Paine associate, journalist Joseph Gales, in organizing a large event in England. Gales himself was later accused of sedition and fled to the United States.[73] The event was billed as a "A Meeting of the Friends of Justice, Liberty, and Humanity" and drew thousands to hear speakers advocate for emancipation, universal suffrage, and natural rights.[74] Yorke proved one of its most eloquent speakers as he called for the triumph of a "culture of reason" over ignorance and oppression.[75] Yorke was clearly calling for a fundamental change, but not violent change, in his speech:

> The governments of Europe ... present no delectable symmetry to the contemplation of the philosopher—no enjoyment to the

69. *Id.*

70. *See* TURLEY, *supra* note 2.

71. *See generally* AMANDA GOODRICH, HENRY REDHEAD YORKE, COLONIAL RADICAL: POLITICS AND IDENTITY IN THE ATLANTIC WORLD, 1772-1813 (2019).

72. *Id.* at 7.

73. *See generally* W. H. G. Armytage, *The Editorial Experience of Joseph Gales, 1786-1794*, 28 N.C. HIST. REV. 332, 358-60 (1951).

74. *See* TURLEY, *supra* note 2.

75. Proceedings on The Trial of Henry Redhead (1795), *in* 25 A COMPLETE COLLECTION OF STATE TRIALS AND OTHER PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1007 (T.B. Howell ed., 1818).

> satisfaction of the citizen. A vast deformed and cheerless structure, the frightful abortion of haste and usurpation, presents to the eye of the beholder no systematic arrangement, no harmonious organization of society. Chance, haste, faction, tyranny, rebellion, massacre, and the hot inclement action of human passions, have begotten them. Utility never has been the end of their institution, but partial interest has been its fruit. Such abominable and absurd forms, such jarring and dissonant principles, which chance has scattered over the earth, cry aloud for something more natural, more pure, and more calculated to promote the happiness of mankind.[76]

The large crowd and biting criticism alarmed the government. Yorke was a primary target. As a mixed-race orator, Yorke was no doubt a lightning rod for many in the establishment.[77] Notably, the Crown sought a treason charge, rather than sedition, against Yorke and some of his associates such as Gale. Given the past rulings on overt acts, the government alleged that the organizers encouraged followers to store pikes and other weapons.[78] What happened next is telling.

The treason charges quickly failed, so the government turned to the ready-made alternative of sedition. While the government would have preferred to try Yorke as a traitor, it could achieve the same results without having to prove any overt acts or treasonous conduct. The government simply accused Yorke and the others of working to "seditiously combine, conspire, and confederate with each other, and with divers other disaffected and ill-disposed subjects ... to break and disturb the peace and tranquility of this realm, and to rise and excite riots, commotions, and tumults therein."[79] The Yorke case is also fascinating due to its relevance to later uses of sedition in the United States where speakers were blamed for

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76. Proceedings on The Trial of Henry Redhead (1795), *in* 25 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, 1003, 1006-07 (T.B. Howell ed., 1818).

77. The actual parentage and racial makeup of Yorke remains somewhat unclear. *See* Amanda Goodrich, *Henry Redhead Yorke: Politics and Identity in the Atlantic World*, 1790-1813, UCL (Dec. 4, 2015), https://lbsatucl.wordpress.com/2015/12/04/henry-redhead-yorke-politics-and-identity-in-the-atlantic-world-1790-1813/ [https://perma.cc/4B5R-8WPD].

78. Proceedings on The Trial of Henry Redhead, *supra* note 76, at 1020.

79. *Id.* at 1012.

third-parties' conduct. That rationale would be used repeatedly against communist, labor, and political organizers.[80] The government further alleged that the effort to gather thousands of supporters without sufficient preparation or housing evidenced an intent to cause disorder.[81] Yorke was a complex figure with some surprising and, in some matters, troubling views.[82] However, he was a great advocate for free speech.

It is also notable that the Crown continued to make the same allegations regarding the pikes and weapons even though it decided not to charge him with treason, another practice that we would see repeated in the United States. Sedition allowed the government to migrate to a type of "treason-lite" charge where it could paint Yorke as a traitor while only proving seditious language. Yorke plowed into the rationale with his characteristic clarity:

> Is any man to be criminated because he happens to hear that two men agree to make pikes?—Did I stimulate them to arms?—No, a cloud of witnesses will be called, who will prove to you that I never suggested the idea of arms ... who will prove to you, that so far from stimulating their passions against the government, my language was not only constantly peaceable, but specifically threatened them with the dangers which might arise from tumult and confusion; that the cause of reform could only go on

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80. It would also feature greatly in the prosecution of former President Donald Trump who was not charged with sedition or incitement, but then prosecuted with repeated reference to his role in the incitement of the January 6th riot. See *infra* notes 321-22 and accompanying text.

81. As discussed below, this argument would parallel some raised in relation to the January 6th riot:

> [The organizers]... called themselves A Meeting of the Friends of Justice, Liberty, and Humanity.... [They] convened [their assembly] by an advertisement in the Sheffield Register ... It beg[an] ... 'Public meeting in the open air;' and the very manner of convening [the assembly], indicate[d] an intention of disturbance. The convening a multitude, which no private house could afford room for, shows that intention; and particularly when they were convened respecting a public object.

Proceedings on The Trial of Henry Redhead, *supra* note 76, at 1015.

82. The most surprising and troubling was Yorke's view that, despite the repellent practice of slavery, it should not be outright banned in light of the costs to colonies and the economy. HENRY REDHEAD, A LETTER TO BACHE HEATHCOTE, ESQ. ON THE FATAL CONSEQUENCES OF ABOLISHING THE SLAVE TRADE (1792).

> with the cause of peace, and it would be giving a strong argument to the enemies of reform, that if a little was granted, more would be expected.[83]

At the trial, the prosecution argued that Yorke's criticism of the government was enough to make him a criminal since his words served "to undermine the government of the country, to spread disaffection and discontent among the minds of his majesty's subjects, and particularly to draw into the disrespect of his majesty's subjects ... the Commons House of Parliament."[84] Various witnesses were called who attested to Yorke's peaceful views and the absence of any evidence that he had ever advocated violent acts. Nevertheless, Yorke was convicted and sentenced to two years imprisonment and fines.[85] Yorke struggled with illness after his incarceration and died at the age of forty-one in 1813.[86]

B. Blackstonian Alienability and the First Amendment

English sedition flourished under a narrow, functionalist concept of free speech. That foundation was laid in part by Sir William Blackstone, who saw prosecuting seditious libel as a necessary precaution for a government in maintaining stability and security. The Blackstonian view has a certain Hobbesian appeal on the limits imposed by the social contract establishing the "Leviathan" of the state.[87] For the security that comes from the departure of the state of nature, citizens yield certain freedoms to the state. The protection from the state pursuing disruptive speech is viewed as preserving the order organized society provides. While prior restraints were legitimately challenged in limiting the power of the press, Blackstone rejected the claim that citizens should be protected from the consequences of their speech.[88] Despite the criticism of figures like

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83. Proceedings on The Trial of Henry Redhead, *supra* note 76, at 1077.

84. *Id.* at 1012-13.

85. *Id.* at 1154. Notably, Yorke's son, Henry Galgacus Redhead Yorke, became a Whig member of Parliament and a reformer. Yorke's son was ten when his father died and would take his own life by taking cyanide in Regent's Park in 1848. H.R.G. Yorke, Esq. M.P., 30 THE GENTLEMAN'S MAGAZINE 96 (1848).

86. Proceedings on The Trial of Henry Redhead, *supra* note 76, at 1154.

87. *See generally* to THOMAS HOBBES, LEVIATHAN (1651).

88. 4 BLACKSTONE, *supra* note 7, at 118-20.

Thomas Cooley,[89] Blackstone balked at the notion that people are free to divide and to inflame the public:

> [W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law.... the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[90]

Blackstone argued that, under the common law, free speech was a practice left largely to the government's discretion and sufferance, a privilege lost when "stirring up the objects ... to revenge, and perhaps to bloodshed."[91] Blackstone's common law defense for sedition was forced and evasive. Torts has long maintained actions for civil libel. However, those actions are allowed to recover damages for losses to reputations. Sedition allows for punishment for political criticism of the state. The use of libel reflected the notion that the accused was challenging the government's legitimacy or authority—attacking its reputation and standing in the eyes of the public. Libel was a crime to lower the government's esteem by criticizing its policies or officials.[92] The crime remained poorly defined, which only magnified the threat to free speech and the free press. Seditious libel has been reduced by Professor Frederick Schauer to "(1) the intentional (2) publication of a

89. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 421 (1868) ("[T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as ... the liberty of the press might be rendered a mockery and a delusion ... if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.").

90. 4 BLACKSTONE, *supra* note 7, at 119-20.

91. *Id.* at 118-19.

92. RONALD J. KROTOSZYNSKI, RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 74 (2012).

(3) written (4) blame of any public man, or of the law, or of any institution established by law (5) without lawful excuse or justification."[93]

Treating sedition as a form of criminalized defamation is disingenuous.[94] Blackstone appears willfully blind in his denial that "*the liberty of the press*, properly understood, is by no means infringed or violated" through sedition prosecutions given its historic and contemporary abuses in England.[95] Under the Blackstonian view, free speech was alienable.[96] An opposing view emerged in the United States under the First Amendment. Free speech was often discussed in the context of natural rights. This rejection of the Blackstonian approach found an alternative Lockean foundation in the notions of a divine investiture of rights in humanity. It is an approach that shifts the focus of sedition from the right of the state to maintain itself to the right of individuals to express their values and thoughts. That view was manifest in the writings of John Trenchard and Thomas Gordon in England. Writing under the pen name Cato, Trenchard and Gordon tied free speech to natural rights and implicitly rejected Blackstone's use of the common law to justify sedition.[97] They readily accepted (as they should) that false claims made against individuals remain actionable. In Number 15 of *Cato's Letters*, "Of Freedom of Speech: That the same is inseparable from Publick Liberty," Cato wrote that:

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93. *See* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 762 (1986).

94. Notably, however, this analogy is often raised today by academics that those of us who oppose censorship (or favor an automonous view of the right of free speech) ignore that free speech has always been curtailed by defamation. That argument contains the same inherent flaw since censorship of "disinformation" seeks to silence those with opposing views as opposed to recover for false statements that harm individuals.

95. *See* 4 BLACKSTONE, *supra* note 7, at 119-20. *See generally* I. BRANT, THE BILL OF RIGHTS 217 (1965).

96. Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1292 (1998) ("Blackstone's approach rested on the view that freedom of expression was an aspect of natural liberty that was alienable and subject to legislative regulation for the common good.").

97. *See generally* 1 J. TRENCHARD & T. GORDON, CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS (1775). *See generally* David Bogan, *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.[98]

The line also has a Millian notion of a "Harm Principle," a view that I have previously supported as the framing for free speech protections in both government and corporate censorship.[99] Yet, it is the rejection of the notion of the inherent right of the state to control seditious speech that is so striking. The view emerges strongly in Cato's understanding of the essential of liberty:

> 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, as 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....
>
> 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.[100]

The autonomous view of free speech was also pronounced in contemporary writings of other "Radical Whigs," who believed man's creation in the likeness of God bestowed a capacity and right to inquiry and reason.[101] In this way, free speech became part of a type of "natural religion" through which "[d]evotion [to] [God] requires ... *free*, *rational*, and *willing*" inquiry.[102] The denial of such expression

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98. 1 TRENCHARD & GORDON, *supra* note 97, at 96.
99. *See generally* Turley, *supra* note 2; TURLEY, *supra* note 2.
100. 1 TRENCHARD & GORDON, *supra* note 97, at 244-45, 248.
101. RICHARD ASHCRAFT, REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISES OF GOVERNMENT 66-67 (1986).
102. 2 JOHN TRENCHARD & THOMAS GORDON, THE INDEPENDENT WHIG 27 (London J. Peele

was akin to defying God's plan.[103] The Whigs offered a fully formed and unqualified defense of the individual right to free expression as well as an unambiguous rejection of sedition prosecutions as virtually sacrilegious.

Given their view of free speech and criticism of the Crown, it is not surprising that the government targeted Whigs for sedition. These cases were known to the Framers, including the prosecution of radical Whig and publisher John Tutchin. In 1685, Tutchin wrote a series of poems that challenged the accession of James II.[104] He found himself in the dock facing sedition charges before one of the most infamous jurists in England, Judge and 1st Baron George Jeffreys.[105] The trial was a spectacle as Jeffreys ridiculed Tutchin and then handed down a shocking sentence: not just seven years in prison and a fine, but annual corporal punishment of being whipped through all the market towns of Devonshire.[106] Tutchin appealed his sentence and later was released. However, the Crown arrested him again in 1704. In that trial, Lord Chief Justice John Holt mocked the notion that speakers and writers "should not be called to account for possessing the people with an ill-opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."[107] One aspect of the English law on seditious libel was that truth was no defense. It did not matter if the seditious statement was true. Indeed, the infamous Star Chamber expressly noted that true criticism of the Crown may actually be a worse offense against the government than an outright lie.[108]

This natural rights premise for free speech was echoed in early American documents like the Virginia Declaration of Rights and

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ed., 7th ed. 1743).

103. 2 TRENCHARD & GORDON, *supra* note 97, at 292-95. For further discussion of these sources, see Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause*, 23 U. PA. J. CONST. L. 1, 48-56 (2021).

104. Lee Sonsteng Horsley, *The Trial of John Tutchin, Author of the* Observator, *in* THE YEARBOOK OF ENGLISH STUDIES 124, 124 (T.J.B. Spencer ed., 1973).

105. *See id.* at 124-25.

106. *See id.* at 124.

107. Trial of John Tutchin, 14 How. St. Tr. 1095, 1128 (1704).

108. *See* William W. Van Alstyne, *Congressional Power and Free Speech: Levy's Legacy Revisited*, 99 HARV. L. REV. 1089, 1092 (1986).

Declaration of Independence.[109] As noted by Zechariah Chafee, the American approach would embody the rejection of English view to "make further prosecution for criticism of the government ... forever impossible in the United States of America."[110]

Arguably, the most important conflict between the Blackstonian view and the emerging American view came with the criminal libel trial of publisher John Peter Zenger.[111] Sedition prosecutions often included criticism of government ministers. As discussed in *The Indispensable Right*, the English courts applied the *De Scandalis Magnatum* statutes to prosecute those who undermined the reputations of government officials.[112] These cases had not only chilled critics but created a sense of license among officials to crush those who refused to remain silent. That sense of impunity was most embodied by New York Governor William Cosby, a figure long maligned for his penchant for corruption and profiteering.[113] Cosby's manipulation of the case and crackdown on the newspaper showed that sedition remained a direct import from England.[114] Despite this authority and abuse, the Crown would lose in one of the most consequential cases of jury nullification in history. Even though the jury instructions did not allow the jurors to decide on the existence of a libel (which was treated as a question of law for the court), the jurors rejected the charges.[115] There was no question that Zenger challenged the authority and honesty of the governor, writings that served to bring the government into disrepute. However, the jurors still refused to allow criminal liability either out of hatred for Cosby and the Crown or opposition to such actions, or both.

The language of the First Amendment was only a passing moment of relative 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.[116] The greatest conflict

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109. Bogan, *supra* note 97, at 451.
110. ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 21 (1941).
111. *See* TURLEY, *supra* note 2, at 54.
112. *See generally id.* at 76.
113. *See id.* at 54.
114. *See id.* at 57.
115. *Id.* at 57.
116. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 99-100 (1970).

remained over the concept of sedition.[117] 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.[118] Figures like Adams continued to view seditious libel as a means to punish critics of the government or ruling politicians.[119] Accordingly, figures like Leonard Levy have challenged the view that the Framers exhibited a natural right or a libertarian view of free speech.[120] Notably, the principal basis for this critique is the unresolved definition and applicability of sedition charges that continued after the ratification of the First Amendment:

> 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.[121]

For Levy and others, the language of the First Amendment was not an implied rejection of the Blackstonian approach. The reference to "Congress" not abridging free speech is itself telling since it does not include similar limits on the courts. Speech controls could, under this view, continue to be maintained through the common law.[122] Levy noted that failure to expressly bar the common law practice meant that "[t]he security of the state against libelous advocacy or attack was always regarded as outweighing any social interest in open expression."[123]

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

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117. *See id.* at 100.

118. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS xv (1985).

119. EMERSON, *supra* note 116, at 99-100.

120. LEONARD LEVY, LEGACY OF SUPPRESSION (1960); LEVY, *supra* note 118, at 99-100; *see also* David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 799 (1985). *But see* Vincent Blasi, *The Checking Value in the First Amendment Theory*, AM. BAR FOUND. RES. J. 521, 527, 533 (1977).

121. LEVY, *supra* note 118, at 281.

122. *See id.*

123. *See* LEVY, LEGACY OF SUPPRESSION, *supra* note 120, at 237.

constitutionally under the "actual meaning of the instrument."[124] He referred to sedition as the "monster" lurking in the New Republic.[125] That monster, however, would consume many of his contemporaries, including Adams and Jefferson.[126] More importantly, the courts quickly gravitated back to Blackstonian views of sedition and erased the new approach embodied in the First Amendment. Judges 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 the 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 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.[127]

This judicial relapse would put the country back on the boom-and-bust course of free speech, with the right rising during periods of stability and waning in periods of "temporary panic."[128] Not surprisingly, the unfinished work with sedition continued to cause conflict from the very start of the Republic to the present day.[129]

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124. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569-73 (1866).

125. *See* TURLEY, *supra* note 2, at 19.

126. *See id.* at 333.

127. J. STUART MILL, ON LIBERTY 17 (D. Spitz ed., 1975). *See generally* Van Alstyne, *supra* note 108, at 1091.

128. Turley, *supra* note 1, at 600-10.

129. Indeed, much of First Amendment law continues to be an unfinished masterpiece, including the Court's effort to bring clarity to questions of conflict between anti-discrimination laws and the free speech rights. *See* Jonathan Turley, *The Unfinished Masterpiece: Compulsion and the Evolving Jurisprudence Over Free Speech*, 83 MD. L. REV. 145, 148-49 (2023).

II. AMERICAN RAGE AND THE PROSECUTION OF SEDITIOUS SPEECH

As discussed in greater detail in *The Indispensable Right*, rage rhetoric has been a part of every decade of American history.[130] Rage itself is no crime. It is seen in the burning of an American flag, an act protected under the First Amendment.[131] It is also true that extremist speech has at times led to violent acts that have been legitimately prosecuted, including the January 6th riot. The problem has been maintaining the line between violent speech and violent acts. It has remained a struggle that precedes the ratification of the First Amendment. Indeed, the legendary Boston Tea Party involved many of the issues still being debated over the line of what is permissible and what is criminal advocacy. The Boston Tea Party shows how rage rhetoric can become riotous action. Groups like the Sons of Liberty engaged in property damage as part of violent protests before seeking outright rebellion.[132] However, most of those calling for action were not seeking an insurrection. In his book, *Defiance of the Patriots*, Benjamin Carp wrote that "[t]he 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."[133] Yet, the Tea Party quickly turned into direct and violent criminal conduct.[134] It is an example of how rage rhetoric can occur in a mix of political speech and criminal acts.

A. Rage Rhetoric and the Advent of American Sedition

The Boston Tea Party was an act of rage celebrated by generations as an act of patriotic defiance. It is often framed as an act of defiance of a colonized people. Yet, it was as much an economic as a political protest. The tea would undersell American companies as

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130. *See generally* Turley, *supra* note 2.

131. Texas v. Johnson, 491 U.S. 397, 399 (1989).

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

133. *Id.* at 2.

134. *Id.* at 5 (while some praised the act, "others called it riotous, disorderly and disturbing. They saw a pack of rebels who had disobeyed the law, destroyed private property, and threatened anyone who stood in their way").

a way to generate needed capital for the struggling East India Company.[135] Adding insult to injury was the fact that the very officials collecting the duties would be paid out of those collections from the colonists.[136] Rage rhetoric in meetings at the Old South Meeting House would become acts of rage.[137] Indeed, it was obvious to some that the rhetorical would become physical expressions of rage. Josiah Quincy Jr. warned this would certainly end with criminal charges and "[w]hoever supposes that shouts and hossannas will terminate the trials of the day, entertains a childish fantasy."[138] Others referenced sedition and the likelihood of Crown charges.[139]

The destruction of the tea on Dartmouth, Eleanor, and Beaver would thrill many and outrage others. For patriots like John Adams, the property destruction was a brilliant act of liberation. After observing the harbor thick with tea and broken crates, John Adams wrote:

> This is the most magnificent Movement of all. There is a Dignity, a Majesty, a Sublimity, in this last Effort of the Patriots, that 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 cant [sic] but consider it as an Epocha [sic] in History.[140]

Adams marveled at the property destruction as fulfilling the need of "doing something to be remembered—something notable."[141] This

135. *Id.* at 3.

136. *Id.* at 47.

137. TURLEY, *supra* note 2, at 76.

138. CARP, *supra* note 132, at 121. Quincy's voice was particularly notable as a patriot who wrote against British rule under the name "Hyperion" but would (with John Adams) defend the soldiers accused in the "Boston Massacre." Bob Ruppert, *Josiah Quincy, JR.*, J. AM. REVOLUTION (June 4, 2019), https://allthingsliberty.com/2019/06/josiah-quincy-jr/ [https://perma.cc/9XYX-TXW2].

139. This included the colony's treasurer, Harrison Cray, who warned Quincy that his remarks would be viewed as criminal speech. Quincy, who was in poor health, responded "Personally, perhaps, I have less concern than any one present in the crisis which is approaching. The seeds of dissolution are thickly planted in my constitution." *Id.*

140. Diary Entry of John Adams (Dec. 17, 1773), https://founders.archives.gov/documents/Adams/01-02-02-0003-0008-0001 [https://perma.cc/J6N9-DHEP].

141. *Id.*

violent act of property destruction remains one of the most revered moments of American history. As William Pitt observed, "if that mad and cruel measure should be pushed ... England has seen her best days."[142] What began as an economic form of protest became a revolutionary act. The rage was communicative and, because the underlying cause was deemed just, it was still celebrated as a type of righteous rage.

The same rage was evident soon after the new nation was formed and a new tax was imposed with similarly ruinous results for many in the country. The Whiskey Tax hit the citizens of Pennsylvania particularly hard. With many veterans still without their pay from the war and a shortage of coin, whiskey had become key to trade and commerce.[143] Yet, the tax had to be paid in coin or the farmers could lose their property. These veterans rose up to demand justice and a fair hearing. They were met with charges of sedition and rebellion from former rebels who now wielded the authority of the state.[144] Much like their former English governors, American legislators denounced those who would "inflame" the populace against the government. In 1794, members of Congress demanded a censure resolution to denounce these groups in seditious terms. The resolution declared:

> [W]e cannot withhold our reprobation of the self-created societies, which have risen up in some parts of the Union, misrepresenting the conduct of the Government, and disturbing the operation of the laws, and which, by deceiving and inflaming the ignorant and the weak, may naturally be supposed to have stimulated and urged the insurrection.[145]

The timing is notable. This resolution targeting those who spread deception and contempt for the American government was brought at the same time as the *Yorke* case in England.[146] The debate was one of the most illustrative of the early divide on sedition. On November 26, 1794, Rep. Fisher Ames rose to denounce those who

142. BENJAMIN LABAREE, THE BOSTON TEA PARTY 183 (Cambridge University Press 1964).
143. *See* TURLEY, *supra* note 2, at 89-90.
144. *See id.* at 91-92.
145. 4 ANNALS OF CONG. 899 (1794) (Gales & Seaton eds. 1849).
146. *See id.*; Goodrich, *supra* note 71, at 2.

maligned the government. An ardent Federalist, Ames was a strong advocate for sedition prosecutions, warning of the danger of allowing the "rabble" to spread "false stories."[147] This charge to Congress on that day could have been ripped from the prosecution's argument against Yorke. Referencing the danger of sedition, Ames suggested that worse should befall these "unworthy citizens."[148] Anyone supporting such political groups were deemed equally guilty: "They may be as men not wanting in merit, but when they join societies which are employed to foment outrages against the laws, they are no longer innocent. They become bad citizens. If innocence happens to stray into such company, it is lost."[149]

James Madison rose to rebut these words and oppose the use of censure, maintaining that "opinions are not the objects of legislation."[150] More fundamentally, Madison reminded the House that

> we must try its nature and see how far it will go: in the present case he considered the effects of the principle contended for would be pernicious. If we advert to the nature of republican government, we shall find that the censorial power is in the people over the government, and not in the government over the people.[151]

Others denounced the resolution as an attack on free speech and the resolution was handily defeated.[152] It was a reassuring moment of clarity as well as a contrast with the *Yorke* case in England. Yet, Madison's monster—sedition—would soon devour those very rights after later unrest over taxes.

The coexistence of free speech and sedition is one of the most glaring contradictions in the founding documents. As with declaring "all men are created equal"[153] while preserving slavery, embracing

147. Ames' call for the use of laws to stop the "spread the infection" of false claims is reminiscent of contemporary efforts to combat disinformation. *See* TURLEY, *supra* note 2, at 267.

148. 4 ANNALS OF CONG. 930 (1794).

149. *Id.*

150. Mayton, *supra* note 47, at 122; Jeremy J. Ofseyer, *Speech or Opinion? Two Objects of First Amendment Immunity*, 2002 UTAH L. REV. 843, 876 (quoting 3 ANNALS OF CONG. 934 (1794)).

151. 4 ANNALS OF CONG. 930 (1794).

152. *Mayton*, *supra* note 47, at 123.

153. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

sedition after adopting the First Amendment was fundamentally at odds with the values leading to ratification. After the ratification of the First Amendment barring any abridgment of the freedom of speech, courts quickly embraced a variety of limitations, including an allowance for sedition charges, enabling figures like John Adams to turn sedition charges on their own enemies. Even critics of sedition such as Thomas Jefferson, who objected to federal sedition prosecutions, supported the use of state sedition prosecutions of their opponents.[154] Jefferson maintained sedition was only denied to federal government but "reserved" to the states and "[w]hile 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."[155] While this could be taken as a pre-incorporation statement of federalism, Jefferson also spoke of the need to charge a few people with sedition as a lesson to the many. Jefferson explained 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."[156] For Adams, sedition prosecutions seemed more appealing by the gross. What was so striking about the use of sedition by the Federalists was how quickly and completely it mirrored the abuses under the Crown.

Sedition was used against political critics who were guilty of nothing beyond contempt for Adams. The most ironic prosecution was against Democratic-Republican writer Thomas Cooper.[157] Cooper was charged with sedition after he pointed out that Adams was replicating the abuses of the British "to introduce the political evils of those European governments whose principles we have rejected."[158] Adams was fully cognizant of this contradiction and struggled throughout his remaining years to rationalize these abuses. Like his British predecessors, Adams insisted that slanders

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

155. This letter was later cited by Felix Frankfurter to support his own narrowing of the protections under the First Amendment in Dennis v. United States, 341 U.S. 494, 522 n.4 (1951).

156. 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).

157. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 231 (1956); *see also* James Morton Smith, *Thomas Cooper and Sedition: A Case Study in Suppression*, 42 MISS. HIST. REV. 438, 438 (1955).

158. SMITH, *supra* note 157, at 439 (quoting Thomas Cooper).

again him were attacks on the state as a whole. Accordingly, Adams maintained that "I have no doubt it is a libel against the whole government, and as such ought to be prosecuted."[159] Unlike Madison, Adams did not question the notion of libeling the state or prosecuting people for their opinions. When asked to intervene with Adams to pardon publisher James Callender, John Marshall responded:

> The unconstitutionality of the law, cannot be urged to the President because he does not think it so.... [His] opinion is confirmed by the judgement of the courts & is supported by as wise & virtuous men as any in the Union. Of consequence whatever doubts some of us may entertain, he who entertains none, would not be & ought not to be influenced by that argument.[160]

As with Lord Chief Justice John Holt, Adams seemed comfortable with arresting those with an "ill-opinion of the government ... [f]or it is very necessary for all governments that the people should have a good opinion of it."[161] That concept was codified in the Alien and Sedition Acts which made it a crime to "print, utter, or publish ... any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States."[162] Adams and his Administration showed how such laws can create a sense of license to silence critics. No insult would be brooked even from members of Congress. Vermont Rep. Matthew Lyon was prosecuted for criticizing John Adams when he said, with obvious reason, that Adams possessed an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[163] Lyon was convicted and sentenced

159. *Id.* at 443 (quoting John Adams).

160. Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435 (2007); LETTER FROM ST. GEORGE TUCKER TO JOHN MARSHALL (NOV. 6, 1800), *in* 6 THE PAPERS OF JOHN MARSHALL, 1800-1807, at 4-5 (Charles Hobson ed., 1990).

161. *See* Trial of John Tutchen, 14 How. St. Tr. 1095, 1128 (1704).

162. Sedition Act of 1798, § 2, ch. 74, 1 Stat. 596 (1798) (expired 1801).

163. *See* CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON, AND THE MISFITS WHO SAVED FREE SPEECH 114, 127-28 (2015); *see also* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 231 (1956).

to four months in prison and a fine.[164] These cases would become insatiable for Federalist judges who would ride through towns directing arrests for critics to be brought before them.[165] Leading political figures and writers from the opposition were arrested in a crackdown that would have made Lord Holt blush.[166]

Once again, Jefferson showed opportunism in a period of "temporary panic." When sedition was being used against his own party and supporters, Jefferson was irate, complaining that "our general government has, in the rapid course of [nine] or [ten] years, become more arbitrary and has swallowed more of the public liberty than even that of England."[167] Jefferson would even campaign against the laws in 1800, but he would later allow prosecution for sedition during his Administration.

The Sedition Act represented the abandonment of the truly revolutionary concepts of free speech espoused by figures leading to the Revolution. Justice Black noted in *Communist Party of U.S. v. Subversive Activities Control Board*:

> The enforcement of ... the Sedition Act, constitutes one of the greatest blots on our country's record of freedom. Publishers were sent to jail for writing their own views and for publishing the views of others. The slightest criticism of Government or policies of government officials was enough to cause biased federal prosecutors to put the machinery of Government to work to crush and imprison the critic ... Members of the Jeffersonian Party were picked out as special targets so that they could be

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164. When then-President Thomas Jefferson would later learn of the sentence, he remarked "I know not which mortifies me most, that I should fear to write what I think or my country bear such a state of things." Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), https://founders.archives.gov/documents/Jefferson/01-30-02-0398 [https://perma.cc/8DC5-MDWX].

165. *See* TURLEY, THE INDISPENSABLE RIGHT, *supra* note 2.

166. One of these cases foreshadowed later sedition allegations against Trump. William Duane, the publisher of a Republican newspaper, printed the text of a Federalist bill that he denounced as giving the Federalists the ability to review and possibly reject state electoral votes—a controversy that would foreshadow the controversy on January 6, 2021, following the Biden election. Duane was charged with sedition, but juries acquitted him twice. When the legal process did not succeed, Duane was then summoned to the Senate for trial and, when he did not appear, the Senate found him in contempt and issued a warrant for his arrest. Notably, that warrant was signed by the presiding officer of the State, Thomas Jefferson. Duane was never actually tried. TURLEY, *supra* note 2.

167. Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), *supra* note 164.

> illustrious examples of what could happen to people who failed to sing paeans of praise for current federal officials and their policies.[168]

Black was spot on except in one respect. Jefferson was both a victim and victimizer in sedition prosecutions, though his record pales in comparison to that of Adams. While Jefferson pardoned those convicted under the Adams Administration, he soon found his own intolerable critics.[169] Rev. Harry Croswell exposed the relationship between Jefferson and publisher James Callender. Vicious and unrelenting, Callender was viewed as an attack dog for Jefferson in spreading rumors and assailing Federalists, particularly John Adams.[170] Ironically, Callender had previously declared a seditionist after he called Washington and Adams "poltroons" and "venal" and accused Adams of being a habitual liar whose administration was a "scene of profligacy and ... usury."[171]

People v. Croswell was particularly notable because it was brought under the New York seditious libel law, which did not expressly allow for truth as a defense.[172] Croswell faced a Democratic-Republican judge aligned with Jefferson who would later be elected governor. Judge Morgan Lewis blocked the defense in its attempts to prove Croswell's allegations—a move widely seen as shielding Jefferson.[173] That ruling meant that Croswell would be tried under a standard closer to the pre-Revolution English standard than that of the federal Sedition Act.[174] On appeal, Alexander Hamilton

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168. 367 U.S. 1, 155-56 (1961) (Black, J., dissenting).

169. *See* LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 70-71 (1963).

170. MICHAEL DUREY, "WITH THE HAMMER OF TRUTH": JAMES THOMSON CALLENDER AND AMERICA'S EARLY NATIONAL HEROES 117, 119-21 (1990). Callender has been described as "one of the most scurrilous and slimy publicists who ever wrote." Stephen B. Presser & Becky Baur Hurley, *Saving God's Republic: The Jurisprudence of Samuel Chase*, 1984 U. ILL. L. REV. 771, 808.

171. FRANCIS WHARTON, *Trial of James Thompson Callender, for a Seditious Libel*, *in* STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS WITH REFERENCES, HISTORICAL AND PROFESSIONAL, AND PRELIMINARY NOTES ON THE POLITICS OF THE TIMES 688, 689 (1849).

172. David Jenkins, *The Sedition Act of 1798 & the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 173-74 (2001).

173. Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law*, 62 N.Y.U. ANN. SURV. AM. L. 45, 78.

174. *Id.* at 64.

stepped forward to argue the case and the necessity of truth as a defense. The Supreme Court of New York divided evenly on whether to order a new trial (allowing the conviction to stand), so the conviction stood.[175] However, Hamilton's view would later prevail when New York amended the law to allow for truth as a defense.[176]

The draw of speech criminalization was also evident in the case of Federalist publisher Samuel Freer, who published a criticism of the Croswell charges.[177] Once again, allies of Jefferson had just endured years of abusive sedition prosecutions by Federalist judges and prosecutors. Now, they yielded to the same impulse once in power. Freer's great offense was to highlight the abuses of the Croswell prosecution and the Jeffersonians sought criminalization of his speech. Once again, Hamilton stepped forward for the defense. In 1804, Judge James Kent rejected the basis for the prosecution of sedition and was joined by Justice Smith Johnson.[178] Chief Justice Morgan Lewis wrote again that truth was no defense, and he was joined by Justice Brockholst Livingston. That left a deadlock on the court. However, Kent still imposed a fine of ten dollars for Freer's contempt of the court.[179] On its face, the result was heartening in the rejection of sedition and only a small fine for contempt. Yet, that small fine still constituted a judicial penalty for this publisher.

The abuses of the Adams-Jefferson period showed how sedition remained a Siren's Call for many jurists, journalists, and politicians. Even those once targeted by such actions would target others in taking power. The misuse of the court system also reflected how the courts during this period were openly partisan and conflicted in their work. Sedition powers played to these impulses and contributed greatly to the breakdown and corruption of the legal system. It is also notable that the public itself was cognizant of the dangers presented by the cases. The ending of abusive sedition charges played a significant factor in Adams' loss in the 1800 election.[180] What the Federalists hoped were prosecutions that would paint the

175. *Id.* at 78.
176. *Id.*
177. People v. Freer, 1 Cai. 518, 518-19 (N.Y. Sup. Ct. 1804).
178. Finkelman, *supra* note 173, at 78-79.
179. *Id.* at 79.
180. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 722 (1993).

Jeffersonians as radicals, would instead paint their own party as a menace to liberty.[181]

Sedition would continue to return with cyclic regularity with periods of social and political unrest. President Abraham Lincoln showed a dangerous constitutional relativism when he unilaterally and unconstitutionally suspended *habeas corpus*.[182] The suspension, however, was made even more menacing by the arrests orchestrated by Secretary of State William Seward and military officials against dissenters in politics and the media.[183] The case of Clement Vallandigham showed how the expiration of the Sedition Act was no barrier to sedition prosecutions.

Vallandigham was a former Ohio congressman who was a major critic of the war. A contrarian who was undeterred by threats of arrest, Vallandigham gave a series of speeches in 1863 railing not only against the war but emancipation. The speeches drew the ire of General Ambrose Everett Burnside, who showed as having even worse legal judgment than he did military judgment during the war. As the military authority in Ohio, Burnside showed an utter disregard for free speech values, particularly with citizens who failed to use the "proper tone" in discussing the war.[184] Burnside saw Vallandigham as nothing more than a seditionist in criticizing the war and his "habit of declaring sympathies for the enemy will not be allowed in this Department."[185] Vallandigham was arrested for "declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government."[186] The trial itself showed the license that came with sedition charges to vent

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181. Wendell Byrd, *New Light on the Sedition Act of 1798: The Missing Half of the Population*, 34 L. & HIST. REV. 514, 584 (2016) ("[T]he Adams administration's support of the Sedition Act, as well as its split from the High Federalists, proved fatal for the Federalist Party.").

182. PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 71-82 (Univ. Press of Kan. 1994); *see also* Jonathan Turley, *Uncivil Action: Was Lincoln Wrong on Secession?*, RES IPSA (Sept. 24, 2010), https://jonathanturley.org/2010/09/24/uncivil-action-was-lincoln-wrong-on-seccession/ [https://perma.cc/F7V5-J4FK].

183. PALUDAN, *supra* note 182, at 73.

184. Geoffrey R. Stone, *Abraham Lincoln's First Amendment*, 78 N.Y.U. L. REV. 1, 10 (2003) (quoting General Order No. 38 (Apr. 13, 1863)).

185. *Id.* at 5.

186. *Id.* at 10.

raw animus. Vallandigham was denounced by the trial judge, who described him as part of the:

> class of mischievous politicians [who] had succeeded in poisoning the minds of a portion of the community with the rankest feelings of disloyalty. Artful men, disguising their latent treason under hollow pretentions of devotion to the Union, were striving to disseminate their pestilent heresies among the masses of the people.[187]

Vallandigham was convicted but his punishment was later commuted by Lincoln to banishment to the confederacy.[188] The Lincoln-era cases demonstrated how vaguely national security laws and powers could be used in the absence of a formal sedition law. "Panic politics" would continue to drive demand for sedition prosecutions in the early twentieth century, with crackdowns on Anarchists, communists, socialists, unionists, and anti-war activists.[189]

Anarchists, and later communists, presented a long-standing target for speech prosecutions. From the assassination of President William McKinley in 1901 to various riots, anarchists were associated with political violence.[190] The actions of "lone wolf" actors like Leon Czolgosz made anarchists particularly menacing to the majority, an amorphous, undetectable element in society.[191] Czolgosz was a disciple of Emma Goldman and embodied the threat of fanatical militants seeking to spread panic and disorder.[192] The McKinley assassination unleashed open and righteous state rage. Johann Most was an anarchist writer and editor of German anarchist newspaper Freiheit (Freedom).[193] In its September issue, the Freiheit ran excerpts from a German revolutionary writer calling government officials "outlaws" and rallying supporters to "murder the murderers

187. *Ex parte* Vallandigham, 28 F. Cas. 874, 923 (C.C.S.D. Ohio 1863).

188. Stone, *supra* note 184, at 10, 16.

189. *See* TURLEY, *supra* note 2.

190. *See generally* Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 AM. HIST. REV. 777, 780 (1955).

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

192. Kraut, *supra* note 191, at 170.

193. *Id.* at 170.

[and] save humanity through blood and iron, poison and dynamite."[194] Notably, Most realized that the article would be taken as incitement after the assassination and quickly canceled the edition and retrieved copies. However, some copies were already in circulation. Most was arrested and convicted not for sedition per se but for disturbing the peace.[195] Most was never accused of any violent act, but rather violent advocacy.

The same state rage was evident in the prosecution of the accused involved in the Haymarket Riot in 1886. Again, the protest had many of the same elements as the Boston Tea Party in that it was an economic demonstration that ended in violence. Indeed, the speeches before the riot address the type of social and political reforms addressed in the Yorke address, this including calls for strikes by the Workingmen's Party.[196] The most violent elements turned out to be the response of the police. Tensions were high in the square because various protesters had been killed and wounded just the prior night when police fired into a crowd. Editor and anarchist August Spies expressly called for peaceful protest, and the crowd remained peaceful until an unknown individual threw a bomb into the line of police officers.[197] The police then opened fire on the crowd with deadly effect. It was later found that every wounded officer was shot by other officers. Once again, the trial judge tolerated little consideration of the rights of the eight defendants, including Spies.[198] The judge left little question that these men were to be punished for their beliefs rather than their actions. Judge Joseph Easton Gary declared that "'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."[199] All were quickly convicted and seven sentenced

194. *Id.*

195. *Id.*

196. PAUL AVRICH, THE HAYMARKET TRAGEDY 193 (1984).

197. 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. *Id.* at 206.

198. Seven were sentenced to death, though two later had their sentences commuted. One died just before his execution and four were hanged. *Id.* at 279, 375-76, 378.

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

to death. Four would be hanged including Spies, who had called for peaceful protests.

The anarchists did have obvious violent elements. Yet, figures like Spies were advocates and were executed for their influence on others. Indeed, defending the rights of such individuals was treated as itself a threat to society. Anti-sedition and anti-anarchy laws were replicated among the states,[200] including laws making it a felony to "advocate" anarchism.[201] Soon, with the advent of the Russian Revolution, socialists and communists would become the focus of such prosecutions, including the thousands rounded up in the Palmer raids.[202] In the 1960s, the menace would be found in radical groups from the Black Panthers to the Students for a Democratic Society.[203] Again, some groups like the Symbionese Liberation Army (SLA) and the Black Liberation Army (BLA) demonstrate the move of some from violent speech to violent action.[204] Rage rhetoric would again dominate the national debate. Black Panther and writer Stokely Carmichael spoke in terms of self-defense, which was interpreted as calling 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 without social justice*. White people must be made to understand that they must stop messing with black people, or the blacks *will* fight back![205]

Social and economic conditions drove what was called the "Summer of Rage," and that rage rhetoric was again met with state rage in

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200. ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1910-1920 (1955).

201. *See* 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, 863 (2008).

202. Turley, *supra* note 1, at 602.

203. BRYAN BURROUGH, DAYS OF RAGE: AMERICA'S RADICAL UNDERGROUND, THE FBI AND THE FORGOTTEN AGE OF REVOLUTIONARY VIOLENCE 42-52 (2015).

204. *Id.* at 55-60.

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

the form of investigations like COINTELPRO and prosecutions on the state and federal levels.

As will be discussed below, such rage rhetoric continued into the twenty-first century with the presidency of Donald Trump. Extreme groups on the left (Antifa) and right (Proud Boys) particularly fueled the anger of the disaffected.[206] Antifa is particularly interesting in this historical context due to its origins in European anarchist movements and our history of suppression of anarchist groups.[207] Antifa represents one of the most anti-free speech movements in United States history and regularly engages in violent protests.[208] However, the majority of its loosely associated members are not violent.[209] Yet, this group captures the use of rage rhetoric that can easily be construed as "bad tendency" speech. The Antifa movement is the product of European anarchist and Marxist groups from the 1920s.[210] The anarchist roots of the group gives it the same organizational profile of such groups in the early twentieth century with uncertain leadership and undefined structures.[211] That fluidity

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206. Lawrence J. Trautman, *Democracy at Risk: Domestic Terrorism and Attack on the U.S. Capitol*, 45 SEATTLE U. L. REV. 1153, 1194 (2022).

207. *See* MARK BRAY, ANTIFA: THE ANTIFASCIST HANDBOOK 3-5, 15-16 (2017); CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 1-4 (2007).

208. *See Who Are Antifa?*, ANTI-DEFAMATION LEAGUE (Aug. 30, 2017), https://www.adl.org/resources/backgrounders/who-are-antifa [https://perma.cc/CU62-7PP3] (acknowledging that some supporters of Antifa engage in violent protest).

209. *Id.* For that reason, I have opposed efforts to declare Antifa a terrorist organization due to the that fact there are many members who do not engage in violent conduct and the organization itself is an amorphous collection of different groups. *See* Turley, *Fanning the Flames*, *supra* note 1; *The Right of the People Peacefully to Assemble: Protecting Speech by Stopping Anarchist Violence Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Professor Jonathan Turley); *see also* Jonathan Turley, *Declaring Antifa a Terrorist Organization Could Achieve Its Anti-Speech Agenda*, L.A. TIMES (June 1, 2020), https://jonathanturley.org/2020/06/04/declaring-antifa-a-terrorist-organization-could-achieve-its-anti-free-speech-agenda/ [https://perma.cc/GAS3-KDVU].

210. *See* BRAY, *supra* note 207, at 3-5, 15-16. 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. *Id.* at 25.

211. Perhaps the oldest reference to "Antifa" in the United States is the Rose City Antifa (RCA) in Portland, Oregon. BRAY, *supra* note 207, at 107. In 2013, various groups that were part of ARA, formed a new coordinating organization referred to as the "Torch Network." *See The Right of the People Peacefully to Assemble: Protecting Speech by Stopping Anarchist Violence Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Professor Jonathan Turley); *see also* Lisa N. Sacco, *Antifa—Background*, CONG. RSCH. SERV. (Mar. 1, 2018).

clearly helps evade law enforcement and civil liability.[212] There have been many organizations that have targeted critics and retaliated against the exercise of free speech from the Ku Klux Klan 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, by defining the right itself as a tool of oppression.[213] Like its counterparts in right-wing groups such as the Proud Boys, Antifa has a long and well-documented history of such violence.[214] Antifa has also attacked journalists.[215] Antifa 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.[216] Like the Black Panthers and other groups, Antifa has emphasized that violence is an act of self-defense.[217]

Antifa, the Proud Boys, and other groups straddle the line between rage rhetoric and violent acts. Antifa and its right-wing counterparts illustrate how such violence can be addressed in the overt acts as opposed to the underlying speech. Throughout the following cases, the struggle over criminalizing "bad tendency" speech has continued to perplex courts and undermine any continuity in the rulings—a problem that continues to this day.

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212. *See, e.g.*, 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/6SYV-RY33].

213. The author of what is called the "bible" of the Antifa movement, *Antifa: The Anti-Fascist Handbook*, Rutgers Professor Mark Bray had called Antifa a "social revolutionary self-defense," "pan-left radical politics uniting communists, socialists, anarchists and various different radical leftists together for the shared purpose of combating the far right." Benjy Sarlin, *Antifa Violence Is Ethical? This Author Explains Why*, NBC NEWS (Aug. 26, 2017, 6:48 AM), https://www.nbcnews.com/politics/white-house/antifa-violence-ethical-author-explains-why-n796106 [https://perma.cc/N9UK-9B6K]. 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.'" BRAY, *supra* note 207, at xv. *But see id.* at 143-65 (arguing "the ideology of anti-authoritarian anti-fascists [promote] free speech far more than that of their critics").

214. *See generally* Turley, *Fanning the Flames*, *supra* note 1.

215. *See* Kavanaugh, *supra* note 212.

216. *See* ANTI-DEFAMATION LEAGUE, *supra* note 208.

217. *See* Mark Bray, *Antifa Isn't the Problem. Trump's Bluster is a Distraction from Police Violence*, WASH. POST (June 1, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/06/01/trump-antifa-terrorist-organization/ [https://perma.cc/9M33-KSV5].

B. Bad Tendency Speech and the Holmesian Rationale

The history of American sedition follows a pattern of "panic politics" leading to free speech criminalization. However, the political conditions leading to these speech crackdowns is not nearly as important as the legal conditions that enabled such abuses. Underlying all of these periods is a rejection of core free speech values in favor of a more fluid and functionalist understanding that can be traced to the early English precedent. The *Most* case is a good example of the hold of the Blackstonian bad tendency approach on courts. The appellate court upholding the conviction not only rejected the need for overt acts but further speculated why Goldman was allowed to escape punishment for enflaming such followers:

> The teaching of such horrid methods of reaching an end is the offense. It is poor satisfaction, when one of their dupes has consummated the results of their teaching, to catch him, and visit upon him the consequences of his acts. 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. No more striking illustration of the criminal power of words could be given, if we are to believe the murderer of our late President, than that event presents. The assassin declares that he was instigated and stimulated to consummate his foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security.... If he advocates stealthy crime as the means of reaching his end, he, by that act, commits a crime for which he can be punished. The distinction we have tried to point out has been too long overlooked. If our conclusions are sound, it is the teachers of the doctrine who can and ought to be punished. It is not necessary to trace and establish the connection between the teaching of anarchy and a particular crime of an overt nature.[218]

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

The court erased any meaningful distinction between advocacy and actions. The views of figures like Goldman were treated as the legal cause for violence by third parties and thus punishable.

It was in the early 1900s that the Supreme Court struggled to define the scope of sedition and the limits of the First Amendment in dealing with extremist speech. The Espionage Act of 1917 allowed for the prosecution of those who made "false reports or false statements" or sought to benefit our enemies in undermining the military or recruiting efforts.[219] The law should have been treated as unconstitutionally vague but instead was viewed as insufficiently broad. Accordingly, Congress passed an outright sedition law. The Sedition Act of 1918 amended the Espionage Act to allow prosecution of an assortment of speech crimes, including "willfully mak[ing] or convey[ing] false reports ... to promote the success of its enemies" or "willfully utter[ing], print[ing], writ[ing], or publish[ing] any disloyal, profane, scurrilous, or abusive language about the ... government."[220]

The United States government was back in the business of sedition prosecutions under Woodrow Wilson with the entry into World War I and went after political dissenters with the same relish as the Adams Administration.[221] Like his predecessors, Wilson dismissed free speech values with the position that "[disloyalty] ... was not a subject on which there was room for ... debate" since such disloyal citizens "sacrificed their right to civil liberties."[222] The implied threat to free speech was expressed by Attorney General Charles Gregory, who made clear that he was on the hunt for the disloyal and divisive elements of society. Gregory promised punishment without mercy.[223] From 1919 to 1920, Gregory's successor,

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219. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (1917).

220. Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553 (1918).

221. *See* Jack A. Gottschalk, *"Consistent with Security": A History of American Military Press Censorship*, 5 COMMC'N & L. 35, 38 (1983).

222. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 53 (1979) (quoting Attorney General Charles Gregory as declaring "May God have mercy on them, for they need expect none from an outraged people and an avenging government").

223. *All Disloyal Men Warned by Gregory*, N.Y. TIMES (Nov. 21, 1917), https://www.nytimes.com/1917/11/21/archives/all-disloyal-men-warned-by-gregory-criminal-courts-will-handle.html [https://perma.cc/THD5-98L2]. For a discussion of this period, see Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 940, 944 (2009).

Attorney General Mitchell Palmer, continued this scorched Earth policy by arresting hundreds of individuals in his eponymous "Palmer Raids."[224] The crackdown targeted communists, socialists, and anarchists with repressive measures across the country.[225] The size of the crackdown was breathtaking, including a series of raids in January 1920 where over 3,000 alleged Communists were rounded up.[226] These cases offered continual opportunities for judicial intervention. Yet, as with the earlier periods, this crackdown was only possible with a compliant judiciary. A well-known example is the decision of the United States Court of Appeals for the Ninth Circuit in *Shaffer v. United States*, where the court upheld the criminalization of clearly protected political speech.[227] The defendant was charged with mailing copies of *The Finished Mystery*, a book that challenged the claimed basis for the war and stated: "The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches."[228] It is hard to imagine a greater example of protected speech, but the Ninth Circuit offered little more than a passing acknowledgment that "disapproval of war and the advocacy of peace are not crimes under the Espionage Act."[229] The court then eviscerated that protection:

> the question here ... is whether the natural and probable tendency and effect of the words ... are such as are calculated to produce the result condemned by the statute.... The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country.... To teach that patriotism is murder and the spirit of the devil, and that the war against Germany was

224. EDWIN P. HOYT, THE PALMER RAIDS, 1919-1020: AN ATTEMPT TO SUPPRESS DISSENT 51-52, 118 (1969).
225. *See generally* FINAN, *supra* note 207, at 32-34; STONE, *supra* note 184, at 220-26.
226. FINAN, *supra* note 207, at 1-4.
227. *See* 255 F. 886, 888 (9th Cir. 1919).
228. *Id.* at 887; *see also* Stone, *supra* note 184, at 945.
229. *Shaffer*, 255 F. at 887.

> wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.[230]

The opinion captures the slippery slope of the Blackstonian view of speech limits. The speech is unlawful because some might find it convincing, and, if enough are convinced, it could weaken the objectives of the government.

The judicial embrace of the Blackstonian view led ultimately to the "clear and present danger" test in *Schenck v. United States*. *Schenck* exposed Justice Oliver Wendell Holmes's long-standing struggle with free speech. Indeed, as discussed in *The Indispensable Right*, *Schenck* reflects Holmes's deeper struggle with natural rights.[231] *Schenck* and later cases showed Holmes at his most intellectually dishonest as he struggled to rationalize sedition and speech prosecutions.[232] Indeed, Holmes tried to recharacterize such prosecutions in non-seditious terms. Holmes's effort collapses under even cursory review. Charles Schenck and Elizabeth Baer were leading socialists in Philadelphia who opposed the draft in World War I.[233] They were engaged in organizing opposition by informing the others of their rights. Fliers called on fellow citizens, encouraging men to "Assert Your Rights" and oppose conscription as a form of involuntary servitude.[234] Notably, Holmes framed his analysis (like Blackstone) with a reference to prior restraints to narrow the scope of the First Amendment: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose."[235] Holmes clumsily evaded the free speech implications of sedition prosecutions by focusing on the inchoate crime, converting speech into an attempt to commit the criminal offense. For Holmes, it was a matter of context and influence in reviewing whether 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

230. *Id.* at 887-88.
231. *See* TURLEY, *supra* note 2, at 212-16.
232. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
233. *Id.* at 49-50.
234. *Id.* at 50-51.
235. *Id.* at 51-52.

crime like obstructing the draft.[236] This dangerous relativism led to one of the most regrettable and misunderstood judicial soundbites in history: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[237] The ability of exercising free speech now depended on a judicial determination of "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."[238]

The analogy was immediately challenged, including Zechariah Chafee's observation that Schenck was much more like a "man who gets up in a theater between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked."[239] Nevertheless, "[s]houting fire in a crowded theater" continues to be used as a way to dismiss free speech concerns.[240] It also foreshadowed the common effort of treating speech as conduct as a way to avoid addressing the obvious denial of free expression. This test continues despite the fact that Holmes himself later sought to walk back his sweeping dismissal of free speech rights.[241] Holmes would adopt a more expansive view of free speech, but these cases were distorted by Holmes's view that *Schenck* was a straightforward criminal case (of obstructing the draft) and not a free speech case.

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236. *Id.*

237. *Id.* at 52.

238. *Id.*

239. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 944 (1919).

240. Jonathan Turley, *Shut Up and Play Nice: How the Western World Is Limiting Free Speech*, WASH. 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/2QA6-KU78]; *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). Indeed, even in recent hearings on government-supported censorship, Democrats continually quoted the line to justify banning or blacklisting on social media—an ironic reference to a case where a socialist was targeted for anti-war advocacy.

241. This later change in Holmes's approach came after private disagreements with other leading legal figures at the time. Indeed, Holmes's position in *Schenck* proved a point of contention between Holmes and Learned Hard, as Hand wrote to Ernst Freund that "I have so far been unable to make [Holmes] see that he and we have any real differences." Douglas H. Ginsburg, *Afterword*, *in Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 243, 244 (1973).

For many, every statement soon became a call of fire and every period akin to a crowded theater. That was quickly evident after the issuance of *Schenck* when the Court issued an equally destructive decision for free speech in *Frohwerk v. United States*.[242] In upholding a conviction under the Espionage Act of 1917, Holmes dismissed the free speech rights of the publisher of a small newspaper despite the fact that the publisher's anti-draft opinions were recognized as having no appreciable impact on conscription. Ironically, the one unassailable statement made by Holmes was that "there is not much to choose between expressions to be found in them and those before us in *Schenck v. United States*."[243]

Indeed, both were clearly the exercise of core protected free speech rights. Yet, Holmes still believed that it was just to send Jacob Frohwerk away for ten years:

> It does not appear that there was any special effort to reach men who were subject to the draft.... [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.[244]

A terrible trilogy was complete with the addition of *Debs v. United States*, where the Court took the same approach in upholding the conviction of socialist leader Eugene Debs.[245] It was arguably the inevitable conclusion to the cases with the imprisonment of the leading socialist figure in the United States and a repeated candidate for the American presidency.[246] Debs's crime was simply speaking against the war.[247] Even before the jury, Debs remained defiant and

242. 249 U.S. 204, 206 (1919).

243. *Id.* at 207.

244. *Id.* at 208-09.

245. 249 U.S. 211, 217 (affirming Debs's ten-year sentence).

246. Jonathan Turley, *At Michigan Rally, Bernie Sanders Revels in His Role as Political Successor to Eugene Debs*, USA TODAY (Mar. 9, 2020, 4:51 PM), https://www.usatoday.com/story/opinion/2020/03/10/bernie-sanders-michigan-rally-political-successor-eugene-debs-column/5000675002/ [https://perma.cc/JS9H-X5Q9].

247. Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1173 (1984).

confident in his inherent right to oppose "the present government" and "social system":

> Your honor, I ask no mercy, I plead for no immunity. I realize that finally the right must prevail. I never more fully comprehended than now the great struggle between the powers of greed on one hand and upon the other the rising hosts of freedom. I can see the dawn of a better day of humanity. The people are awakening. In due course of time they will come into their own.[248]

Writing for a unanimous Court, Holmes again ignored criminalization of political opinions by stressing the bad tendency of the language as having "natural tendency and reasonably probable effect" of deterring people from supporting or enlisting in the war.[249]

The willful blindness shown by Holmes in the trilogy remains chilling. One of the "great dissenters" with Brandeis, Holmes was able to see a horizon of rights imperceptible to many of his contemporaries. Yet, he remained myopic on free speech, stubbornly clinging to narrow functionalist rationales for speech criminalization. Eventually, Holmes would recognize the inherent flaws in the trilogy and move back toward a broader view of free speech in his dissent in *Abrams v. United States*. What is striking about the case is the lack of meaningful difference in the underlying exercise of free speech. In *Abrams*, the Court upheld the convictions under the Espionage Act of 1917 of five Russian-born immigrants who challenged the U.S. intervention into the Russian Revolution as well as the president's "cowardly silence" on the issue.[250] Under the trilogy, the result was all too predictable. Holmes previously resolved such controversies by focusing on the inchoate crimes tied directly to the crime of obstructing the draft.[251] They were similar to the Adams sedition cases in the prosecution of "disloyal, profane, scurrilous, or abusive language about the form of government of the

248. *Id.*
249. Debs v. United States, 249 U.S. 211, 216 (1919).
250. Abrams v. United States, 250 U.S. 616, 617, 620 (1919).
251. *See generally* James M. McGoldrick, Jr., *"This Wearisome Analysis": The Clear and Present Danger Test from* Schenck *to* Brandenburg, 66 S.D. L. REV. 56, 65-70 (2021).

United States."[252] Such viewpoints were deemed as "intended to bring the form of Government of the United States into contempt, scorn, contumely, and disrepute" language "intended to incite, provoke and encourage resistance to the United States in said war."[253] Holmes refused to sign off on the convictions but continued to cling to the trilogy as rightly decided:

> I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.[254]

Holmes clearly sought to narrow his clear and present danger test and, in a foreshadowing of the *Brandenburg* standard, warned that

> we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[255]

Holmes effectively "came home" on free speech with his famous and full-throated endorsement of the "marketplace of ideas" model:

> [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. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every

252. Sedition Act of 1918, ch. 75, § 40 Stat. 553, 553 (repealed 1920). *Compare id.*, *with* Sedition Act of 1798, ch. 74, § 1 Stat. 596, 596 (expired 1801).
253. *Abrams*, 250 U.S. at 617.
254. *Id.* at 627 (Holmes, J., dissenting) (citations omitted).
255. *Id.* at 630.

> day we have to wager our salvation upon some prophecy based upon imperfect knowledge.[256]

Holmes's embrace of the marketplace of ideas model is inherently at odds with the bad tendency rationale used in the trilogy. In a blatant contradiction with *Frohwerk* (which also had an inconsequential impact), Holmes dismissed the need for criminalization of the speech without offering a coherent standard for all four cases:

> [N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt.[257]

This lack of clarity has led to considerable speculation about his motivations. Some, like David Rabban, conclude that Holmes finally saw the error of his way and the value of political dissent.[258] Others, like Edward Bloustein, simply state that "[t]he only explanation I can offer for this pattern of omission and obfuscation is that Holmes wished to avoid embarrassment."[259] The truth is likely a mix of these theories. Yet, Holmes's own military service may have played a considerable role in his initial hostile reception to the draft cases. Holmes wrote profoundly about his experience in battle in the Civil War and how "in our youth our hearts were touched with fire."[260] His experience seemed to harden his view of broad claims of autonomous or natural rights. When the *Abrams* case went before the Court, Holmes appears to have realized that his earlier rulings were incompatible with his view of free speech. To his credit, he sought to rectify that problem. Yet, to his fault, he never honestly

256. *Id.*

257. *Abrams*, 250 U.S. at 268 (Holmes, J., dissenting).

258. David M. Rabban, *The Emergence of First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1314-16 (1983).

259. Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1145 (1989).

260. *See* Jonathan Turley, *The Military Pocket Republic*, 97 NW. UNIV. L. REV. 1, 37-39 (2002).

and completely broke away from the earlier rationales. Holmes was the perfect personification of the conflicted and confused approach to free speech that has been evident in the United States since the Adams Administration.

The sedition cases of the early 1900s vividly demonstrated the unresolved underlying theory of free speech in the United States. In *Dennis v. United States*, that divide was on public display in the rivalling opinions of Justices Felix Frankfurter and William Douglas. While a plurality applied a slightly augmented clear and present danger standard,[261] the opinions returned the Court to the same debate over sedition laws and speech criminalization from the founding. Crushingly consistent, Frankfurter adopted a narrow view of the right based on Jefferson's allowance for state sedition laws and other sources. Frankfurter relieved himself and the Court of any greater duty to protect free speech on the basis that the First Amendment "is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument."[262] Douglas offered an alternative view of Jefferson but also a theory of free speech that draws the distinction between speech and acts that was voiced by Montesquieu.[263] Douglas maintained that "The First Amendment reflects the philosophy of Jefferson 'that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.'"[264]

The cycle of public panic and speech crackdowns would continue in the twentieth century with the Cold War and the "Red Scare." New powers were granted under the Internal Security Act to allow the mass detention of dissidents.[265] Both congressional and grand jury investigations were used as cudgels against political dissent.[266]

261. 341 U.S. 494, 515 (1951).

262. *Id.* at 523 (Frankfurter, J., concurring).

263. Turley, *supra* note 2, at 231.

264. *Id.* (quoting The Virginia Statute for Religious Freedom, ch. 24, 12 Hening's Stat. 84, 85 (1785)).

265. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 18-19 (2003).

266. David J. Fine, Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C. R.-C. L. L. REV. 432, 432-33 (1972).

Indeed, the much maligned work of the "House Committee on Un-American Activities" was a natural outgrowth of the Blackstonian model of free speech.[267] After all, socialism and communism were viewed as existential threats injected into the body politic by fellow travelers. The Rubicon was crossed when the courts discarded meaningful distinctions between advocacy and actions. From there, it was a small step to go from punishing the expression of bad tendency ideas to punishing those who held those views. This sense of license to attack political dissenters was supported by academics at the time, such as Professor Carl Auerbach, who maintained that allowing constitutional protections for speech was itself a threat to the Constitution.[268] Free speech was defined in strictly functionalist terms to support the constitutional system, and, accordingly, the First Amendment could not be interpreted in a way that undermines the stability of the system.[269] It became 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."[270]

While *Dennis* left the area in a muddle and even more uncertain for free speech rights, the Supreme Court would adopt a more protective standard in *Brandenburg v. Ohio*.[271] Clarence Brandenburg was an Ohio Ku Klux Klan leader who held a televised rally in which he declared, "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to

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267. 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 184, at 949-50.

268. Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 189 (1956).

269. *See id.*

270. *Id.*

271. 395 U.S. 444, 449 (1969) (per curiam).

suppress the white, Caucasian race, it's possible that there might have to be some revengance [sic] taken."[272] He proceeded to call for the sending of Blacks to Africa and Jews to Israel.[273] After the broadcast, he was arrested under an Ohio law criminalizing the advocacy of crime or violence or to assemble with a group for that purpose.[274] 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 ... likely to incite or produce such action."[275]

The standard is the outgrowth of Holmes's effort to confine prosecution to speech causing "a clear and present danger." That standard purportedly 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. Given the fractured decision in *Dennis* (and the abuse of the McCarthy period), the Court reached relative *terra firma* with the *Brandenburg* standard, but the strains of its earlier decisions, including the "bad tendency" rationale, lingered like a dormant virus in its jurisprudence.

III. THE JANUARY 6TH RIOT AND THE REVIVAL OF AMERICAN SEDITION

On January 6, 2021, the United States experienced one of the darkest days of its history in an attack on the Capitol by rioters seeking to stop the certification of the 2020 election of President Joe Biden.[276] It was a desecration of our constitutional process that warranted a massive federal investigation and prosecution of those

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272. *Id.* at 446.
273. *Id.* at 447.
274. *Id.* at 444-45.
275. *Id.* at 447.
276. In my capacity as a network legal analyst and a columnist, I covered that terrible day. I criticized Donald Trump's rally speech while it was being given and later called for him to be censured for his conduct on that day. *See* Jonathan Turley, *The Case for a Trump Censure*, RES IPSA (Jan. 13, 2021), https://jonathanturley.org/2021/01/13/the-case-for-a-trump-censure/ [https://perma.cc/W4R4-7858].

responsible. Hundreds were arrested and charged, many with trespass or unlawful entry.[277] There is widespread and justified condemnation of over what occurred on that day. Indeed, half of Americans polled believe that Trump should face criminal charges for his role in fueling the violence on that day.[278] As will be discussed below, criminal charges against those involved in the January 6th riot can be brought that do not imperil free speech rights. This Article focuses specifically on the use of sedition-related charges in a minority of those cases. There are historical and political comparisons to the prior periods of sedition prosecutions. As in the Adams Administration, the use of sedition charges held obvious political benefits. Sedition has at times been preferred over alternative crimes to register public outrage or to drive political messages. The seditious conspiracy crime was reviewed by Special Counsel Jack Smith in his investigation of possible criminal conduct by Trump, but ultimately was not charged by Smith.[279]

The framing of the crimes on that day carry obvious legal as well as political implications. The January 6th Committee and many others have stressed that January 6th was an "insurrection," not a "riot."[280] Much like the term sedition, the use of "insurrection" serves to register not just the legitimate outrage over the attack on the Capitol but the specific use of force to seek to stop the constitutional process of certification. It converts rage into rebellion. However, while there were individuals who clearly came to the Capitol with violent intentions on that day, the motivations of all of those who entered the building were more varied.

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277. Kierra Frazier, *Jan. 6 Sentences Are Piling Up. Here's a Look at Some of the Longest Handed Down.*, POLITICO (May 30, 2023, 12:32 PM), https://www.politico.com/news/2023/05/30/january-6-arrest-sentencing-00099158 [https://perma.cc/XS82-R8AC].

278. Siladitya Ray, *Nearly Half Of Americans Think Trump Should Face Criminal Charges For Capitol Riot, Poll Find*s, FORBES (June 30, 2022), https://www.forbes.com/sites/siladityaray/2022/06/30/nearly-half-of-americans-think-trump-should-face-criminal-charges-for-capitol-riot-poll-finds/?sh=da8d795376c0 [https://perma.cc/ZZ8D-64SK].

279. Devlin Barrett & Perry Stein, *Garland Names Special Counsel for Trump Mar-a-Lago, 2020 Election Probes*, WASH. POST (Nov. 18, 2022), https://www.washingtonpost.com/national-security/2022/11/18/justice-trump-garland-special-counsel/ [https://perma.cc/QK8T-3R2C].

280. *See, e.g.*, Renee Graham, *Jan. 6 Was Not a Riot. It Was an Insurrection*, BOS. GLOBE (Jan. 4, 2022), https://www.bostonglobe.com/2022/01/04/opinion/jan-6-was-not-riot-it-was-an-insurrection/ [https://perma.cc/G2SR-RQFG].

Despite primetime hearings and media saturation, the public may not be entirely convinced. While condemning the attack, a CBS poll showed that 76 percent of the public saw the tragedy as "a protest that went too far."[281] Academic studies have also challenged the characterization of the riot as an insurrection. A Harvard study found that most of those who participated in the January 6th protests were motivated by loyalty to Trump and only 8 percent harbored "a desire to start a civil war."[282] Once again, that does not alter the collective and righteous condemnation for what these people did on that day. However, it is significant how the crimes are charged by the Justice Department. The array of charges brought in hundreds of cases also do not suggest a general insurrection. Indeed, FBI sources told the media that, after a national investigation and hundreds of arrests, they found "scant evidence" of any "organized plot," and instead found that virtually all the cases are *one-offs*.[283] One agent explained: "Ninety to ninety-five percent of these are one-off cases.... Then you have five percent, maybe, of these militia groups that were more closely organized."[284] The profile of charges, with a small number of sedition-related charges, offers a unique insight into the continued use of such charges given the availability of alternative criminal charges.

There is an undeniable need for comprehensive prosecutions for the serious offenses on January 6th. Yet, this is also the type of period that has spawned some of the worst attacks on free speech historically in this country. There are echoes of prior periods in some of the calls for Trump or his associates to be charged due to

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281. Anthony Salvanto, Kabir Khanna, Fred Backus & Jennifer Depinto, *CBS News Poll: A Year After Jan. 6, Violence Still Seen Threatening U.S. Democracy, and Some Say Force Can be Justified*, CBS NEWS (Jan. 2, 2022, 1:01 PM), https://www.cbsnews.com/news/january-6-opinion-poll-2022/ [https://perma.cc/WN8U-JSFP].

282. Miles J. Herszenhorn, *Why Did Trump Supporters Storm the U.S. Capitol on Jan. 6? Because of Trump, New Harvard Study Finds*, THE CRIMSON (July 26, 2022), https://www.thecrimson.com/article/2022/7/26/trump-jan-6-hks-study/ [https://perma.cc/Z5GW-WGKV]. The study also found that belief in QAnon "was one of the [defendants'] lesser motives." *Id.* The study was hardly pro-Trump, and one author even expressed surprise with the results since conspiracy theories "were so prominently displayed in much of the [riot's] visual imagery." *Id.*

283. Mark Hosenball & Sarah N. Lynch, *Exclusive: FBI Finds Scant Evidence U.S. Capitol Attack Was Coordinated—Sources*, REUTERS (Aug. 20, 2021), https://www.rueters.com/world/us/exclusive-fbi-finds-scant-evidence-us-capitol-attack-was-coordinated-sources-2021-08-20/ [https://perma.cc/WU8H-4VDG].

284. *Id.*

their influence on third parties. It is a resurgence of bad tendency rationales. There are also extemporaneous statements from the bench that have raised controversy. The federal case based on the January 6th riot was assigned to U.S. District Judge Tanya S. Chutkan who previously referred to the need to arrest Trump for his influence over supporters. In the sentencing of a January 6th defendant, Judge Chutkan remarked that the rioters "were there in fealty, in loyalty, to one man—not to the Constitution."[285] She added that "[i]t's a blind loyalty to one person who, by the way, remains free to this day."[286] It was reminiscent of how Judge Hinsdale in the trial of socialist John Most complained that he was "instigated and stimulated to consummate his foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security."[287] In the case of Trump, neither the D.C. nor the federal prosecutors ever charged him with incitement, let alone insurrection. Indeed, no one was criminally charged with insurrection in any of the hundreds of cases brought after January 6th, though the D.C. Circuit held that Trump could be sued civilly for incitement after the rejection of his immunity claims.[288]

Ultimately, Trump would be charged, but not for sedition or incitement. Yet, Special Counsel Jack Smith would emphasize the connection of his allegations of electoral fraud to the January 6th riot.[289] Others were directly charged with sedition-related crimes while various lawsuits were filed to bar Trump from ballots based on his alleged "insurrection." There are also charges like conspiracy to obstruct official proceedings that raise serious free speech questions. These crimes present some of the same questions of the criminalization of bad tendency speech. Despite the revulsion over the events on January 6th, there needs to be a countervailing

285. Jonathan Turley, *Gagging Donald Trump: Why Smith's "Narrowly Tailored Motion" is Neither Narrow Nor Wise*, RES IPSA (Sept. 17, 2023), https://jonathanturley.org/2023/09/17/gagging-donald-trump-why-smiths-narrowly-tailored-motion-is-a-neither-narrow-nor-wise/ [https://perma.cc/B7PC-4XD7].

286. *Id.*

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

288. Blassingame v. Trump, 87 F.4th 1, 5 (D.C. Cir. 2023).

289. *Special Counsel Jack Smith Delivers Statement*, DEPT. OF JUST. (Aug. 1, 2023), https://www.justice.gov/sco-smith/speech/special-counsel-jack-smith-delivers-statement-0 [https://perma.cc/4LU9-QSPE].

concern that this period could metastasize into another time of "panic politics" used to justify the erosion of free speech.

A. The January 6th Defendants: Drawing Prosecutorial Lines Between Protesters, Rioters, and Seditionists

There should be no debate over the gravity of what occurred on January 6th. The fact that the riot occurred in the midst of the constitutional process for the transfer of power magnifies the seriousness of the underlying conduct. As stated in *Abrams*, an effort to prevent a constitutional process by force like the certification of an election is clearly one of the "certain substantive evils that the United States constitutionally may seek to prevent."[290] The question is not the legitimacy of punishment, but the specific crimes alleged to mete out such punishment.

The January 6th cases can be divided into three groups. The first group consists of many individuals charged with relatively minor offenses like trespass and unlawful entry. The second group is charged with more serious charges like obstructing a federal proceeding or violent acts.[291] The third and smallest group is charged with seditious conspiracy, the focus of this Article. Before turning to the sedition charges, it is useful to discuss the division of the second and third groups. An illustrative case can be found in the prosecution of Guy Reffitt.[292] Arrested with zip ties and a gun, Reffitt was convicted of five counts, including transport of a firearm in support of civil disorder and obstruction of an official proceeding.[293] For that conduct, he was given the longest sentence up to that point of any January 6th defendant of 87 months in prison, 3 years of probation, $2,000 in restitution, and mandatory mental health treatment.[294] However, the Justice Department sought an enhancement for

290. Abrams v. United States, 250 U.S. 616, 627 (1919).

291. *See, e.g.*, Daniel Barnes & Ryan Reilly, *Capitol Rioter Guy Reffitt Gets Longest Jan. 6 Sentence, But No Terrorism Enhancement*, NBC NEWS (Aug. 1, 2022, 3:51 PM), https://www.nbcnews.com/politics/justice-department/capitol-rioter-guy-reffitt-gets-longest-jan-6-sentence-no-terrorism-en-rcna40664 [https://perma.cc/MRX8-UDC8] (discussing seven-year sentence and rejection of terrorism enhancement).

292. *Id.*

293. *Id.*

294. *Id.*

terrorism because Reffitt was "planning to overtake our government."[295] The court rejected that claim. The court treated Reffitt as a violent offender and imposed a heavy sentence for his conduct.

Reffitt was notably a member of a militia group known as the "Three Percenters," a group often discussed with the Proud Boys and the Oath Keepers as an extremist organization.[296] The Oath Keepers indictment offers an insight into the array of charges brought against the third group.[297] The eleven defendants, including Oath Keepers leader Elmer Stewart Rhodes III, were charged with many of the same counts from groups one and two.[298] This included the obstruction of an official proceeding used against Reffitt.[299] However, most of the public attention was drawn to the second count of seditious conspiracy under 18 U.S.C. § 2384 which states:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.[300]

While rarely used, the provision includes the expansive grounds of conspiring "by force to prevent, hinder, or delay the execution of any law of the United States."[301] The law is substantially different from the original sedition provisions making it a crime to "print, utter, or publish ... any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the

295. *Id.*
296. Robert Legare, *Former Three Percenter Says He Took a Gun to January 6 Capitol Attack*, CBS NEWS (Mar. 4, 2022, 8:32 PM), https://www.cbsnews.com/news/january-6-former-three-percenter-says-he-took-gun-to-capitol/ [https://perma.cc/Z5M2-V2KK].
297. Indictment at 1, United States v. Rhodes, 2022 WL 1306914 (D.D.C. Jan. 12, 2022) (No. 1:22-cr-00015-APM).
298. *Id.*
299. *Id.*
300. 18 U.S.C. § 2384.
301. *Id.*

Congress of the United States, or the President of the United States."[302] However, the provision can clearly sweep into the same difficult areas of speech crimes. The "force" element has been found to be satisfied by mere property damage and that "however that force is directed—evidences an intent to oppose the government's authority or the execution of a law."[303] It captures Holmes's ill-considered conversion of free speech issues into inchoate crimes to avoid addressing these issues.

The Oath Keepers indictment reveals the same extremist language of prior groups, including militant resistance. Members took an oath to defend the Constitution "from all enemies' foreign and domestic."[304] The indictment shows members storing weapons and organizing teams to march on the Capitol.[305] Rhodes argued that they brought the weapons because they were doing security and also expected that Trump was going to use the Militia Act of 1903 to call for volunteers to put down what they viewed as a democratic insurrection.[306] He also alleged that he cooperated with the federal government, which was aware of their actions.[307] Putting those defenses aside, there are clearly unassailable criminal counts against these defendants. The question is whether the sedition charge serves a material purpose that outweighs its potential for abuse.

The indictment includes counts under 18 U.S.C. § 1512(k) for conspiracy to obstruct an official proceeding, 18 U.S.C. § 1512(c)(2) for obstruction of an official proceeding and aiding and abetting, 18 U.S.C. § 372 for conspiracy to prevent an officer from discharging any duties, and civil disorder and other related charges.[308] The obvious overlap of such charges is a common factor in criminal defense

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302. Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired 1801).

303. United States v. Nordean, 2022 U.S. Dist. LEXIS 222712, at *26-27 (D.D.C. Dec. 11, 2022).

304. Indictment at 3, United States v. Rhodes, 2022 WL 1306914 (D.D.C. Jan. 12, 2022) (No. 1:22-cr-00015-APM).

305. Rebecca Beitsch, *Oath Keepers Stockpiled 30 Days of Supplies, Rifles Ahead of Jan. 6*, THE HILL (Jan. 19, 2022), https://thehill.com/policy/national-security/590442-oath-keepers-stockpiled-30-days-of-supplies-rifles-ahead-of-jan-6/ [https://perma.cc/3ALH-9L3X].

306. Tim Dickinson, *Man Who Stockpiled Arms for 'Bloody' Battle on Jan. 6 Insists He's No Danger to the Public*, ROLLING STONE (Feb. 15, 2022), https://www.rollingstone.com/politics/politics-news/stewart-rhodes-jan-6-court-filing-1300800/ [https://perma.cc/TC8A-NGNW].

307. *Id.*

308. 18 U.S.C. § 1512(k); *id.* § 1512(c)(2); *id.* § 372.

cases. However, there is a striking comparison of the sedition charge and the crime of conspiracy to "corruptly ... obstruct, influence[ ], or impede[ ] any official proceeding."[309] The charges place in sharp relief the choice between sedition charges and, as advocated by Montesquieu, the charging of the underlying overt acts.[310] The defendants planned and took overt acts to impede an official proceeding. Such prosecutions focus on the actions rather than the viewpoints of the defendants. The same is true of conspiracy and incitement provisions tied to the rioting itself.[311]

Seditious conspiracy charges remain dangerously fluid regarding defendants' underlying intent. Federal courts have limited the provision's scope to those cases where defendants seek to obstruct a law "wholesale" and not just a specific application.[312] As the Supreme Court stressed, "'opposing' by force the authority of the United States, or [ ] preventing, hindering or delaying the 'execution' of any law of the United States ... evidently implies force against the government *as a government*."[313] However, this limiting interpretation has proven illusory for defendants. For example, in the case of Proud Boys member Ethan Nordean and his associates, the defendants argued that these interpretations turn on motive and that they were opposed to the specific certification of the Biden election, not a wholesale opposition to the law. The court wiped away any benefit from the more limiting interpretation by saying that the defendants were raising "a distinction without a difference" by arguing that they were only opposed to the application of the law in this case: "Section 2384 proscribes conspiracies to 'prevent, hinder, or delay the execution of any law of the United States,' not to 'prevent, hinder, or delay' such execution only when the conspirators

309. 18 U.S.C. § 1512(c).

310. M.G. Wallace, *Constitutionality of Sedition Laws*, 6 VA. L. REV. 386, 387-88 (1920).

311. This includes 18 U.S.C. § 373(a) (2018) (Solicitation to Commit a Crime of Violence) ("Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct."). Such provisions raise their own First Amendment issues but establish the range of options other than sedition.

312. United States v. Nordean, 2022 U.S. Dist. LEXIS 222712, at *12 (D.D.C. Dec. 11, 2022).

313. Baldwin v. Franks, 120 U.S. 678, 693 (1887) (emphasis added).

believe the law is invalid."[314] Moreover, the court rejected past cases that emphasized a more general opposition to the government or its laws. Notably, the court cited cases from the early twentieth century using sedition charges to crackdown on social and labor groups to show that no such finding is necessary, including *Anderson v. United States*. In that case, the Industrial Workers of the World were engaged in protected speech in seeking to displace what they denounced as rule by "bourgeois," and "parasites."[315] The overt acts the court cited included being "actively engaged in conducting the association and carrying out and propagating its principles by written, printed and verbal exhortations."[316] Thus, it is the limitation that seems to raise "a distinction without a difference" if the defendants need not have opposed the government or the underlying law generally to qualify as sedition.

The line between protest and sedition is virtually impossible to discern in the hundreds of charges linked to January 6th. In that sense, the mixed verdict in the Oath Keepers trial only deepened that uncertainty.[317] Charges such as conspiracy to obstruct an official proceeding can have anti-free speech applications when converting political viewpoints into criminal acts. That issue is most evident in the calls to prosecute Trump for his speech at the Ellipse and his inflammatory public statements. While such action could produce greater clarity in the post-*Brandenburg* period, it could also lead to a resumption of the dangerously fluid standards from the *Schenck* period.

The question is the dividing line between the last two groups—the "rioters" and the "seditionists." Reffitt is a good example of the blurred line. Reffitt planned to participate in a riot and brought zip ties and a weapon. He was not charged with seditious conspiracy, and the court rejected a terrorism enhancement. Many like Reffitt wanted to block the certification of the election, which they wrongly believed was fraudulently secured. The motivation of the "rioters" and the "seditionists" were the same to the extent that they wanted to stop the certification.

314. *Nordean*, 2022 U.S. Dist. LEXIS 222712, at *12.
315. Anderson v. United States, 273 F. 20, 24 (8th Cir. 1921).
316. *Id.* at 23.
317. *See infra* notes 433-36 and accompanying text.

In *United States v. Rahman*, the United States Court of Appeals for the Second Circuit considered a challenge to the seditious conspiracy offense in a major terrorism case.[318] The Court held that "[n]otwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching."[319] Notably, the court rejected the First Amendment challenge of *Rahman* based on the *Dennis* decision and its upholding of the constitutionality of the Smith Act's criminalization of the advocacy for, or conspiracy to advocate for, the overthrow of the government by force or violence.[320]

The reliance on the *Dennis* decision in 1999 is telling. While the Act was upheld, the Court was deeply fractured, and ultimately the "clear and present danger" standard was effectively supplanted by the Court in *Brandenburg*.[321] More worrisome is the underlying charge in *Dennis* in which Communists were prosecuted for their political views without any overt acts to justify the prosecution.[322] Justice Black stated the threat of this prior restraint with his signature clarity and, in dissent, spoke to future justices to correct this grave error:

> These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government....
>
> So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the

318. 189 F.3d 88, 115 (2d Cir. 1999).
319. *Id.* at 117.
320. *Id.* at 114-15.
321. Brandenburg v. Ohio, 395 U.S. 444 (1969).
322. Dennis v. United States, 341 U.S. 494 (1951).

> basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection....
>
> Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[323]

The call to a "later court" may be answered due to the seditious conspiracy cases connected to the January 6th riot. There is also the potential risk that courts could return to not just a "clear and present danger" standard of *Dennis* but the "bad tendency" approach.[324] In *Gitlow v. New York*, the Court held "[t]hat a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question."[325] Lower courts allowed for the criminalization of speech where "the *natural and probable tendency* and effect of the words quoted therefrom are such as are calculated to produce the result condemned by the statute."[326] The test was denounced by figures like Chafee who maintained that with the test "[a]ll genuine discussion among civilians of the justice and wisdom of continuing a war ... becomes perilous."[327]

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323. *Id.* at 579-81; *see also* Michael P. Downey, Note, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 700-04 (1998).

324. *See* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 341 (2003); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 591 (1981).

325. 268 U.S. 652, 652 (1925). *Gitlow* also opened the door for the expansion of First Amendment jurisprudence with the incorporation under the Fourteenth Amendment to govern state actions. *Id.* at 666 ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

326. *E.g.*, Shaffer v. United States, 255 F. 886, 887 (9th Cir. 1919) (emphasis added).

327. CHAFEE, *supra* note 110, at 52.

B. January 6th and the Revival of the "Bad Tendency" Line of Sedition

Rage rhetoric is at the heart of the calls for the prosecution of Donald Trump, though there has been an escalation of such rhetoric on all sides in our current toxic political period.[328] Trump faces an array of criminal allegations, including some that do not raise the free speech issues discussed in this Article. For example, in August 2022, his home at Mar-a-Lago was the focus of an unprecedent FBI raid to seize classified material allegedly being held by Trump in violation of federal laws, including the Presidential Records Act.[329] 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."[330] 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."[331] The focus is on the overt act of willful concealment or retention. Trump also faces charges for obstruction and other charges based on his retention and failure to turn over classified and sensitive material at Mar-a-Lago despite an earlier subpoena, which raises serious and valid criminal allegations.[332] Likewise, Trump faces allegations of seeking to coerce or defraud Georgia election officials to secure a

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328. Recently, President Biden has been accused of inflammatory speech directed at Trump supporters including calling them "semi-fascists" and threats to the nation. *See* Shannon Pettypiece, *Biden Attacks Trump, MAGA Republicans As a Threat to Democracy in Blistering Speech*, NBC (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/AGU2-6NGH].

329. Jonathan Lemire, Kyle Cheney & Nicholas Wu, *Trump's Mar-a-Lago Home 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/7VTC-AM6V].

330. 18 U.S.C. § 2071 (2022).

331. U.S. Dep't of Just., Just. Manual § 910 (2020).

332. Jonathan Turley, *Prosecuting Donald Trump*, RES IPSA (Sept. 5, 2022), https://jonathanturley.org/2022/09/05/hats-off-to-hillary-prosecuting-trump-in-the-shadow-of-clintons-emails/ [https://perma.cc/G7XF-GDDR]; *see also* Jonathan Turley, *Federal Judge Orders Appointment of Special Master and Halts Use of Seized Mar-a-Lago Documents by Prosecutors*, RES IPSA (Sept. 6, 2022), https://jonathanturley.org/2022/09/06/federal-judge-orders-appointment-of-special-master-and-halts-use-of-seized-mar-a-lago-material-by-prosecutors/ [https://perma.cc/68XR-S7FM].

recount of the 2020 results.[333] Finally, Trump faces an array of bank and tax fraud claims in New York in a civil case based on acts of devaluing or over-estimating property values.[334] While free speech concerns are present, these are prosecutions that turn on the alleged actions taken by Trump to secure allegedly unlawful benefits or aims. However, it is the Special Counsel prosecution in Washington, D.C. that raises core free speech concerns in charges related to Trump's speech on January 6th. While Special Counsel Jack Smith did not bring sedition, insurrection, or incitement charges, the indictment relies heavily on Trump's speech and past statements as "fueling" the violence.[335] The question is where to draw the line between protected rage and criminal speech.

Donald Trump is, in many ways, the face of an age of rage for both sides of our political divide. Trump has built his political career attacking a variety of groups, from undocumented migrants to the media to the establishment. While he is not unique in the use of such rhetoric, he has made the calculated use of rage as a type of political signature. Yet, the Trump case is a unique combination of many of the most salient characteristics of the early sedition cases. The gist of the charges linked to the January 6th riot remains his alleged incitement or encouragement to riot or insurrection. The heart of those allegations remains reckless and potentially violent speech. Any prosecution would return the Court to the earlier logic of cases like *Gitlow* where the Court embraced the notion that some speech can be criminalized as inviting anarchy: "A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."[336] The Court held

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333. *See* Graham Kates, *Special Grand Jury Considering Trump Election Interference in Georgia Convenes*, CBS NEWS (May 2, 2022), https://www.cbsnews.com/news/trump-georgia-2020-election-interference-grand-jury-today/ [https://perma.cc/K3TS-C8NW].

334. *See New York's Attorney General Says Trump's Company Misled Banks, Tax Officials*, NPR (Jan. 19, 2022), https://www.npr.org/2022/01/19/1074000357/new-yorks-attorney-general-says-trumps-company-misled-banks-tax-officials [https://perma.cc/7KDH-98S3].

335. Statement of Special Counsel Jack Smith, Department of Justice Press Conference, https://www.justice.gov/sco-smith/speech/special-counsel-jack-smith-delivers-statement ("The attack on our nation's capital on January 6, 2021, was an unprecedented assault on the seat of American democracy. As described in the indictment, it was fueled by lies. Lies by the defendant targeted at obstructing a bedrock function of the U.S. government, the nation's process of collecting, counting, and certifying the results of the presidential election.").

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

that the government does not have to wait until a spark "has enkindled the flame or blazed into the conflagration."[337] It is a description that would seem prophetic for many critics of Trump's Ellipse speech and its role of flaming the rage before the riot at the Capitol. Yet, the *Gitlow* approach is untethered to even the "clear and present danger" standard.[338]

There is a concerning similarity between some calls for criminalization of speeches on January 6th and past sedition cases. Many have stressed that the actions and precautions on that day revealed an intent to cause a riot.[339] These arguments are reminiscent of arguments of the Crown in *Yorke* that "the very manner of convening [the assembly], indicate[d] an intention of disturbance."[340] Those arguments combine with the bad tendency rationale to create a classic seditious speech rationale. 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. Brandeis's *Whitney* concurrence is celebrated for its effort to reinform free speech protections and explain the importance of free speech to our constitutional system:

> [The Framers] valued liberty both as an end, and as a means.... 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

337. *Id.*

338. 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.

339. Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html [https://perma.cc/7DFP-W9WK].

340. THOMAS JONES HOWELL, *The Trial of Henry Redhead, Otherwise Known as Henry Yorke, Gentleman, for a Conspiracy*, *in* 25 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1015 (1795).

> 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.[341]

Brandeis's language is both penetrating and poetic. However, he would also concur in upholding a conviction of protected political speech and association. His solution would foreshadow the *Brandenburg* test in opposing criminalization where there is still "time to respond." Yet, his legal poetry did nothing for Whitney who merely sought to create a communist organization.

Despite his insistence that the defendant "is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation,"[342] Brandeis's famous concurrence could not decouple his analysis from the fluid purpose of the prosecution. There remained the right of the government to prosecute a woman[343] who merely sought to establish a Communist Labor Party—an effort deemed a crime under the 1919 California Criminal Syndicalism Act.[344] The difference between the views of Brandeis and Black is the meaning of abridgment under the First Amendment. The failure to focus on the overt acts continued to create a morass of uncertainty in an area that demands bright-line rules. The "evil" remained the potential for public unrest or even unease. The tweaking of the specific standard remained tethered to what remained speech crimes in cases like *Dennis* and *Whitney*.

The last incarnation of the "clear and present danger" standard came with *Brandenburg*, which effectively substituted a new and

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341. Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

342. *Id.* at 373.

343. Charlotte Anita Whitney came from a prominent family, whose illustrious members included the American Supreme Court Justice Stephen Johnson Field. Ronald K. L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in* Whitney v. California, 9 SUP. CT. REV. 333, 338 (2005).

344. *Id.* at 341, 343 (discussing the enactment of California's criminal syndicalism statute "as an emergency measure for the 'immediate preservation of the public peace and safety'").

more protective standard in its place without reversing cases like *Dennis*. The "evil" was now loosely defined as "lawless action":

> The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe [(1)] advocacy of the use of force or of law violation [(2)] except where such advocacy is directed to inciting or producing imminent lawless action and [(3)] is likely to incite or produce such action.[345]

While an obvious and important improvement over the test first articulated in *Schenck*, it introduced new ambiguity over the meaning of terms like imminence. In the first major application of *Brandenburg*, an anti-war activist was again in the dock and accused of inciting lawless conduct. In *Hess v. Indiana*, Gregory Hess was with roughly 150 other anti-war protesters in May 1970 at Indiana University (Bloomington) when he was overheard telling others "We'll take the fucking street later" or "We'll take the fucking street again."[346] Hess was convicted in Indiana state court of disorderly conduct.[347] In this case, there was an underlying statute that sought to prevent the "evil" of public disorder. The state law criminalized acting in a "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."[348] The Court overturned the conviction on the basis of *Brandenburg*:

> 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 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."[349]

345. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).
346. 414 U.S. 105, 107 (1973).
347. *Id.* at 105.
348. *Id.* at 105 n.1.
349. *Id.* at 108-09.

Putting aside that Hess was advocating the retaking of the street as an "action," the Court simply declared that his advocacy would not produce "imminent disorder."[350] The obvious import is that, under other circumstances, those same words might be deemed as sufficiently threatening imminent disorder and thus could be criminally charged. The correct result, therefore, was mired in the same uncertainty. The bright-line option was to reject charges based on how third parties might react to such advocacy—and to charge any overt actions of rioting. It seems clear that there was already public disorder, a point noted by the dissent:

> [B]y contrast to the majority's somewhat antiseptic description of this massing as being "[i]n 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.[351]

The Court offers no explanation for the different treatment between the extremist speech cases. In a case like *Whitney*, the defendant was seeking to establish a political party.[352] In *Hess*, there were demonstrators in the street.[353] The dissent is right to accuse the majority of an "antiseptic description"[354] even if it was wrong on the ultimate conclusion on the underlying free speech rights. The lack of coherence is due to the Court's refusal to create a bright-line rule with a focus on overt acts and the conspiracy to bring about those acts. Advocacy or political change cannot be such a proscribed act in the Constitution.

One of the most intriguing aspects of the Trump allegations is that they parallel the jurisprudence surrounding sedition. Under the English model, the focus was on the speech or the cause.[355] Because it did not matter if the speech was true or not, it was not the actual effect but the potential effect that mattered.[356] In later

350. *Id.* at 109.
351. *Id.* at 110 (Rehnquist, J., dissenting).
352. Whitney v. California, 274 U.S. 357, 364-65 (1927).
353. *Hess*, 414 U.S. at 106.
354. *Id.* at 110 (Rehnquist, J., dissenting).
355. *See supra* Part I.B.
356. Van Alstyne, *supra* note 108, at 1092.

American cases, some cases advancing the "bad tendency" rationale continued this emphasis on the speech itself. However, in other cases, the focus would shift to the intended effect or the resulting action.[357] Those issues have now cycled back into major litigation with the January 6th defendants and particularly the alleged case against Trump. The Trump speech falls precisely in the middle of the morass of *Schaefer*, *Dennis*, *Gitlow*, and *Whitney* before the adoption of the *Brandenburg* standard. Those cases were emblematic of the Court's struggle to preserve the criminalization of speech while seeking to impose discernible limits on the government.[358] The absence of overt acts led justices to emphasize certain "evils" of extremist speech that raise the risk of anarchy and disorder. While relying on a "clear and present danger" rationale, the Court embraced the "bad tendency" approach that allowed prosecution for "utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow."[359] Citing *Gitlow*, a validating "evil" included speech that "endanger[ed] the foundations of organized government."[360]

The indictment of Trump or his close aides for their fueling of the January 6th riot face a threshold challenge under *Brandenburg*. The problem with using the speech itself is that there is not an easy or clear line distinguishing simple advocacy for political change. On January 6th, some Republicans were joining an effort to challenge the certification of the election.[361] While many of us

357. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 363 (2003) (permitting a ban on cross-burning only with respect to those burnings "done with the intent to intimidate").

358. *See* Schaefer v. United States, 251 U.S. 466, 468, 478, 482 (1919) (upholding defendant's conviction under the Espionage Act for publishing "false reports" to hinder the United States' war efforts, despite the satirical nature of the publication, when humor could still have "evil influence"); Dennis v. United States, 341 U.S. 494, 497, 502 (1951) (affirming petitioners' conviction under the Smith Act for organizing with the Communist Party and "advocat[ing] the overthrow" of the United States, while recognizing that mere "discussion of political theories" would not be punishable under the Act); Gitlow v. New York, 268 U.S. 652, 655, 672 (1925) (upholding conviction of Gitlow for publishing a "left wing manifesto" under the bad tendency test); Whitney v. California, 274 U.S. 347, 366, 372 (1927) (affirming conviction of Whitney under the California Criminal Syndicalism Act for aiding in the establishment of the Communist Labor Party of California).

359. *Whitney*, 274 U.S. at 371.

360. *Id.* at 370-71.

361. Barbara Sprunt, *Here Are The Republicans Who Objected To The Electoral College*

strongly disagreed with the basis for that challenge, federal law allows for members to do so.[362] Indeed, Democrats have repeatedly organized such challenges, including contesting the elections of George W. Bush and Donald Trump.[363] 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.[364] If the certification challenge was a lawful option 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.[365] 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 the Trump speech and actions on that day that crossed the line from extreme speech to criminal speech. 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.[366] Again, I was one of those who challenged Trump's claims as he was giving them on the Ellipse. However, Trump will be able to point to such language as falling squarely within the protections of *Brandenburg*, including his references to "going to cheer on our brave senators and congressmen and women" and telling his supporters "to peacefully and patriotically make your voices heard."[367]

Count, NPR (Jan. 7, 2021, 4:26 PM), https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count [https://perma.cc/8V2Q-JS64].

362. Electoral Count Act, ch. 90, 24 Stat. 373 (1887) (codified as amended at 3 U.S.C. §§ 5-6, 15-18 (2000)).

363. *Democrats Challenge Ohio Electoral Votes*, CNN (Jan. 6, 2005, 7:08 PM), https://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote.1718/ [https://perma.cc/67R7-EV3W]; Kyle Cheney, *House Democrats to Challenge Trump's Electoral College Win*, POLITICO (Jan. 6, 2017, 12:14 AM), https://www.politico.com/story/2017/01/house-democrats-trump-electoral-college-233264 [https://perma.cc/7LLQ-YG6T].

364. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914-15 (1982).

365. *See Thousands Protest, Hold Vigils on Inauguration*, NBC NEWS (Jan. 19, 2005, 9:31 AM), https://www.nbcnews.com/id/wbna6842927 [https://perma.cc/375G-KTN8].

366. *See* Turley, *supra* note 276.

367. *Trump's Speech Before Mob Stormed Capitol*, AP (Jan. 14, 2022, 1:12 AM), 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/F8XD-268F].

The question is how to distinguish those lines from other political protests that turned violent. Under *Brandenburg*, Trump would have a strong argument that he did not advocate force and did not ask his followers to violate the law in challenging certification. More importantly, he could cite to his call for peaceful protest and the use of the rally to reinforce their 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 question is whether the proximity in time and location to the electoral certification makes this a call to specific criminal conduct. 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* where actual Communist party officials were still protected under the First Amendment—a striking contrast to *Whitney*.[368] The Court held:

> We 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.[369]

Likewise, in *Noto v. United States*, the Court rejected a Smith Act charge for advocating the overthrow of the government.[370] Even a call for rebellion was not sufficient. It had to be "*present* advocacy" to meet what would become the *Brandenburg* standard.[371] Clearly, in the January 6th context, prosecutors can argue that Trump was engaged in such "present advocacy" since he was instigating action on Capitol Hill. Yet, like the *Schenck* progeny, that analysis remains maddeningly circular. We are again left with the "evils" of the speech itself. If the action being instigated was lawful—for example,

368. 354 U.S. 298, 318-27 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978); Whitney v. California, 274 U.S. 357, 371-72 (1927) (affirming petitioner's conviction for aiding in establishment of Communist Labor Party because free speech protections did not apply to "the advocacy and use of criminal and unlawful methods").

369. *Yates*, 354 U.S. at 318.

370. 367 U.S. 290, 297-98 (1961).

371. *Id.* at 298.

protesting to support the certification challenge—it remains protected speech.[372]

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.[373] Trump was wrong on the law in claiming that Vice President Pence had the inherent authority to simply refuse to accept certification.[374] However, calling for the Vice President to exceed his authority is arguably not a crime, particularly when a few lawyers were advising that this is a novel and unanswered question for the courts. Rather, 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*.[375] Judge David O. Carter in the U.S. District Court for the Central District of California ruled against privilege arguments raised by President Trump's private counsel, John Eastman, to withhold documents from the January 6th Committee.[376] 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 6th.[377] The court declared "it [is] more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021."[378] Carter rejected any claim based on Eastman's

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

> Strong 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).

373. Electoral Count Act, ch. 90, 24 Stat. 373 (1887).

374. *Id.*

375. 594 F. Supp. 3d 1156, 1192-93 (C.D. Cal. 2022).

376. *Id.* at 1198-99.

377. *Id.* at 1192.

378. *Id.* at 1193.

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.[379] Carter ruled that such legal advice failed under the "crime-fraud exception" because the President knew there was no basis for such a challenge.[380] Noting that Eastman still believed that the statute was unconstitutional as written, the court simply brushed that aside and stated the "ignorance of the law is no excuse" and "believing the Electoral Count Act was unconstitutional did not give President Trump license to violate it."[381] Once again, many (including the author) agree with Judge Carter's view of the Act and the lack of this 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.[382] That is the same purpose as earlier certification challenges,[383] but the court treated this challenge as criminal because it was legally unfounded.[384] That makes the protest not even a riot but a *coup*. The opinion is weakened by the court's sweeping dismissals of countervailing views or motives. It reads much like earlier speech prosecutions 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 rendered 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."[385] 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

379. *Id.* at 1194-95.
380. *Id.* at 1188, 1190-91.
381. *Id.* at 1192.
382. *See id.* at 1195.
383. *See supra* note 345 and accompanying text.
384. *Eastman*, 594 F. Supp. 3d at 1192 ("Disagreeing with the law entitled President Trump to seek a remedy in court, not to disrupt a constitutionally-mandated process.").
385. *Id.* at 1198.

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."[386] Many civil libertarians have long argued that the Court was blinded by its own contempt for the anti-war sentiments in upholding the conviction.[387] Judge Carter showed the same conclusory tendency in simply declaring that Trump knew that the election was not stolen and that "[t]he illegality of the plan was obvious."[388]

The alternative framing is the riot itself, the Yorke-like argument that the certification challenge was merely the pretext for an insurrection. That was the basis for the second Trump impeachment.[389] 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 are calculated to produce the result condemned by the statute."[390] 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 "bad tendencies" decision, the theory that shaped the lower court rulings.[391] The pamphlets clearly engaged in political speech, but were deemed "calculated to cause ... insubordination" and obstruction of the draft.[392] 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."[393] In *Debs*, the Court emphasized the "natural tendency" of words and how they had a "reasonably probable effect to obstruct the recruiting service."[394] Indeed,

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386. Schenk v. United States, 249 U.S. 47, 51 (1919).
387. *See, e.g.*, CHAFEE, *supra* note 110, at 81-82.
388. *Eastman*, 594 F. Supp. 3d at 1192.
389. *See* Brian Naylor, *Article of Impeachment Cites Trump's 'Incitement' of Capitol Insurrection*, NPR (Feb. 9, 2021, 12:30 PM), https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/11/955631105/impeachment-resolution-cites-trumps-incitement-of-capitol-insurrection [https://perma.cc/Y7BE-RE9J].
390. Shaffer v. United States, 255 F. 886, 887 (9th Cir. 1919).
391. *See* Rabban, *supra* note 258, at 1261.
392. Schenck v. United States, 249 U.S. 47, 49 (1919).
393. Frohwerk v. United States, 249 U.S. 204, 209 (1919).
394. Debs v. United States, 249 U.S. 211, 216 (1919).

the obvious absence of a "clear and present danger" in *Debs* only highlighted its inherent reliance on a "bad tendency" rationale. As Chafee 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."[395]

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. 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 6th. 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 positions. Moreover, it fails to offer a discernible limiting principle for other politicians who have engaged in inflammatory rhetoric at times of rioting.[396] 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[397] or more aggressive forms of

395. Chafee, *supra* note 239, at 948.

396. *See, e.g.*, Jonathan Turley, *Insurrection or Advocacy? Chicago Mayor Lightfoot Issues "Call to Arms" After Leaked Abortion 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/PF72-CW38]; 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/5TMJ-8FPQ].

397. Jonathan Turley, *"Blow Up Republicans": UNC Professor Triggers Firestorm With Call for Killing Republicans*, RES IPSA (June 25, 2021), https://jonathanturley.org/2021/06/25/blow-up-republicans-unc-wilmington-professor-triggers-firestorm-with/ [https://perma.cc/M76X-TB8R] (detailing other such violent rhetoric).

protests.[398] 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? Trump could therefore prove the ultimate stress test for the modern sedition doctrine, exposing the inherent weakness of tests that focus on the potential impact of speech as opposed to actual overt acts.

C. The Disqualification and the 14th Amendment

The framing of the second Trump indictment may have avoided a direct challenge to a sedition charge, though some of the free speech concerns remain. Notably, however, these issues would be litigated in collateral litigation over efforts to disqualify Trump from running in 2024 under section 3 of the 14th Amendment. While Trump has not been charged with incitement or insurrection, those were the bases for claims that states could unilaterally bar him under a provision written after the Civil War to bar confederates from re-taking oaths to serve in Congress. Despite comprehensive and insightful scholarship in support of his theory,[399] some of us have long maintained that this theory is fundamentally wrong on the history and meaning of Section 3.[400] It is also extremely dangerous and destabilizing for our constitutional system, as shown by the attempted use of the same provision to bar over 120 members of Congress from serving and cleansing ballots of various candidates.[401] There are a host of objections that have been raised to the disqualification effort from the inapplicability of the provision to

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398. 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/MP83-NBRN].

399. *See, e.g.*, William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605,662-63 (2024).

400. *See, e.g.*, Jonathan Turley, *The Disqualification of Donald Trump and Other Urban Legends*, THE HILL (Sept. 19, 2023), https://thehill.com/opinion/judiciary/4158573-the-disqualification-of-donald-trump-and-other-urban-legends/ [https://perma.cc/GB8L-4VGM].

401. Jonathan Turley, *Ballot Cleansing: Democrats Are Moving to Bar Republicans from Ballots Nationwide*, RES IPSA (jonathanturley.org), (Jan. 5, 2024), https://jonathanturley.org/2024/01/05/ballot-cleansing-democrats-are-moving-to-bar-republicans-from-ballots-nationwide/ [https://perma.cc/7CM7-EEUY].

presidents to the requirement of prior congressional action. Prior congressional action was found necessary by Supreme Court Chief Justice Salmon Chase.[402] Chase held that Section 3 of the Fourteenth Amendment "clearly requires legislation in order to give effect to it."[403] Chase alluded to the need for congressional action as inescapable and that given "the very nature of things, it must be ascertained what particular individuals are embraced by the definition" of being rebels or insurrectionists.[404] As such, "[t]o accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress."[405] The patchwork actions of states in 2023 to 2024 reinforce Chase's view that this interpretation is not only evident from the language but practically essential for the application of this provision.[406] That view is reinforced by the only federal law passed to implement Section 3. The federal criminalization of "rebellion or insurrection" under 18 U.S.C. § 2383 suggests that many in Congress also believed that this was not a self-enforcing provision.[407]

For the purposes of this Article, the most relevant question raised by the disqualification cases is whether January 6th can be treated as an insurrection or rebellion. With that question, we have seen a return to theories based in part on the scope of sedition.

The impetus for the disqualification provision occurred during the 39th Congress convened in December 1865 when many members were not too pleased to see Alexander Stephens, the former Confederate vice president, waiting to take a seat with other former Confederate senators and military officers. They were seeking to take the very same oath that they had violated before plunging the nation into a war that took hundreds of thousands of lives. Section Three states:

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402. *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (Chase, C.J.).

403. *Id.* at 26.

404. *Id.*

405. *Id.*

406. *See* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350, 362 (forthcoming 2024).

407. *But see* Baude & Paulsen, *supra* note 399, at 697 n.352.

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[408]

The claim that this provision is self-executing has allowed a couple of secretaries of state to unilaterally find that January 6th was an actual insurrection or rebellion, and that Trump gave aid or comfort to those who carried it out. There is no need, in their view, for an act of Congress. Yet, it is the fluidity of the definition of an insurrection or rebellion that is most striking given our history with the abuse of sedition laws. A Harvard survey showed that many citizens view January 6th as a protest that became a riot.[409] However, advocates insist that even such a riot was viewed as an insurrection or rebellion in the nineteenth century. As discussed in *The Indispensable Right*, it is certainly true that the 1800s were a time of abusive criminalization of speech and the treatment of dissenters as traitors and insurrectionists.[410] Ironically, many scholars who abjure originalist interpretations would apply such meaning in an effort to block Trump. Yet, even for those who adhere to originalist interpretations, it is not clear that these terms can be construed to cover even a riot. The context of this Amendment presents its own gravitational pull on the interpretation. As Professor Steven Calabresi has noted "[t]he kinds of 'insurrections' described in Section 3 are akin to 'rebellions' as the paradigm case of the onset of the Civil War makes clear."[411] This was meant as a response to those who had

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408. U.S. CONST. amend. XIV, § 3.

409. Miles Herszenhorn, *Why Did Trump Supporters Storm the U.S. Capitol on Jan. 6? Because of Trump, New Harvard Study Finds*, HARV. CRIMSON (July 25, 2002), https://www.thecrimson.com/article/2022/7/26/trump-jan-6-hks-study/ [https://perma.cc/Z5GW-WGKV].

410. *See* TURLEY, *supra* note 2.

411. Steven Calabresi, *Donald Trump and Section Three of the Fourteenth Amendment*, VOLOKH CONSPIRACY (Dec. 31, 2023, 8:48 AM), https://reason.com/volokh/2023/12/31/donald-trump-and-section-3-of-the-14th-amendment/ [https://perma.cc/ND3G-JZ4A].

just fought a war on behalf of a breakaway nation with its own military, currency, foreign policy, and legislature. Ultimately, many confederates not only would serve in Congress due the 1872 enactment of the Amnesty Act but even on the Supreme Court itself.[412]

In the Trump case, the broader meaning given to "insurrection" and "rebellion" parallels the use of seditious conspiracy charges of obstructing proceedings. That is evident in the Colorado decisions disqualifying Trump. In the state trial court, Judge Wallace agreed that the provision was "primarily written to prevent officials who left to join the Confederacy from returning to office."[413] However, the court found that an insurrection encompassed "any public use of force or threat of force by a group of people to hinder or prevent the execution of law."[414] Since force can include property damage alone, any protest with property destruction at a courthouse or Capitol could qualify as an insurrection. That could include the violent protest at the White House before January 6th in which dozens of officers were injured, a structure burned, and the President removed to safety.[415] Rather than explore the implications of such a sweeping definition, the Colorado Supreme Court simply adopted the record created by the district court and declared January 6th an insurrection.[416]

The close parallel to seditious conspiracy is no surprise given its historic abuse in elevating offenses to something akin to treason. Indeed, as shown in the Star Chamber proceedings, sedition was a ready-made alternative that did not demand the proof of treason, a type of treason-lite option with the same stigma and severity of sentencing. Notably, academics[417] and the Colorado courts have

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412. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 119, 120, 123 (2021).

413. Anderson v. Griswold, No. 2023CV32577 2023 U.S. Dist. LEXIS 362, at *86 (D. Colo. Nov. 17, 2023).

414. *Id.* at *88.

415. *The U.S. Park Police Attack on Peaceful Protesters at Lafayette Square—Part I: Oversight Hearing Before the H. Comm. on Nat. Res.*, 116th Cong. 2, 21 (2020) (statement of Jonathan Turley, Law Professor, George Washington University Law School).

416. *Anderson*, 2023 U.S. Dist. LEXIS 362, at *38.

417. Calabresi, *supra* note 411. Professor Calabresi previously believed that Trump was disqualified, but later changed his view after considering the language further and concluding that presidents and vice presidents are not included in the definition of "officers of the United States." *Id.*

relied on 19th Century definitions referencing sedition.[418] For example, Webster's 1860 definition states:

> A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state. It is equivalent to SEDITION, except that sedition expresses a less extensive rising of citizens. It differs from REBELLION, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one, or to place the country under another jurisdiction.[419]

The Webster definition is obviously not dispositive on the interpretive question. First, saying that the term is the equivalent to sedition may be true in a colloquial sense but not a legal sense. There are a host of legal terms used with "latitude" in public, but given more limited meaning in court. Second, the definition itself draws a distinction on how sedition references small "risings." Third, as discussed, sedition was specifically developed as an alternative to treason and rebellion in English cases, a crime that covered bad tendency speech and disruptive advocacy. Finally, it was not included in the language of the Fourteenth Amendment. Whatever the colloquial meaning, there is no reference to sedition even though sedition crimes had long been brought under the federal code.[420]

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418. *Id.*

419. Noah Webster, An American Dictionary of the English Language 613 (1860). Calabresi noted that insurrection was defined along similar lines to sedition, as shown in Webster's 1828 definition:

> A rising against civil or political authority; the open and active opposition of a number of persons to the execution of a law in a city or state. It is equivalent to sedition, except that sedition expresses a less extensive rising of citizens. It differs from rebellion, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction. It differs from mutiny, as it respects the civil or political government; whereas a mutiny is an open opposition to law in the army or navy. *Insurrection* is however used with such latitude as to comprehend either sedition or rebellion.

Calabresi, *supra* note 411.

420. Calabresi would later argue that the definition actually tips the balance against disqualification. *Id.* ("The canon of construction of noscitur a sociis, a word derives its meaning from the company it keeps applies here. The kinds of 'insurrections' described in Section 3 are akin to 'rebellions' as the paradigm case of the onset of the Civil War makes clear. The events that occurred on or about January 6, 2021 were very, very bad, but they

It is not surprising that sedition would again find its way into a controversy over the criminalization of political advocacy. The appeal of sedition has always been its malleability. It is a concept based on the danger of disloyalty and disruption in society. It is a criminal clay that can be shaped into most any form of expression that challenges the authority of the state. The circularity is positively crushing. Sedition was hatched as a way to prosecute those who were not guilty of treason or rebellion. Abusive sedition cases in the English and colonial cases contributed to the motivation of the framers to embrace a more robust protection for free speech in the United States. Over two centuries later, it is being invoked to justify broadening the meaning of insurrection and rebellion to justify disqualification of one of the leading candidates for the presidency. If successful, it could be used to introduce the very fluidity of culpability that was associated with the colonial period. No conviction, no charge, no congressional action. Yet, candidates can be barred from office based on a finding that they engaged "any public use of force or threat of force by a group of people to hinder or prevent the execution of law."[421] It could also be triggered by a mere showing that the defendants sought to "possess any property of the United States contrary to the authority thereof."[422] That could involve sit-ins or occupation protests. Indeed, during the Trump Administration, there was a move to charge Black Lives Matter protesters with sedition for their taking property by force.[423]

What is equally unnerving is the combination of the embracing of sedition rationales with the dismissal of free speech protections. What was striking about the disqualification decisions in Colorado and Maine was the cursory rejection of any claim that Trump had a protected right to speak against the election and the certification. While based on speech going back to 2016, the core of these allegations center on the Ellipse speech on January 6th. To evade free speech protections, advocates are using the very same construct

were not an insurrection or rebellion."). Calabresi, *supra* note 411.

421. *Anderson*, 2023 Colo. Dist. LEXIS 362, at *88.

422. 18 U.S.C. § 2384 (2012).

423. Aruna Viswanatha & Sadie Gurman, *Barr Tells Prosecutors to Consider Charging Violent Protesters With Sedition*, WALL ST. J. (Sept. 17, 2020), https://www.wsj.com/articles/barr-tells-prosecutors-to-consider-charging-violent-protesters-with-sedition-11600276683 [https://perma.cc/L3UH-K5P2].

used from *Yorke* to *Schenck* where the speech itself is simply treated as the crime itself. The cursory treatment was evident in the decision of Maine Secretary of State "because I conclude that Mr. Trump intended to incite lawless action, his speech is unprotected by the First Amendment."[424] Of course, even if some were incited, the question is Trump's right to use inflammatory speech or rage rhetoric.

The Colorado courts explored the free speech protections for Trump's speech under *Brandenburg*. Notably, while acknowledging that Trump told his followers to go protest "peacefully," the trial court ruled that it is not just his actual comments that day that can be used to find incitement but his comments going back years.[425] Notably, the analysis begins with a citation to *Schenck*, a decision that stands as one of the most regressive free-speech decisions in history. It was both fitting and chilling. Many of those calling for Trump to be charged with incitement and insurrection invoked Holmes' "crowded theater" line to suggest that Trump was criminally liable for starting the riot. In considering Trump's language under a "true threat" analysis, the court declared "context matters" and that context could extend back years to stump speeches and social media postings. While acknowledging that there needs to be "limits" and that Trump raises a valid objection to the court relying on "any speech ever uttered," the court declared "we need not define those outer limits now."[426] However, the district court showed few such limits in going back to Trump's first entrance into national politics as a candidate. That including an alarming statement by Trump that a heckler deserved a punch in the face in a February 2016 rally. Such statements bear as little relevance to opposing the certification of an election as Joe Biden saying that same year that he wished he could just beat the heck out of Trump behind a gym.[427] The court treated any reckless or rageful comment as indicative of an intent—four years later—to incite an insurrection.

424. Ruling of the Secretary of State Sheena Bellows, State of Maine, Dec. 28, 2023, at 23.

425. Anderson v. Griswold, 2023 Colo. 63, ¶ 289.

426. *Id.* ¶ 236.

427. *Biden Says He Wishes He Could Take Trump 'Behind the Gym' Over Groping Comments*, ABC NEWS (Oct. 21, 2016) ("The press always asked me 'Don't I wish I were debating him?' No I wish we were in high school [so] I could take him behind the gym. That's what I wish.").

The disqualification controversy proved a license to engage in the same biased analysis from early sedition cases, treating words as criminal when spoken by a defendant while innocent when spoke by political allies. An example is the word "fight," which is used ubiquitously by politicians to energize their base and to call for protests. Both courts cited the testimony of Chapman University Professor Peter Simi, a sociologist called as an expert on political extremism and extremist language. The courts cited with approval his view that "violent far-right extremists understood that [President] Trump's calls to 'fight,' which most politicians would mean only symbolically, were, when spoken by [President] Trump, literal calls to violence by these groups, while [President] Trump's statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability."[428] Thus, not only can Trump be held an insurrectionist for the same language like "fight" used by his political opponents, including President Biden, but his express instruction to do so "peacefully" may be disregarded. In this way, his speech is not only unprotected by the First Amendment, but countervailing speech is dismissed as a defense.

In *Trump v. Anderson*, the Supreme Court ultimately rejected in a per curium opinion the disqualification theory on the threshold issue of whether states can unilaterally enforce the provision without an act of Congress.[429] The Court unanimously held that "States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency."[430] The justices found that the text clearly presupposes an act of Congress and that unilateral state action would produce non-uniform results. The opinion found that "the 'patchwork' that would likely result from state enforcement would sever the direct link that the Framers found so critical between the National Government and the people of the United States' as a whole."[431] In looking at the potential uses of this theory, the Court concluded that "nothing in the Constitution requires that we endure such chaos."[432]

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428. *Anderson*, ¶ 240.
429. Trump v. Anderson, 144 S. Ct. 662 (2024) (per curiam).
430. *Id.* at 667.
431. *Id.* at 671 (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 822 (1995)).
432. *Id.*

The resolution of the issue on the state enforcement relieved the Court of any need to address the meaning of "insurrection" or "rebellion" under the amendment. However, in making the case to Congress to disqualify, the sedition-based arguments could arise again in the future. If a single party were to gain control of both houses and the White House, the temptation to disqualify opponents as insurrectionists could again prove irresistible. Just as sedition was used to avoid the demands of proving treason in the Seventeenth Century, it could offer the same benefit in declaring opponents to be insurrectionists in the Twenty-First Century. Since a criminal charge, let alone a conviction, is not necessary, the fluid concept of sedition could prove the perfect vehicle of rage politics in disqualification actions.

IV. RAGE RHETORIC IN A POST-SEDITION AMERICA

It is time to bring an end to the crime of sedition in the United States. As discussed above, the necessity of a sedition crime in the United States has never been established. Even with the recent increase of charges, relatively few cases stemming from the January 6th riot included seditious conspiracy charges. Those involving the Proud Boys and Oath Keepers involved overt acts that helped ameliorate concerns over speech prosecutions. However, the cases also highlighted how superfluous these crimes are in such circumstances.[433] The convictions of Oath Keeper members Elmer Stewart Rhodes III and Kelly Meggs on seditious conspiracy were notably accompanied by the acquittal of Jessica Watkins, Kenneth Harrelson, and Thomas Caldwell despite these co-defendants allegedly being involved in the same underlying conduct.[434] The two leaders and the co-defendants shared convictions for conspiracy to obstruct an official proceeding, obstruction of an official proceeding, and conspiracy to prevent members of Congress from discharging their

433. *Four Oath Keepers Found Guilty of Seditious Conspiracy Related to U.S. Capitol Breach*, U.S. 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/UC4C-VLLX].

434. Ryan J. Reilly & Daniel Barnes, *Two Oath Keepers, Including Founder, Convicted of Seditious Conspiracy in Jan. 6 Case*, NBC NEWS (Nov. 29, 2022), https://www.nbcnews.com/politics/justice-department/oath-keepers-verdict-seditious-conspiracy-trial-rcna58415 [https://perma.cc/2ZME-VL4K].

official duties.[435] Thus, the jury agreed that they were trying to obstruct the proceeding and prevent the members from discharging their constitutional duties without resorting to sedition allegations based on their speech or viewpoints.[436] The question is what is lost by removing this crime from the books. Sedition was developed as a way to prosecute speech offenses.[437] It invites highly subjective charging and verdict decisions on which protesters sought to merely riot and which sought to overthrow the government or cause an insurrection. It calls for the very type of interpretations demanded in earlier sedition trials like that of Thomas Redhead Yorke. The elimination of sedition will leave treason, which was constitutionally defined to require overt acts to attack or overthrow the nation. It would leave conspiracy to commit treason as well as a host of crimes addressing the underlying overt acts. It would correct the historical and legal error when sedition became an avenue for "constructive treason" prosecutions for speech crimes.

The use of sedition charges historically has overlapped with periods of intense anti-free speech policies and political repression. They were often charges that were brought with obvious political advantage for a governing party. As shown after the January 6th riot, such charges bring a sense of true account. There is an understandable desire to label crimes as an attack on the constitutional system, to stigmatize those who challenge our core values. However, such labeling comes at an obvious cost in creating uncertainty over what is protected and what is criminalized speech. Holmes's theater analogy became a mantra because it afforded a rationalization for criminalization of the speech of others. Notably, it did not require an actual stampede to result. Rather, speech was criminalized because of how it would be received: it would "cause panic."[438]

Consider that analogy further. If there were a fire, the speech would be presumably protected. Indeed, it would be a commendable rather than a criminal act. It is the fact that *there is no fire* that

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435. *See id.*

436. *See id.*

437. Adam M. Smith, Charlene Yim & Marryum Kahloon, *The Crime of Sedition: At the Crossroads of Reform and Resurgence*, TRIALWATCH FAIRNESS REPORT 1 (Apr. 2022).

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

converted the statement into a criminal offense. In this case, the analogy dovetails with cases from the post-*Schenck* period involving incitement through false accounts or exaggerated claims. Consider *Schaefer v. United States*.[439] Before the ruling in *Gitlow*, the Court upheld the Espionage Act in a case involving two German-language newspapers—the Philadelphia Tageblatt and the Philadelphia Sonntagsblatt—accused of "false reports and statements of certain news items or dispatches purporting to be from foreign places."[440] Today, the articles would be understood as virtual ravings on the war and insults to American bravado. The Court itself acknowledged that few would take such rhetoric seriously, but resolved all doubts in favor of criminal charges.

> Coarse indeed this was, and vulgar to us, but it was expected to produce, and it maybe did produce, a different effect upon its readers. To them its derisive contempt may have been truly descriptive of American feebleness and inability to combat Germany's prowess, and thereby chill and check the ardency of patriotism and make it despair of success, and in hopelessness relax energy both in preparation and action. If it and the other articles, which we shall presently refer to, had not that purpose, what purpose had they? Were they the mere expression of peevish discontent, aimless, vapid, and innocuous? We cannot so conclude.[441]

It was the perceived potential "effect upon its readers" that was sufficient to turn the insults and ridicule into seditious acts. While Schaffer's conviction would be reversed, the other three defendants were left with five-year sentences. The Court blithely dismissed the fact that the article appeared intended as humor: "[A]llusion and innuendo could be as effective as direct charge and 'coarse or heavy humor' when accompanied by sneering headlines and derision of America's efforts could have evil influence."[442] The Holmes analogy becomes the theater of the absurd as any speech threatening "panic"

439. 251 U.S. 466, 480-81 (1920).
440. *Id.* at 468.
441. *Id.* at 478-79.
442. *Id.* at 478.

becomes a possible criminal act. Sometimes shouting is just shouting.

The Holmes analogy should reinforce the need to reexamine how the Court has treated rage rhetoric or violent speech. Seditious libel was a creature of defamation that was converted into a criminal offense to be used by the government against critics and dissenters. Yet, the theater example shows how such situations are at most matters for civil or tort liability. Like any negligent or intentional tortious act, shouting "fire" in a theater can be the basis for liability for the injuries that result. There are many laws that deter speech causing injury, not just to individuals, but to the state, including provisions with civil components like 42 U.S.C. §§ 1985(1) and 1985(2) under the Ku Klux Klan Act of 1871, covering conspiracies to use force, intimidation, or threats against federal officials or witnesses.[443]

The exit from the Holmes theater can be found by focusing on the intended purpose of speech and role in criminal conduct. If someone makes a false or inflammatory statement to cause panic, it is commonly charged as terroristic threats or statements. To establish that crime, it is necessary to establish the specific intent to cause public disorder or panic. Such prosecutions do not present the same threat to free speech, particularly with judicial review designed to protect political or social advocacy. If the intent is to seek political or social change rather than panic, it is not a terroristic act.

January 6th was indeed Holmes's crowded theater. Yet, the Trump Ellipse speech can be justified as having a political rather than a criminal purpose. Absent new evidence of an intention to cause the riot or physical assault on the Capitol, Trump was calling for political change (albeit based on a deeply flawed factual and constitutional foundation). The falsity of the underlying claims cannot drive the analysis. Many politicians make unfounded factual or constitutional claims. Indeed, many take unconstitutional actions. However, criminalizing such speeches would create a chilling effect on free speech that would prove perfectly glacial. Putting aside the theater analogy, the next question becomes whether there is a right to rage—a right to extreme (even violent) speech.

443. 42 U.S.C. § 1985(1)-(2).

One of the most common answers to seditious speech crimes is the classic "more speech" solution. Justice Brandeis embraced the view of the Framers that free speech was its own protection against false statements: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[444] However, this defense tends to get bogged down in a functionalist debate over whether better speech truly does drown out bad speech. Hateful and rageful speech fills a void in many people. They may not be influenced by logic or general opinion. Moreover, people can increasingly create silos or echo chambers in news and social media, confining their exposure to sources that reaffirm their viewpoints. Conversely, there is little evidence to show that censorship and prosecutions truly work to eliminate hateful or violent viewpoints. Even countries with massive censorship and criminalization systems like Germany have not curtailed the rise of Neo-Nazi and other hate groups.[445]

If the future of sedition is to be resolved, it should be resolved on the underlying right to free speech regardless of its value or "bad tendency." That debate returns us to where we began. The "bad tendency" model and many past sedition cases explicitly or implicitly treat free speech as justified as a guarantee for democratic self-government. There is no question that free speech is vital to the function of a free nation as a check on government abuse and an essential component to participatory democratic action. Yet, this functionalist rationale plays readily into the countervailing classification of some speech as inherently threatening or weakening for a democratic system by spreading false or harmful attacks. The alternative is to treat the First Amendment as an affirmation of the individual and the right to speak freely. Ironically, as noted above, one of the most passionate voices against sedition and criminalized speech was Chafee, who also played a critical role in advancing the functionalist view of free speech.[446] To his credit,

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444. Whitney v. California, 274 U.S. 357, 377 (1927).

445. Andy Eckardt & Patrick Smith, *Germany Cracks Down on Far Right With Raids as Hate Crimes Rise*, NBC NEWS (May 27, 2023, 6:00 AM), https://www.nbcnews.com/news/world/germany-far-right-hate-crimes-extremist-rcna86173 [https://perma.cc/5CDL-4E59].

446. *See generally* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991).

Chafee opposed the dangerous ambiguity of *Schenck*.[447] However, he also tied the protection of free speech to its utility in preserving democratic systems. Chafee, and later figures like Alexander Meiklejohn, saw censorship and criminalization as a form of government abuse that threatened the democratic foundations of the government. Thus, sedition prosecutions were as anathema to functionalists as they were to scholars who believed in a natural rights or liberty basis for free speech. This functionalist approach, however, allows for tradeoffs when the government seeks worthy ends.[448]

The morass of functionalism is evident in *Virginia v. Black* where the Supreme Court struck down a state law criminalizing cross burning.[449] That was the correct decision, but the Court then struggled to allow criminalization where cross burning is done with the intent to intimidate. The case began on August 22, 1998, when Barry Black led a Ku Klux Klan (KKK) rally in Carroll County, Virginia with twenty-five to thirty people.[450] The rally was held on private property with the permission of the owner and was located in an open field observable from a nearby road.[451] In the rally, speakers discussed what they believed while denouncing "blacks and the Mexicans."[452] At least one speaker used violent rhetoric and said how "he would love to take a .30/.30 and just random[ly] shoot the blacks."[453] Black was charged with burning a cross with the intent of intimidating a person or group of persons under Virginia state law.

The Virginia statute treated speech as "prima facie evidence of an intent to intimidate a person or group of persons."[454] While crafted as hate speech, it was the same logic upon which seditious libel prosecutions were premised: the speech itself was the crime regardless of any resulting act. It is also a law that could easily be justified under a type of "bad tendency" rationale. Yet, while recognizing the connection of cross burning to racial violence, the Court also noted

447. Chafee, *supra* note 239, at 944.
448. Turley, *Harm and Hegemony*, *supra* note 1, at 579-81.
449. 538 U.S. 343, 347-48 (2003).
450. *Id.* at 348.
451. *Id.*
452. *Id.* at 349.
453. *Id.*
454. *Id.* at 348.

that "the history of cross burning indicates, a burning cross is not always intended to intimidate."[455] Thus, such speech can signify "group solidarity" or political association.[456] Writing in dissent, Justice Clarence Thomas insisted that the true meaning of cross burning was lost on his white colleagues because "certain things acquire meaning well beyond what outsiders can comprehend."[457] Thomas insisted that such invested or familiar meaning could justify criminalizing speech since it "has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."[458] For Thomas, speech can become a criminal threat through historical "association between acts of intimidati[on] ... and violence."[459] That view would allow the criminalization of a long list of symbols, flags, and images adopted by or associated with extremist groups. The Court's required intent still relied on the particular purpose and gravity of the speech involved in a cross burning:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.[460]

The opinion still weighed certain speech as more "virulent" and susceptible to specific criminalization even though it can also be used as a form of associational expression. Notably, the Court could have simply allowed speech to be the basis of a criminal charge if it is used as part of a conspiracy or with intent to threaten or coerce an individual. Instead, as it has since *Schenck*, the Court sought to reach a nuanced compromise that allowed for criminalization while requiring an ill-defined showing of intent. The allowance for criminalization still turned on the underlying category or specific

455. *Id.* at 365.
456. *Id.* at 365-66.
457. *Id.* at 388 (Thomas, J., dissenting).
458. *Id.* at 391.
459. *Id.* at 389.
460. *Id.* at 363 (majority opinion).

expression of speech and how it was perceived by others.[461] Relying on *Chaplinsky v. New Hampshire*, the Court returned to its long-standing position that speech regulation is permissible when the speech is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[462] The role of courts in separating low-value speech from higher-value speech is a task laden with subjectivity. It can be the difference between speech viewed as condemning a class-based war machine or opposing conscription in *Schenck*. The value of the speech still depends greatly on how one defines the purpose or underlying point of the speech.

There is an array of laws that allow criminal penalties for speech but are tied to a conspiracy to bring about a specific crime.[463] Crimes like distributing child pornography[464] or soliciting criminal acts[465] will necessarily be based on speech. The application of these laws is often defended under the "integral-speech exception" to the First Amendment. Under this exception, the Court rejected "the contention that conduct [that is] otherwise unlawful is always immune from state regulation [merely] because an integral part of that conduct is carried on by" means of speech.[466] The "integral-speech exception" makes sense in dealing with crimes of conspiracy where the speech is directed at facilitating a specific crime. In such cases, the speech is part of a "course of conduct" that goes to the elements of a crime.[467] This exception is defended on the basis that courts will be vigilant to bar the criminalization of speech by simply declaring

461. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 500 (1949).

462. *Black*, 538 U.S. at 343, 358-59 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

463. These laws include, but are not limited to, 18 U.S.C. § 2(a) (crime to counsel or induce or command the commission of an offense against the United States); 18 U.S.C. § 241 (making it a crime to conspire to injure, oppress, threaten, or intimidate any person to prevent or retaliate against the exercise of rights under the Constitution or federal law); 18 U.S.C. § 371 (making it a crime to conspire to commit any offense against the United States); 18 U.S.C. § 372 (crime to conspire to prevent through force or intimidation or threat any person from holding office or discharging official duties); and 18 U.S.C. § 373(a) (crime persuade another to use unlawful force against another person).

464. New York v. Ferber, 458 U.S. 747, 761-62 (1982).

465. United States v. Williams, 553 U.S. 285, 297-98 (2008).

466. *Giboney*, 336 U.S. at 498; *see also* Volokh, *supra* note 12, at 987.

467. *See* Cox v. Louisiana, 379 U.S. 559, 563 (1965).

certain expressions as elements or integral to crimes.[468] Thus, figures like Professor Eugene Volokh have said that it is "obvious" that "the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal."[469] However, the application of this exception was far less obvious to some of us[470] in cases involving issues like "stolen valor" claims where many argued they fall outside of First Amendment protections.[471] Indeed, while arguing for narrow tailoring by the court, Volokh's description of the exception still harkens back to the tendency of some speech to produce unwanted results:

> When speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct (illegal conduct other than the prohibited speech itself)—such as murder, fights, restraint of trade, child sexual abuse, discriminatory refusal to hire, and the like—this opens the door to possible restrictions on such speech.[472]

A crime for speech that "tends to cause" illegal conduct raises the same issues as the early sedition cases.

In *United States v. Alvarez*, the government repeated the mantra that lying about military service and recognitions was the type of "low value" speech that falls outside of the First Amendment.[473] The government made a variety of "bad tendencies" claims to justify the criminalization of speech, claiming that it is "common sense that

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468. *Giboney*, 336 U.S. at 498-99.

469. Volokh, *supra* note 12, at 987.

470. Nathan Koppel, *Legal Battle Over Stolen Valor Heats Up*, WALL ST. J. (Oct. 11, 2010), https://www.wsj.com/articles/BL-LB-34440 [https://perma.cc/5CKV-2EMW]; *Stolen Valor Offensive, But Is It Criminal?*, NPR (Mar. 9, 2010), https://www.npr.org/templates/story/story.php?storyId=124498468 [https://perma.cc/WEW8-B6L9] (debate between Professors Jonathan Turley and Eugene Volokh); *see also* Jonathan Turley, *Lying About Receiving a Medal of Honor? It's Shameful—But It Shouldn't Be a Crime*, WASH. POST (Feb. 17, 2012), https://www.washingtonpost.com/opinions/lying-about-winning-a-medal-of-honor-its-shameful-but-it-shouldn't-be-a-crime/2012/02/16/gIQAhpNFKR_story.html [https://perma.cc/74GX-S96L]; Jonathan Turley, *Undo the Stolen Valor Act to Protect Free Speech*, L.A. TIMES (Oct. 20, 2011), https://www.latimes.com/opinion/la-xpm-2011-oct-20-la-oe-turley-stolen-valor-supreme-court-20111020-story.html [https://perma.cc/2CAG-9J96].

471. Eugene Volokh, Commentary, *Amicus Curiae Brief: Boundaries of the First Amendment's "False Statements of Fact" Exception*, 6 STAN. J. C.R. & C.L. 343, 348 (2010).

472. Volokh, *supra* note 12, at 986-87.

473. 567 U.S. 709, 718-19 (2012).

false representations have the tendency to dilute the value and meaning of military awards."[474] The Court rejected these arguments and found that even false statements are still protected absent a "direct causal link between the restriction imposed and the injury to be prevented."[475] Yet, the Court continued its fluid accommodation of government interests by suggesting that lying about military medals could be criminalized with a showing that "the public's general perception of military awards is diluted by false claims."[476] While one can feel assured that it is difficult to prove an impact on "general perception," the suggestion is that the more impactful the speech, the greater susceptibility of the speech to criminalization. That was precisely the point raised in the *Schenck* period cases where speakers were arrested due to their feared influence in draft avoidance.

The constitutional scope of the integral-speech exception or related doctrines will continue to be fiercely debated. As Volokh notes, "*Giboney* has thus become, at times, a tool for avoiding serious First Amendment analysis—a way to uphold speech restrictions as supposedly fitting within an established exception, without a real explanation of how the upheld restrictions differ from other restrictions that would be struck down."[477] Avoidance has indeed been the signature of the Court in both sedition and integral-speech exception cases for decades. For those who embrace a liberty-basis for the free speech, the bright-line rule is found in not abridging free expression. Even if one rejects the absolute conduct basis of Justice Black, speech alone would not be a criminal offense absent a close nexus to a crime that is not itself a speech offense. Thus, conspiracy offenses are enforceable while crimes that undermine "perceptions" or "faith" in institutions or honorifics would not be enforceable.

Despite the defense of free speech values in cases like *Alvarez*, there remains a functionalist hold on the jurisprudence under the First Amendment. The problem was not the criminalization of speech, but the failure of the government to show that the speech

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474. *Id.* at 726 (quoting the Brief for United States at 49, 54).
475. *Id.* at 725.
476. *Id.* at 726.
477. Volokh, *supra* note 12, at 988.

had a material impact on "general perception[s]" of the public.[478] Alternatively, the issue could have been framed in terms of the right of individuals to speak, even falsely or offensively, without the threat of prosecution. The focus of criminal enforcement should be the elements of the crime itself, including conspiracy to commit a specific criminal act. Viewed from that perspective, the current use of the sedition provision is redundant with existing non-sedition provisions on conspiring to obstruct or prevent government functions.[479] The provision can be eliminated without the loss of a single existing criminal case without seemingly punishing seditious speech.

The bright-line rule would be a bar on criminalizing speech based on its tendency to corrupt or incite others. Holmes again shows the danger of the fluid approach tied to the impact or effect of speech on the conduct of others. In *Fox v. Washington*, the Court upheld the conviction of an anarchist for speech that "encourag[es a] ... breach of law."[480] It was an absurdly broad law that even many modern advocates of the "integral-speech" exception would condemn. However, the logic is not that different than modern arguments. Fox supported a nudist collective called "the Home" and criticized pushing the government to shut it down as a violation of public nudity laws.[481] Fox published his defense of the Home in an article entitled "The Nude and the Prudes" and called for a boycott of some of the critics.[482] He objected that "a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom."[483] It was clearly protected speech. Yet, the Court upheld Fox's conviction and Holmes insisted that this was not a crackdown on "unfavorable opinions."[484] According to Holmes, the statute was not criminalizing speech that "tend[s] to produce unfavorable opinions of a particular statute" but rather as

478. *See Alvarez*, 567 U.S. at 726.
479. *See supra* Part IV (outlining redundancy of sedition charges when other criminal charges are available).
480. 236 U.S. 273, 276 (1915).
481. *See id.* at 276-77.
482. *Id.*
483. *Id.* at 276.
484. *Id.* at 277.

limited to speech urging criminal violation of the law.[485] Rather, Holmes noted that, just as Fox could be prosecuted for "encouragements ... directed to a particular person's conduct," he could be prosecuted for the same statements "to a wider and less selected audience."[486] The Court's framing is as breathtaking as it is chilling:

> the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.[487]

The *Fox* decision captures the indeterminacy of the functionalist approach to free speech. Here, disrespect became a criminal offense while claiming that such open-ended rationales do not endanger the purpose of the First Amendment. The emphasis in *Alvarez* on the effect of speech (to disrespect or undermine military honors) only demands a closer nexus to the social ill sought to be avoided by the curtailment of dangerous speech or rage rhetoric.

Sedition is the ultimate example of such a speech crime that has historically been used for abusive crackdowns and selective enforcement. As previously discussed, there are an array of other laws criminalizing actual treason, violence, or conspiracy.[488] The superfluous status of sedition only highlights its historical abuse to target unpopular or offensive speech. Even with the recent uptick in sedition charges, it remains a sleeper in the criminal code. While rarely used, it rests on the books as a continual threat to the dissenting groups and speakers. The elimination of sedition would have no impact on the ability to prosecute those who take material steps toward conspiracies of violence or insurrection.[489] Yet, the removal of the crime from our books after hundreds of years of controversies

485. *Id.*; *see also* Volokh, *supra* note 12, at 990.
486. *Fox*, 236 U.S. at 277-78.
487. *Id.* at 277.
488. *See supra* Part IV.
489. *See supra* Part IV.

and abuses would reaffirm the values contained in the First Amendment.

CONCLUSION

The rise in rage rhetoric in contemporary politics is neither new nor unmatched in our history. The United States was the product of a period of rage and key historic figures were denounced as seditionists before the Revolution. Indeed, the very embodiment of the American voice was Thomas Paine, a man who seemed to spend much of his life committed to enraging others and challenging institutions. He also inspired figures like Yorke in their own fights for free speech.[490] Thus, it was no surprise that he found himself the target of seditious libel. After the dissemination of his *Rights of Man*, Paine was the subject of a 1792 Royal Proclamation against Seditious Writings and Publications.[491] He was convicted in absentia having fled to France. For Paine, the conviction was a distinction of honor, declaring "If to expose the fraud and imposition of monarchy ... to promote universal peace, civilization, and commerce—and to break the chains of political superstition, and raise degraded man to his proper rank;—if these things be libellous ... let the name of libeller be engraved on my tomb."[492] For John Adams, who never recognized his deep and lethal hypocrisy over free speech, there was frustration with the appeal of Paine who not only advocated but personified the values of free speech. In one letter, Adams complained to Thomas Jefferson: "What a poor, ignorant, malicious, short-sighted, crapulous mass is Tom Paine's 'Common Sense'.... And yet history is to ascribe the American Revolution to Thomas Paine!"[493] After alienating many of the Framers after the Revolution, Paine went to France as a celebrated American revolutionary.[494] He would later be jailed by French officials in the Luxembourg prison after his

490. GOODRICH, *supra* note 71, at 68-69.

491. ALBERT GOODWIN, THE FRIENDS OF LIBERTY 215, 217 (1979).

492. Philip S. Foner, *Introduction* to THOMAS PAINE, THE AGE OF REASON 30 (Kensington Publ'g 1974) (1794) (quoting *Letter Addressed to the Addressers on the Late Proclamation*, 1792).

493. Letter from John Adams to Thomas Jefferson (June 22, 1819), *in* 10 THE WORKS OF JOHN ADAMS 380, 380-81 (1856).

494. Foner, *supra* note 492, at 30.

completion of the first part of *The Age of Reason*.[495] During his imprisonment, American Minister Gouverneur Morris made clear that not only was Paine not considered an American citizen but conveyed a total lack of interest in his fate in 1793 despite being marked for execution during The Terrors.[496] Paine was irretrievably and wonderfully seditious in his challenging of governments and their contradictions.

As Paine's history vividly demonstrates, the Constitution was not only written for times like these but was written in a time like this one. It was written when political figures like John Adams were actively seeking to put opponents to death under the same seditious libel model used by the Crown against colonists.[497] Running through this history is the scourge of sedition prosecutions. The recent revival of such charges should concentrate our minds on the lack of any necessity for such an offense and the proven danger that it presents to free speech principles.[498] Like a virus, the sedition affliction has again taken hold as many seek to punish others for views deemed dangerous or disloyal.

Even with the elimination of sedition as a crime, there will remain difficult issues to address, including the scope of the "integral-speech exception" in some cases. However, the continuation of this crime on the books embodies the failure of the country to break completely and finally from the legacy of the British seditious libel laws. As the Court continues to struggle with the constitutional standard for speech with alleged criminal tendencies, it is even more important to limit the range of such criminal laws.[499] The value of sedition to silence critics or dissenters will continue to appeal to many in times of great political and social unrest. Just as

495. *Id.* at 33-34.

496. J.C.D. CLARK, THOMAS PAINE: BRITAIN, AMERICA, AND FRANCE IN THE AGE OF ENLIGHTENMENT AND REVOLUTION 326-28 (2018).

497. Byrd, *supra* note 181, at 543-44, 554.

498. *See supra* Part III.A.

499. This is particularly the case in an age of censorship by state-corporate partnerships. Former German Chancellor Angela Merkel declared that "when people stir up sedition on social networks using their real name, it's not only the state that has to act, but also Facebook as a company should do something." Andrew Blake, *Facebook, Twitter, Google Adopt Hate Speech Rules in Germany*, WASH. TIMES (Dec. 16, 2015), https://m.washingtontimes.com/news/2015/dec/16/hate-speech-rules-adopted-germany-social-media-gia/ [https://perma.cc/GZ9Z-RL8P].

this rhetoric captures the common rage of extremist groups, the charges capture a collective disgust with the violent and reckless content of that speech. The question is not the basis or the legitimacy of that disgust, particularly in relation to the January 6th riot. Rather, the question is whether the focus should remain the underlying conduct as opposed to the speech itself. Rage is the expression of political isolation and extremism. To criminalize rage rhetoric is to allow such political distemper to shape our constitutional norms; our self-defining values. It is time to end the crime of sedition in the United States.