INCITEMENT TO INSURRECTION AND THE FIRST AMENDMENT

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"It is hazardous to discourage thought, hope and imagination. . . . [F]ear breeds repression; . . . repression breeds hate; . . . hate menaces stable government; . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).*

"[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), Justice Goldberg for the majority.*

"We enter parliament in order to supply ourselves, in the arsenal of democracy, with its own weapons . . . . If democracy is so stupid as to give us free tickets and salaries for this bear's work, that is its affair . . . . We do not come as friends, nor even as neutrals. We come as enemies. As the wolf bursts into the flock, so we come." Joseph Goebbels, Nazi Party Minister of Propaganda (1928).

The free exchange of ideas, particularly in the political context, is critical to representative democracy. Intrinsic to the United States' constitutionally mandated commitment to the open marketplace of ideas is the robust protection of unpopular, and sometimes even harmful, speech. Federal statute, however, criminalizes advocacy that incites insurrectionary action likely to undermine or overthrow the democratic order of the government.

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This Article is the first survey and critique of the multifaceted doctrinal complexity of prosecuting incitement to insurrection. The Supreme Court has long recognized that incitement to violence that poses an imminent threat of harm is not constitutionally protected. The simple imminence test, however, lacks adequate nuance to meet security needs that arise when political insurrection becomes a realistic possibility but does not yet pose an immediate threat.

In place of current doctrine, the Article recommends a hybrid clear and imminent threat test for the prosecution of insurrectionary leaders who intentionally fire up mobs in order to gain or retain political offices through subterfuge, intimidation, threats, and brute force. It advocates that intentional dissemination of ideas likely to instigate violent, extra-constitutional efforts to overturn representative government should not be judged on immediacy. Instead, courts should review the context within which a speaker foments and incites followers to engage in insurrectionary conduct. This test strikes a balance between national security and First Amendment interests, safeguarding the expression of unpopular ideas while also preventing populist leaders from using the First Amendment as a shield against criminal responsibility for inciting others to insurrectionary violence.

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INTRODUCTION

Constitutional democracy requires robust dialogue and secure elections.[1] Core to its operation is the free exchange in political, personal, and informative communications.[2] Dialogue shores up interpersonal engagements on matters of politics, personal dignity, and creativity.[3] Moreover, without the free exchange of ideas, science, philosophy, history, and the like cannot flourish.[4] Calls to violent insurrection, on the other hand, stand apart from the legal protections of the First Amendment.[5] The likelihood of conviction under the federal incitement to insurrection statute, 18 U.S.C. § 2383 ("Section 2383"), is fraught with uncertainty because no federal court has interpreted it.[6] This Article is the first in-depth assessment of whether the law is consistent with free-speech values.

Preservation of democracy is an obvious component of the earliest statement of nationhood, the Declaration of Independence.[7] That formative document identifies the importance of speech to a polity.[8] Indeed, it drives home the need for representative legal order to better preserve meaningful life, personal liberty, and the pursuit of happiness.[9]

Free speech doctrine maintains and defines national consensus about the vitality of diverse voices, opinions, and associations.[10] From the Supreme Court's first forays into the area during the early twentieth century, the value of expression has been tempered by the state's authority over safety and security.[11]

Speech is of preeminent importance to any constitutional democracy committed to diverse, contradictory, cerebral, and visceral

1. Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS UNIV. L.J. 569, 580 (2020).

2. *Id.* at 584–85.

3. *Id.* at 584.

4. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1036.

5. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

6. Even though Section 2383 was enacted in 1948 there is neither legislative history nor any substantive interpretation of the statute. The closest to any helpful judicial interpretation is a rarely cited Supreme Court opinion finding unconstitutional a Georgia state law that criminalized incitement to insurrection. Herndon v. Lowry, 301 U.S. 242, 264 (1937). The case held the state law was void for vagueness because it prohibited attempts at incitement at some indefinite future time. *Id.* at 259–64.

7. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just Powers from the Consent of the Governed").

8. *Id.*

9. *Id.*

10. Tsesis, *supra* note 4, at 1021.

11. *See infra* Subpart II.A.

opinions.[12] Equality of expressive autonomy betters the general welfare by protecting the dignity of expression, public participation, and association with others.[13] Government lacks any legitimate authority to limit the freedom of political and individual consciences.[14] However, intentional calls for insurrections have long been regarded to be threats to civil society when circumstances are likely to incite violent backing for overturning the rule of constitutional law.[15]

The use of police power to prevent mob action challenges democracy to both maintain open channels of communications and simultaneously to preserve domestic tranquility.[16] These two priorities often come into conflict. On the one hand, the First Amendment preserves debate, deliberation, and advocacy against state efforts to censor content and viewpoint.[17] On the other, public safety is an imperative of legitimate government.[18]

The First Amendment protects abstract advocacy even when it calls for the overthrow of government.[19] Speech, be it conformist or disruptive, is essential to constitutional order, which protects individual, associational, and scientific voices.[20] Citizens are entitled to communicate their ideas in the streets and in other fora, boisterously or tranquilly.[21] But the First Amendment is not a shield against charges of insurrection.[22] Official suppression of ideas has

12. Tsesis, *supra* note 4, at 1021.

13. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986).

14. Donald J. Sorochan, *Wrongful Convictions: Preventing Miscarriages of Justice*, 41 TEX. TECH L. REV. 93, 110–11 (2008).

15. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

16. *See* discussion *infra* Subpart II.A.

17. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 322 (1988) (explaining public debate requires citizens to tolerate insulting speech to provide adequate breathing space to the freedoms protected by the First Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (discussing the principle that debate on public issues should be "uninhibited, robust, and wide-open," even if it includes attacks on government officials).

18. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (explaining when conduct combines speech and nonspeech, the government has an important interest in regulating the nonspeech element); Texas v. Johnson, 491 U.S. 397, 407–10 (1989) (explaining the government has a legitimate interest in preventing imminent lawless action and breaches of the peace).

19. *See* Tsesis, *supra* note 4, at 1026 (explaining the First Amendment protects individuals' right to express ideas contrary to the government's positions); Speiser v. Randall, 357 U.S. 513, 529 (1958) (holding an oath requirement for veterans seeking a tax credit to not overthrow the government violated their right to free speech).

20. Tsesis, *supra* note 4, at 1021.

21. *Id.* at 1023.

22. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (explaining the First Amendment protects advocacy of the use of force except

throughout history been a quintessential feature of totalitarian regimes, exemplified in the last century by the Nazis, Soviets, and Khmer Rouge.[23] Today, throughout the world—in countries like Russia, Turkey, China, Syria, and North Korea—autocratic regimes suppress political opposition.[24] Each of them silences protests, associations, and counter-opinions.[25]

Any interpretation of criminal law against insurrection must satisfy the stringent First Amendment principle against suppression of fundamental liberties of thought and communication.[26] This Article discusses the potential pitfalls of prosecuting incitement to insurrection pursuant to Section 2383. The charges that led to President Donald Trump's impeachment for insurrection, and later the unsuccessful Senate trial, were not based on the criminal code;[27] therefore, there remain unanswered questions about whether his words are protected from prosecution under the current incitement doctrine.

Finding the right balance that favors speech but does not become a death sentence to the body politic requires complex analysis of what personal rights are at stake in incitement doctrine more generally. In addition, judges should meet prosecutions with skepticism, since those cases require assessment of political contents and viewpoints, which are typically reviewed through the lens of strict scrutiny and

where such advocacy would produce imminent lawless action); *see also* 18 U.S.C. § 2383.

23. *See* 10 JERRY F. HOUGH AND MERLE FAINSOD, HOW THE SOVIET UNION IS GOVERNED 279 (1979) (concerning communist Soviet Union); JAMES WALLER, CONFRONTING EVIL: ENGAGING OUR RESPONSIBILITY TO PREVENT GENOCIDE 100 (2016) (concerning Khmer Rouge); 2 EDWARD A. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: AMERICAN THOUGHT BETWEEN THE WARS, 1919-1941, at 436 (1968).

24. *See, e.g.*, Anton Troianovski & Valeriya Safronova, *Russia Takes Censorship to New Extremes, Stifling War Coverage*, N.Y. TIMES (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html; Eur. Comm'n, Eur. Neighborhood and Enlargement Negot., *Turkey 2008 Progress Report*, 16 (2008); Leigh Hartman, *Chinese Censorship is a Global Problem*, SHAREAMERICA (Dec. 13, 2019), https://share.america.gov/chinese-censorship-is-global-problem/; Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 66–69 (2015).

25. *See* sources cited *supra* note 24.

26. *See* discussion *infra* Part II.

27. Providing for Consideration of the Resolution (H. Res. 24) Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. Res. 41, 117th Cong. (Jan. 12, 2021).

most exacting scrutiny analyses.[28] Open expression of diverse views is a necessary feature of representative governance.[29]

A proportional solution requires differentiation of ideological self-expression from insurrectionary advocacy likely to lead to assaults on democratic institutions as occurred at the January 6, 2021, attack on the Capitol Building, the seat of government in Washington, D.C.[30]

The challenge for this Article is to align the principles of the First Amendment with those of internal security. To deter and prevent no more than the instigation of insurrection without encroaching on the fundamental right to expression. That balance favors speech as the articulation of ideas, whether for a serious purpose[31] or for humor.[32] However, it also mandates criminal prosecution to fine, imprison, or politically exclude persons who seek to gut democracy by unleashing mob violence.

Popular sentiment is crucial to the development and exercise of a government of the people, by the people, and for the people.[33] The events that followed on the heels of the 2020 United States presidential election demonstrate the danger of a mob acting upon the incitement of a charismatic leader, whose minions are willing to crush political opponents and reject election results.[34] This Article examines the extent to which government's obligation to preserve domestic tranquility justifies restrictions on clear and imminent threats to overthrow democratic order.

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28. The Court has found that certain values are not protected by the First Amendment (obscenity, fighting words, fraud, and defamation)—but that content- and viewpoint-based regulations can only be regulated when they advance a compelling government interest and are narrowly tailored to accomplish that interest in the least restrictive manner. Sable Commc'ns of Cal., Inc. v. F.C.C., 492 U.S. 115, 126–29 (1989); Texas v. Johnson, 491 U.S. 397, 412–14 (1989).

29. Tsesis, *supra* note 4, at 1021.

30. *See generally* Kat Lonsdorf et al., *A Timeline of How the Jan. 6 Attack Unfolded – Including Who Said What and When*, NPR (June 9, 2022, 9:11 AM), https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when; Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial.

31. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

32. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 48, 56 (1988) (holding that a parody of a religious minister was protected speech that required a court to rely on actual malice review in a lawsuit for intentional infliction of emotional distress).

33. Tsesis, *supra* note 4, at 1020–21.

34. *See* discussion *infra* Part I.

The constitutional complications of prosecuting incitement to insurrection are understudied;[35] yet, the urgency of the subject is punctuated by the January 6, 2021, mob's attack on the instruments of United States government after President Trump whipped up a frenzy to overturn the presidential election. In the words of former Fourth Circuit judge J. Michael Luttig under sworn testimony, January 6 "was the final fateful day for the execution of a well-developed plan by the former president to overturn the 2020 presidential election at any cost."[36] After an extensive investigation of the insurrection, the House Select Committee issued a finding in March 2022 that "[t]he president's rhetoric persuaded thousands of Americans to travel to Washington for January 6, some of whom marched on the Capitol, breached security, and took other illegal actions."[37] The President not only denied the validity of election results but also called on loyal supporters to wantonly prevent the certification of election results.[38]

Events of that day and the months surrounding the November 7, 2020, presidential election demonstrate that political insurrection against constitutional order is an unfortunate possibility in the United States. Trump's bombastic rhetoric whipped up millions of frenzied supporters.[39] His speeches were timed to bring about violence against Congress, Congresspeople, the Vice President of the United States, and the American people. As Wyoming Republican Representative Liz Cheney described his role in the attack, "President Trump summoned the mob, assembled the mob and lit the flame of this attack."[40] He called on supporters, including Proud Boys

35. *See* Peter Blumberg, *Insurrection? Sedition? Incitement? A Legal Guide to the Capitol Riot*, BLOOMBERG (June 9, 2022, 5:10 PM), https://www.bloomberg.com/news/articles/2021-01-14/insurrection-sedition-incitement-dc-riot-glossary-quicktake#xj4y7vzkg; Eli Hager et al., *A Civilian's Guide to Insurrection Legalese*, THE MARSHALL PROJECT (Jan. 8, 2021), https://www.themarshallproject.org/2021/01/08/a-civilian-s-guide-to-insurrection-legalese.

36. *Read: J. Michael Luttig's Opening Statement at Jan. 6 Select Committee Hearing*, POLITICO (June 16, 2022, 4:55 PM), https://www.politico.com/news/2022/06/16/j-michael-luttig-opening-statement-jan-6-hearing-00040255.

37. Hugo Lowell, *Capitol Attack Panel to Hold Six Public Hearings as It Aims to Show How Trump Broke Law*, THE GUARDIAN (May 23, 2022, 2:00 PM), https://www.theguardian.com/us-news/2022/may/23/capitol-attack-panel-public-hearings-trump.

38. Naylor, *supra* note 30.

39. Lois Beckett, *Millions of Americans Think the Election Was Stolen. How Worried Should We Be About More Violence?*, THE GUARDIAN (Apr. 16, 2021, 6:00 PM), https://www.theguardian.com/us-news/2021/apr/16/americans-republicans-stolen-election-violence-trump.

40. Dana Bash et al., *January 6 Vice Chair Cheney Said Trump Had a "Seven-part Plan" to Overturn the Election*, CNN (June 10, 2022, 1:06 AM),

and Oath Keepers, to destroy the very democratic institutions that had brought him to power four years before,[41] reconfirming Plato's insight that democracy is vulnerable to attacks by charismatic leaders who solicit support from doting, violent sycophants.[42]

The turn of events in the United States with a president relying on xenophobic zealotry puts the imminent threat of harm test of the seminal *Brandenburg v. Ohio*[43] case back in the spotlight. The real question is how much the First Amendment allows for enforcement of Section 2383 and where enforcement bleeds into autocratic suppression.

A more modified, contextual test is needed for identifying whether intentional calls to insurrection pose a serious or likely threat of harm based on clear evidence that a popular leader's words will influence sycophants to attack, destroy, and kill members of the opposition. What matters is the mind frame of the speaker. Post-speech violence perpetrated by followers is admissible evidence of the scienter.[44]

The imminence component protects abstract speech, requiring law enforcement authorities to both give great latitude to speakers but also to prevent those with ample supporters from rousing them into action for the purpose of destroying representative governance.[45] *Brandenburg*'s imminent threat of harm test remains applicable in criminal incitement cases, but it is too stringent to meet the state's safety and security needs where political insurrection clearly is a realistic possibility but presents no clear and present danger.

Trump's attempted insurrection was a product of gradual, but persistent, incitement against constitutional order, the rule of law, and the peaceful transfer of power.[46] Intentionally spreading messages likely to instigate violently inclined followers to commit

https://www.cnn.com/2022/06/09/politics/jan-6-hearing-cheney-trump-overturn-election-plan/index.html.

41. Barbara Sprunt, *Jan. 6 Panel Shows Evidence of Coordination Between Far-Right Groups and Trump Allies*, NPR (July 12, 2022, 7:44 PM), https://www.npr.org/2022/07/12/1111132464/jan-6-hearing-recap-oath-keepers-proud-boys.

42. PLATO, THE REPUBLIC, *in* THE DIALOGUES OF PLATO 820–24 (B. Jowett trans., Random House 1937).

43. 395 U.S. 444, 447 (1969) (holding that the First Amendment guarantees of free speech prohibit government from proscribing the "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

44. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982).

45. *Brandenburg*, 395 U.S. at 447.

46. *Here's Every Word from the 8th Jan. 6 Committee on Its Investigation*, NPR (July 22, 2022, 6:27 PM), https://www.npr.org/2022/07/22/1112138665/jan-6-committee-hearing-transcript.

extra-constitutional action often takes autocratically inclined leaders time,[47] and its danger should not be judged based on immediacy.

Prosecutions under Section 2383 must first and foremost be narrowly enough tailored to preserve even speech that directly attacks current governmental order.[48] Open debate is critical to the proper functioning of government whose aim is the enforcement of laws for the liberal equality of the common good;[49] therefore, overbroad laws that punish the dissemination of ideas and topics cannot survive close scrutiny.[50] Some threats to government are no more than blunderbuss, blustery talk that little affects social order.

Part I of this Article describes Donald Trump's effort to instigate a populist insurrection in the United States. The impact of demagogic speech entered the hearts, minds, plans, and actions of Americans who sought to destroy their own constitutional structure of representative governance in order retain the presidency for a charismatic leader who had lost the popular and Electoral College votes.

Part II begins by analyzing incitement doctrine, explaining its evolution, its strengths and weaknesses, and the contexts to which it pertains. It begins with early First Amendment cases and then critiques the current standard.[51]

Part III generally analyzes free speech principles to identify the extent to which charges under Section 2383 can be prosecuted. Existing doctrine has a twofold impact on this topic. It vigorously protects free expression, so necessary for airing political grievance, support, and opposition. Yet, its imminence component sets a threshold that renders prosecution too onerous, even in cases where popular leaders expressly direct hordes to violently prevent the operations and stifle the outcomes of democratic elections. This Part also looks to the European Court of Human Rights' clear and imminent standard for differentiating the suppression of ideas from the pursuit of charges against anyone who, like Trump, intentionally fires up a mob ready, willing, and able to engage in violent insurrection.

I. INSURRECTION AT THE CAPITOL

Populist violence took an ominous turn in the United States on January 6, 2021. Resembling nothing in the nation's history, a charismatic president, Donald Trump, inflamed populist sentiments

47. Alec Medine, *How Do Dictators Come to Power in a Democracy?*, RENEW DEMOCRACY INITIATIVE, https://rdi.org/how-do-democracies-turn-into-dictatorships/ (last visited Nov. 21, 2022).

48. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

49. Tsesis, *supra* note 4, at 1050.

50. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 365 (2003).

51. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

and resentments into an uprising against constitutional order.[52] He challenged followers to reverse the 2020 election, which he lost both in the Electoral College and by popular vote.[53] He urged political and populist backers to overturn the presidential election through extra-constitutional and violent means,[54] interpreting the Constitution as an autocrat would at whose hands positive law is at complete executive discretion.

Over the course of six months, Trump urged supporters to reject any election results that would not grant him a second presidential term.[55] The effort to overstep the rule of law built up over time before he set off a violent coterie that attacked the institutions of government.[56] A violent mob acted pursuant to Trump's mantra against the operation of democratic elections. No imminent danger emerged in the previous summer, but even then, a litany of false claims chipped away at democracy and eventually catalyzed activists' resistance to the peaceful operation of constitutional order.

In an effort to undermine democratic order, Trump unsuccessfully borrowed the playbook from autocrats in countries like Venezuela and Ecuador, labeling opponents as "traitors" who were both enemies of the state and his personal antagonists.[57] Throughout his presidency, Trump demonstrated an affinity for autocrats, even as he condemned his Democratic and Republican Party opponents in the United States. Even during the presidential contest of 2016, when Russia was aiding his campaign through online propaganda, he praised Vladimir Putin, its tyrannical president, as "a leader far

52. Marshall Cohen et al., *The January 6 Insurrection: Minute-by-Minute*, CNN (July 29, 2022, 3:43 PM), https://www.cnn.com/2022/07/10/politics/jan-6-us-capitol-riot-timeline/index.html.

53. *U.S. Presidential Election Results 2020*, NBC (July 8, 2022, 11:03 AM), https://www.nbcnews.com/politics/2020-elections/president-results.

54. Naylor, *supra* note 30.

55. Steve Inskeep, *Timeline: What Trump Told Supporters for Months Before They Attacked*, NPR (Feb. 8, 2021, 2:32 PM), https://www.npr.org/2021/02/08/965342252/timeline-what-trump-told-supporters-for-months-before-they-attacked.

56. *Id.*

57. *See, e.g.*, Ken Bredemeier, *Venezuela's Maduro Clings to Power, Urges Military to Oppose 'Coup Plotters,'* VOA (May 2, 2019, 2:36 PM), https://www.voanews.com/a/maduro-clings-to-power-in-venezuela-urging-military-to-oppose-coup-plotters-/4900779.html; Darragh Roche, *Donald Trump Calls Jan. 6 House Panel 'Traitors' Who Should Probe Mike Pence*, NEWSWEEK (Feb. 1, 2022, 10:25 AM), newsweek.com/donald-trump-calls-jan-6-house-panel-traitors-should-probe-mike-pence-1674947; J.M. Rieger, *The President Who Cries 'Treason,'* WASH. POST (June 25, 2020, 2:46 PM), https://www.washingtonpost.com/politics/2020/05/27/president-who-cries-treason/.

more than our president [Obama] has been."[58] He called President Erdoğan of Turkey, who has jailed lawyers and judges,[59] a "friend" and credited him with "doing a very good job."[60] At the time, Turkish forces were perpetrating attacks against and summarily executing Kurdish civilians.[61] Trump also indicated a liking for communist leader President Xi Jinping of China and expressed approval for ending the two-term limit on holding presidential office in the United States.[62] Trump, moreover, admired communist Kim Jong-un's "great and beautiful vision for his country," even as the State Department's annual human rights report detailed the North Korean leader's perpetration of "[u]nlawful and arbitrary killings," torture, and detentions.[63] President Trump's remarkable[64] praise for leaders known for suppressing democratic institutions and jailing those who spoke against their leadership was more than mere political invective. Those national leaders exemplified the governance style he coveted: strength at the behest of the elected executive.

His praises for those autocrats demonstrated an admiration for centralized leadership. He also appreciated the ability of those leaders to manipulate elections in their countries and tried to do the same in the United States by priming his hordes of followers to

58. *Trump Says Putin 'A Leader Far More Than Our President,'* BBC (Sept. 8, 2016), https://www.bbc.com/news/election-us-2016-37303057.

59. *How Turkey's Courts Turned on Erdogan's Foes*, REUTERS (May 4, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/turkey-judges/.

60. *Remarks Prior to a Meeting with President Recep Tayyip Erdogan of Turkey and an Exchange with Reporters in Osaka, Japan*, AM. PRESIDENCY PROJECT (June 29, 2019), https://www.presidency.ucsb.edu/documents/remarks-prior-meeting-with-president-recep-tayyip-erdogan-turkey-and-exchange-with-0.

61. *Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies*, AMNESTY INT'L (Oct. 18, 2019), https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/.

62. *Trump Praises China's Xi for Consolidating Power*, DEUTSCHE WELLE (Mar. 4, 2018), https://www.dw.com/en/us-president-donald-trump-praises-chinas-xi-jinping-for-consolidating-grip-on-power/a-42817441.

63. Dan Spinelli, *Trump Praises Kim Jong Un's "Beautiful Vision for His Country,"* MOTHER JONES (Aug. 2, 2019), https://www.motherjones.com/politics/2019/08/trump-praises-kim-jong-uns-beautiful-vision-for-his-country/.

64. Remarkable because Donald Trump's hubristic effort to exercise disproportionate executive authority departed from American historic resistance to autocratic rule. Such had been the premise of the US Declaration of Independence's anti-tyranny mandates. Ray Nothstine, *The Declaration of Independence Reminds Us to Put Tyrants on Notice*, ACTION INST. (July 3, 2014), https://blog.acton.org/archives/70438-declaration-independence-reminds-us-put-tyrants-notice.html. Moreover, the tripartite structure of the US Constitution also limits presidential authority. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 260–61 (2009).

undermine constitutional order and, thereby, prevent the Biden administration from taking office after what should have been pro-forma electoral certification.[65] This was not just hyperbolic rhetoric, but a concerted attempt to prevent the elected government from exercising the mandate received from the American people.

Trump's statements were not merely abstract. To the contrary, he actively courted supporters and extremists on Twitter to act on a false narrative seeking their aid to unconstitutionally retain the office of president if faced with electoral defeat.[66] The inflammatory rhetoric was orchestrated by him with the aid of advisors who coached him on the use of language to deceive, misguide, and ultimately advocate for insurrection.[67]

During the January 6, 2021, rally, Trump relied on the tremendous authority of the presidency and his charismatic leadership style to stir an impressive crowd to attack the institutions of government.[68] Trump perpetuated the false claim that the election was stolen from him.[69] On two occasions that day, he used rhetoric first formulated in 2016 by Roger Stone, his felonious confidant, who had been criminally convicted for obstructing Congress and whose jail sentence Trump later commuted.[70] "Stop the steal" became a catalyzing phrase then and carried into the 2020 election.[71] A group of researchers concluded, "[p]ut simply, the Jan. 6 insurrection at the Capitol would likely have not occurred if not for Trump's explicit and tacit encouragement of the Stop the Steal movement."[72]

Statements made during the 2020 presidential election and in the months following it pursued an agenda to create constitutional instability, popular uncertainty, and militant activism. On December

65. Andrew Prokop, *Congress' Count of the Electoral Votes, Explained*, VOX (Jan. 6, 2021, 1:54 PM), https://www.vox.com/2021/1/6/22213979/congress-electoral-vote-count-pence-hawley-cruz.

66. Richard L. Hasen, *Facebook and Twitter Could Let Trump Back Online. But He's Still a Danger*, WASH. POST (Mar. 9, 2022, 6:00 AM), https://www.washingtonpost.com/outlook/2022/03/09/facebook-twitter-trump-ban/; Alexandre Bovet & Hernán A. Makse, Influence of Fake News in Twitter During the 2016 US Presidential Election, 10 Nature Commc'ns 7, at 1 (Jan. 2, 2019), https://doi.org/10.1038/s41467-018-07761-2.

67. Heather Szilagyi et al., *Surveying Evidence of How Trump's Actions Activated Jan. 6 Rioters*, JUST SEC. (May 12, 2022), https://www.justsecurity.org/81468/surveying-evidence-of-how-trumps-actions-activated-jan-6-rioters/.

68. *See* Naylor, *supra* note 30.

69. *Id.*

70. *Id.*

71. Jared Holt et al., *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/.

72. *Id.*

19, 2020, Trump relied on his Twitter platform to invite supporters to join him in DC at a rally planned for January 6, the date set under the Constitution for Congress' certification of the Electoral College results. In the post, he emphasized that the event would be "wild."[73] These words prepared ordinary supporters and militiamen set to carry out his orders. Moreover, his statements on January 6, 2021, made to an already inflamed and fawning crowd, clearly and intentionally recruited persons to prevent the certification of the presidential election.[74] This he did despite the fact that "[c]oordinating bodies on election infrastructure and security said in a joint statement issued by the Department of Homeland Security's Cybersecurity & Infrastructure Security Agency" that the 2020 election was the most secure in United States history.[75]

Speaking aggressively and using inflammatory rhetoric at a rally near the White House, taking into account his aggressive rhetoric and the violence that followed, these words were understood by the audience as nothing less than a call to lawless action meant to overturn democratic results. His was not, as Trump's attorneys at the second impeachment trial claimed, mere political rhetoric.[76] He put into doubt election results and called on those assembled to "[f]ight like hell," otherwise "you're not going to have a country anymore," and to "[s]top the steal," which had been an ongoing rhetorical foil he had been using for months prior to the election.[77] In turn, his supporters posted photos online of weapons they intended to bring in order to storm and occupy the seat of US government.[78] Indeed, one of the President's close advisors testified that Trump

73. Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html.

74. Naylor, *supra* note 30.

75. Jen Kirby, *Trump's Own Officials Say 2020 Was America's Most Secure Election in History*, VOX (Nov. 13, 2020, 4:40 PM), https://www.vox.com/2020/11/13/21563825/2020-elections-most-secure-dhs-cisa-krebs.

76. PBS NewsHour, *WATCH: 'Fight Like Hell' Is a Common Political Expression, Trump's Impeachment Defense Says*, YOUTUBE (Feb. 12, 2021), https://www.youtube.com/watch?v=8geA_l7pw9k.

77. Naylor, *supra* note 30.

78. Sarah McCammon, *From Debate Stage, Trump Declines to Denounce White Supremacy*, NPR (Sept. 30, 2020, 12:37 AM), https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy; Brandy Zadrozny & Ben Collins, *Violent Threats Ripple Through Far-Right Internet Forums Ahead of Protest*, NBC (Jan. 5, 2021, 7:07 PM), https://www.nbcnews.com/tech/internet/violent-threats-ripple-through-far-right-internet-forums-ahead-protest-n1252923.

knew that some in the crowd had weapons but nevertheless urged them to fight at the Capitol.[79]

Members of the audience and others, including xenophobic groups who responded to Trump's invitation, showed up to do just that and proceeded to destroy parts of the US Capitol, remove documents from desks, and briefly wreak havoc on the nation and constitutional democracy.[80] A reasonable observer would have thought that Trump's calls to his loyal followers would be understood by some in the attendance to be calls for violent actions. He concluded the speech by instructing his zealous followers to "walk down Pennsylvania Avenue" to "take back the country,"[81] by which he meant to overturn a duly constituted election.

His doting followers forced their way past police personnel and barricades at the US Capitol to demand that Vice President Pence reject the official Electoral College vote and to demand that some state legislatures send alternative slates of electors who would be willing to throw the election in favor of Trump.[82] January 6 was the date set by the Electoral Count Act pursuant to the mandates of the Twelfth Amendment to the Constitution for a joint session of Congress to certify the Electoral College votes.[83] While the Vice President refused to go along with Trump's machinations, American democracy suffered a violent attack. More directly, four Trump supporters died and 140 law enforcement officers were injured after attackers plowed through police barricades.[84]

79. Lauren Gambino & Hugo Lowell, *Ex-White House Aide Delivers Explosive Public Testimony to January 6 Panel*, *The Guardian* (June 29, 2022, 9:53 PM), https://www.theguardian.com/us-news/2022/jun/28/january-6-committee-session-new-evidence.

80. Lonsdorf et al., *supra* note 30.

81. Naylor, *supra* note 30.

82. Katie Benner, *Former Acting Attorney General Testifies About Trump's Effort to Subvert Election*, N.Y. TIMES (Aug. 7, 2021), https://www.nytimes.com/2021/08/07/us/politics/jeffrey-rosen-trump-election.html; Jamie Gangel & Jeremy Herb, *Memo Shows Trump Lawyer's Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 PM), https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html; Richard Luscombe, *Congressman Jim Jordan Sent Text to Mark Meadows Saying Pence Could Block Election Result*, THE GUARDIAN (Dec. 16, 2021), https://www.theguardian.com/us-news/2021/dec/16/jim-jordan-texts-capitol-attack-trump-mark-meadows.

83. 3 U.S.C. § 15 (setting the date and procedures for counting Electoral College votes); U.S. CONST. amend. XII (creating the process whereby the Electoral College votes for the President).

84. Associated Press, *4 Died as Trump Supporters Invaded Capitol*, POLITICO (Jan. 6, 2021, 11:23 PM), https://www.politico.com/news/2021/01/06/shooting-capitol-pro-trump-riot-455639; Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASH. POST (Jan. 27, 2021, 7:47 PM), https://www.washingtonpost.com/local/public-safety/police-union-says-140-

While the former President has not been charged, members of the militia movements, such as the Proud Boys, were charged with conspiring to storm the Capitol.[85] Extremist group rhetoric and recruitment had been underway in the United States even before the 2020 presidential election.[86] Infighting had kept them at bay.[87] Donald Trump became a unifying force almost immediately after he announced his presidential candidacy in 2016. He received the backing of the Oath Keepers organization, some of whom have now been convicted for seditious conspiracy for their role in the January 6, 2021, insurrection attempt.[88] Despite their relatively low numbers,

officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html.

85. *See* Hugo Lowell, *Proud Boys Leaders Charged with Seditious Conspiracy in 6 January Riot*, THE GUARDIAN (June 6, 2022, 7:41 PM), https://www.theguardian.com/us-news/2022/jun/06/proud-boys-leaders-charged-seditious-conspiracy-jan-6-riot ("Top leaders of the far-right Proud Boys group, including its national chairman, Enrique Tarrio, have been charged with seditious conspiracy for plotting to storm the US Capitol to obstruct the certification of Joe Biden's election win over Donald Trump on 6 January 2021."). Tarrio is being prosecuted under several US statutes. United States v. Tarrio, No. 21-175-5, 2022 WL 1718985, at *2 (D.D.C. May 27, 2022). *See also* Spencer S. Hsu et al., *Proud Boys Leader and Lieutenants Charged with Seditious Conspiracy*, WASH. POST (June 6, 2022, 3:10 PM), https://www.washingtonpost.com/dc-md-va/2022/06/06/tarrio-proud-boys-seditious-conpiracy/.

86. Elaina Hancock, *UConn Researcher Studying the Rise of Far-Right Groups for US Government*, UCONN TODAY (Aug. 18, 2022), https://today.uconn.edu/2022/08/uconn-researcher-studying-the-rise-of-far-right-groups/; The George Washington University Program on Extremism, *Anarchist/Left-Wing Violent Extremism in America: Trends in Radicalization, Recruitment, and Mobilization* (Nov. 2021), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Anarchist%20-%20Left-Wing%20Violent%20Extremism%20in%20America.pdf; ADL, *Hate in the Sunshine State: Extremism & Antisemitism in Florida, 2020-2022* (Sept. 13, 2022), https://www.adl.org/resources/report/hate-sunshine-state-extremism-antisemitism-florida-2020-2022; Mahmut Cengiz, *Activity Shows Terror Groups and Right-Wing Extremists Were Undeterred by COVID-19 Pandemic* (Feb. 14, 2022), https://www.hstoday.us/featured/activity-shows-terror-groups-and-extremists-were-undeterred-by-covid-19-pandemic/.

87. Daniel L. Byman, *Assessing the Right-Wing Terror Threat in the United States a Year After the January 6 Insurrection*, BROOKINGS (Jan. 5, 2022), https://www.brookings.edu/blog/order-from-chaos/2022/01/05/assessing-the-right-wing-terror-threat-in-the-united-states-a-year-after-the-january-6-insurrection/.

88. Jennifer Williams, *The Oath Keepers, the Far-Right Group Answering Trump's Call To Watch the Polls, Explained*, VOX (Nov. 7, 2016, 8:20 AM), https://www.vox.com/policy-and-politics/2016/11/7/13489640/oath-keepers-donald-trump-voter-fraud-intimidation-rigged; Ryan Lucas, *A Second Oath Keeper Pleaded Guilty to Seditious Conspiracy in the Jan. 6 Riot*, NPR (Apr. 29,

the groups had large impacts on the violence in 2021.[89] Trump had told the Proud Boys to "stand back and stand by";[90] Trump's speech on January 6 was his way of telling them that they should no longer stand back but rather fight for him at the Capitol.

II. INCITEMENT DOCTRINE

Enforcement of Section 2383[91] to hold Trump criminally responsible faces significant First Amendment hurdles meant to prevent government censorship. There are no reported cases—neither at the district or appellate level—defining its statutory meaning. On its face, the statutory aim is to protect democratic order from internal and external threats. Lack of enforcement of it must be attributed to both the rarity of such cases and the heavy presumption against the suppression of unpopular views.

While there is ample evidence that Donald Trump catalyzed a mob against Congress, under the current Supreme Court doctrine of incitement, conviction is by no means assured. Several scholars have argued that Trump posed an imminent threat of harm under *Brandenburg*,[92] but prosecutors have not brought criminal charges because of the uncertainty of the results.[93]

Since 1819, the Supreme Court has recognized Congress' implied authority to prosecute insurrection.[94] Current federal law prohibits

2022, 2:44 PM), https://www.npr.org/2022/04/29/1095538077/a-second-oath-keeper-pleaded-guilty-to-seditious-conspiracy-in-the-jan-6-riot.

89. Researchers believe at its height the group had about five thousand followers, despite the organization's exaggerated claim of seven times that number. Ryan Lucas, *Who Are the Oath Keepers? Militia Group, Founder Scrutinized in Capital Riot Probe*, NPR (Apr. 10, 2021, 7:01 AM), https://www.npr.org/2021/04/10/985428402/who-are-the-oath-keepers-militia-group-founder-scrutinized-in-capitol-riot-probe.

90. Dean Obeidallah, *Trump's Proud Boys 'Stand Back and Stand By' Debate Moment was More Than a Dog Whistle*, NBC (Sept. 30, 2020, 12:48 PM), https://www.nbcnews.com/think/opinion/trump-s-proud-boys-stand-back-stand-debate-moment-was-ncna1241570.

91. Act of June 25, 1948, ch. 645, 62 Stat. 808 (codified at 18 U.S.C. § 2383).

92. *See, e.g.*, Catherine J. Ross, *What the First Amendment Really Says About Whether Trump Incited the Capitol Riot*, SLATE (Jan. 19, 2021, 3:26 PM), https://slate.com/technology/2021/01/trump-incitement-violence-brandenburg-first-amendment.html; James Wagstaffe, *Incitement to Violence Ain't Free Speech*, JUST SEC. (Jan. 15, 2021), https://www.justsecurity.org/74217/incitement-to-violence-aint-free-speech/.

93. Michael S. Schmidt & Maggie Haberman, *Despite Growing Evidence, a Prosecution of Trump Would Face Challenges*, N.Y. TIMES (June 18, 2022), https://www.nytimes.com/2022/06/18/us/politics/trump-jan-6-legal-defense.html.

94. M'Culloch v. Maryland, 17 U.S. 316, 382 (1819) (recognizing a variety of implied congressional powers, including authority "to call forth the militia to execute the laws, suppress insurrections, and repel invasions"); Stewart v. Kahn, 78 U.S. 493, 507 (1870) ("The power to pass [the relevant statute] is necessarily implied from the powers to make war and suppress insurrections.") (referring to

physical efforts to carry out violent conduct and engage in conspiracy. The US Code renders incitement to rebellion or insurrection criminally and politically actionable.[95] Section 2383 establishes a monetary penalty or imprisonment of up to ten years in a federal penitentiary and, perhaps more importantly, a lifetime prohibition from holding public office.[96] The restriction on advocacy to overturn representative political order implicates First Amendment values writ large because such limitations on speech implicate the ability of individuals to engage politically, assert ideas, and affect audiences.[97]

At an even more fundamental level, liberal democratic ideals of equal and fair representation are implicated by limits and restrictions on the communication of ideas. However, the fundamental and constitutional freedom of speech is not an absolute. Society can rely on its power over "any member of a civilized community," as philosopher John Stuart Mill points out, when its authority is wielded "to prevent harm to others."[98] That definition, however, is in much need of refinement, principally to protect the expression of political or personal views while also safeguarding constitutional order from vituperation that is likely to stir mob violence.[99]

Any state committed to individual rights and public order must be especially vigilant when insurrection is afoot. Censorship creates significant burdens to the exchange of ideas with private and public significance. The First Amendment prevents authorities from engaging in authoritarian or imperialist efforts to quell opposition. A state that suppresses speech challenging its authority poses a threat to core principles of democracy. In his book *On Liberty*, Mill notes the danger posed by a state's "assumption of infallibility" when it undertakes "to decide that question for others, without allowing them to hear what can be said on the contrary side."[100] When government imposes criminal penalties against political heterodoxy, it prevents the free exchange of arguments and tastes that are informative to personal, cultural, legal, social, scientific, and political choices.

U.S. CONST. art. I, § 8, cls. 11, 15); United States v. Comstock, 560 U.S. 126, 168 n.8 (2010) (discussing unenumerated powers, such as the power to criminalize insurrection).

95. 18 U.S.C. § 2383 ("Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.").

96. *Id.*

97. Tsesis, *supra* note 4, at 1027.

98. JOHN STUART MILL, ON LIBERTY 23 (Ticknor & Fields 2d ed. 1863).

99. JOHN RAWLS, A THEORY OF JUSTICE 177 (The Belknap Press of Harvard Univ. Press rev. ed. 1999) (1971) (asserting that legal liberties refer to conditions when people "are free from certain constraints to do it or not to do it" and are "protected from interference by other persons").

100. MILL, *supra* note 98, at 48.

A. Emergence of Doctrine

Any exploration of Section 2383 must begin and be grounded in Supreme Court jurisprudence. Incitement law is fraught with ambiguities, especially about the adequate temporal proximity of calls to violence or arms with any purportedly ensuing physical attacks. Two critically important matters should be reflected in any interpretation of the statute. Enforcement must be muscular enough to secure public safety against incitement to harm, while being liberal enough to maintain breathing space for free exchange of ideas.

1. The Nascence of Incitement Doctrine

While no federal court has yet interpreted Section 2383, the more generally applicable incitement doctrine sets pertinent proximity and contextual parameters for bringing charges under the statute. The doctrine emerged from a series of cases the Court decided in the aftermath of the First World War. The pedigree of the clear and present danger test dates to prosecutions under the Espionage Act of 1917.[101] *Schenck v. United States*[102] upheld the conviction of a defendant who, during America's military engagement in the European theatre, argued that military conscription at home violated the Thirteenth Amendment's injunction against involuntary servitude.[103] In reviewing the offending pamphlet, Justice Holmes, writing for the majority, found that the defendant sought to obstruct enforcement by appealing to men of conscription age.[104] The key inquiry "in every case," he wrote, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[105] "It is a question of proximity and degree."[106]

The Court's approach in *Schenck* was clearly not absolutist in its understanding of the First Amendment. Holmes clarified that certain statements, such as "falsely shouting fire in a theater and causing a panic," were unprotected.[107]

There are circumstantial and substantive differences between uttering cries of distress that create pandemonium in a public setting and engaging in purposeful advocacy likely to have an imminent negative impact on national security. In either case, the danger to

101. Section 34, act June 15, 1917, ch. 30, title I, § 4, 40 Stat. 219 (codified as amended at 50 U.S.C. § 34).

102. 249 U.S. 47 (1919).

103. *Id.* at 48–49. For extensive discussion on the Thirteenth Amendment, *see* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY (2004).

104. *Schenck*, 249 U.S. at 51.

105. *Id.* at 52.

106. *Id.*

107. *Id.*

arbitrary suppression of views renders it imperative to vigilantly guard the free exchange of ideas while also providing adequate police powers to prevent popular leaders from riling up a crowd in order to destroy representative democracy. Each raises a variety of questions about the speaker's intent. The First Amendment places a thumb on the scale of speech, protecting jocund comments and emphatic debates, but it does not extend to advocacy like Donald Trump's seeking to rouse a mob to attack duly elected officials.[108]

Schenck articulated a test in need of clarity. Its "proximity and degree" aspects authorized judges to apply "bad tendency" analysis to determine what consequences were likely to follow vituperative statements.[109] That approach created a climate in which the bench could use an uncertain standard of review to adjudicate allegations arising from purely expressive conduct that posed a serious threat.

In two subsequent decisions, *Frohwerk v. United States*[110] and *Debs v. United States,*[111] Holmes continued to resort to the bad tendency test to uphold convictions for no more than opposition to war, conscription, and other military policies.[112] As in *Schenck*, Holmes warned in *Frohwerk* that under certain circumstances "a little breath would be enough to kindle a fire."[113] Conviction in that case was for no more than printing a German language newspaper, *Missouri Staats Zeitung*.[114] In *Debs*, the Holmes majority upheld a conviction for a publicly made statement by a political candidate at a

108. Martin Pengelly, *Pence Was 40ft From Mob on January 6: 'Vice-President's Life Was in Danger,'* THE GUARDIAN (June 16, 2022, 4:34 PM), https://www.theguardian.com/us-news/2022/jun/16/mike-pence-40ft-from-mob-january-6 ("The document, the California Democrat Pete Aguilar said, 'explains that a confidential informant in the Proud Boys [extremist group] told the FBI the Proud Boys would have killed Mike Pence if given a chance. The witness whom the FBI affidavit refers to stated that other members of the group . . . said that anyone they got their hands on would have been killed, including Nancy Pelosi,' the House speaker.").

109. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1260–61 (1983). Professor David Cole explains that "the 'bad tendency' test offered little or no protection to speech; under this test, the state could punish statements 'inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace.' Gitlow v. New York, 268 U.S. 652, 667 (1925)." David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 878 n.85 (1986).

110. 249 U.S. 204 (1919).

111. 249 U.S. 211 (1919).

112. SAMUEL KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS 181–234 (1956) (elaborating on the history of the clear and present danger test); Herbert Wechsler, *Symposium on Civil Liberties*, 9 AM. L. SCH. REV. 881, 882–84 (1941).

113. *Frohwerk*, 249 U.S. at 209.

114. *Id.* at 205–06, 209.

factory that criticized the draft,[115] but, unlike the pamphlet in *Schenck*, did not overtly call on anyone to resist it.[116]

2. Truth as Aim of Free Speech

Justice Holmes's most protective understanding of the Free Speech Clause is articulated in a dissent to *Abrams v. United States*.[117] The case was decided the same year as *Schenck*, *Frohwerk*, and *Debs*.[118] His argument in *Abrams* for a marketplace of ideas perspective is closely linked to Justice Brandeis's more egalitarian exposition.[119] Both men favored the protection of personal and political speech, but neither believed the constitutional right extended to incitement to violence.

Abrams arose from an appeal of convictions by several amateurish opponents of United States policy who supported the Bolsheviks after their successful 1917 Revolution in Russia.[120] A majority of the Court upheld their criminal convictions under the Sedition Act of 1918[121] for printing a pamphlet that used "disloyal, scurrilous, and abusive" language.[122]

Today the case is primarily remembered not for the majority opinion but for Holmes's dissent, which Brandeis joined. Holmes continued to rely on a variant of his earlier bad tendency analysis.[123] He argued that to prevent state censorship, the prosecution should be required to prove that the offending expression posed "present danger of immediate evil or an intent to bring it about."[124] His views on the subject had evolved, although *Schenck* had been decided less than twelve months before; most importantly, the *Abrams* dissent

115. *Debs*, 249 U.S. at 216. Eugene V. Debs, the subject of prosecution in this case, was a socialist leader who unsuccessfully ran for the United States presidency. NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 342–45 (1982). He claimed the military draft was a capitalist plan against the workers' class interests. ERNEST FREEBERG, DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT 45, 55 (2008). Debs did not complete his term in jail because President Harding commuted his sentence. JOHN W. DEAN, WARREN G. HARDING 230–31 (2004).

116. *Debs*, 249 U.S. at 216–17.

117. 250 U.S. 616 (1919).

118. *Id.* at 616.

119. Space is lacking in this Article to engage in the academic conversation about the extent to which Zachariah Chaffee, Ernst Freund, or Learned Hand influenced Holmes's thinking on the Free Speech Clause. *See* Thomas Healy, *Anxiety and Influence: Learned Hand and the Making of a Free Speech Dissent*, 50 ARIZ. ST. L.J. 803, 817–18 (2018).

120. *Abrams*, 250 U.S. at 617, 620–21.

121. Sedition Act of 1918, ch. 75, 40 Stat. 553 (amending Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219).

122. *Abrams*, 250 U.S. at 617.

123. *Id.* at 628 (Holmes, J., dissenting).

124. *Id.*

recognized that the government had to prove intent rather than expecting the court to assume it.[125] Also new was Holmes's use of proximal immediacy to define the limit on congressional power to restrict speech, which provided more temporal certainty than *Schenck*'s clear and present danger test.[126]

The most memorable and influential portion of the *Abrams* dissent is Holmes's marketplace of ideas theory that, even today, more than a century after he wrote it, continues to influence free speech jurisprudence.[127] In reviewing the context of Mr. Abrams's conviction, Holmes found there was no chance that a hyperbolic pamphlet, opposing President Woodrow Wilson's foreign policy, posed any "immediate danger."[128] The case arose from the mere "surreptitious publishing of a silly leaflet by an unknown man," who advocated that workers join ranks against American capitalism and expressed his support for Soviet socialism.[129] Abrams had not called for violent overthrow of legitimate government in the United States and posed no danger to the public order.[130] The dissent concluded that an unknown group that favored proletariat dictatorship was relatively benign and certainly not seditious.[131]

The most influential passage from Holmes's dissent asserted:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the 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.[132]

His insightful statement recognized that free people must be able to exchange ideas in order to discard faulty opinions and arrive at accurate understandings. His assertion was closely related to the Millian philosophical defense of free expression.[133] Holmes's personal

125. *Id.* at 626, 629.

126. *Id.* at 627.

127. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1476 (2022) (Breyer, J., concurring); Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021).

128. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

129. *Id.*

130. *Id.* at 629.

131. *Id.* at 630–31.

132. *Id.* at 630.

133. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3. However, "[a]s Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social

correspondences additionally show him to have been a devotee of Social Darwinism.[134] Yet, Mill's renowned book, *On Liberty*, is not naive about the potential for speech to be manipulated by persons seeking harmful purposes. He recognized that "[h]istory teems with instances of truth put down by persecution."[135] For purposes of this Article, we might translate that observation to mean that popular demagogues intentionally disseminate propaganda in order to whip up insurrection. The notion that truth always vanquishes evil, Mill wrote, "is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces."[136]

Incitement, when initiated by leaders of movements with significant followings, can be used to communicate threats and calls to violence against identifiable enemies whether the message is spread by print, via the internet, or in person. Statements from popular leaders differ from the insignificant pamphlet that gave rise to the criminal conviction upheld in *Abrams*.[137] Many examples from throughout the world demonstrate the potential long-term tail of carefully crafted propaganda, which in the past reverberated to set off the genocidal campaigns in Nazi Germany, Bahutu Rwanda, and Ottoman Turkey.[138] Truth, contrary to Holmes's famous quote in *Abrams*, is not therefore always the outcome of more speech.

Professor David Rabban demonstrates that, in his dissent to *Abrams*, Holmes evinced greater nuance about speech than he had in his previous three forays into incitement law.[139] Holmes had learned from civil libertarians like educator and writer John Dewey, jurists

Statics." Obergefell v. Hodges, 576 U.S. 644, 705–06 (2015) (Roberts, C.J., dissenting).

134. Judge Richard Posner compares Holmes's Social Darwinism to Friedrich Nietzsche's Übermensch morality, which advocates a complete reevaluation of orthodox views about good and evil. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 885–86 (1988); Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59, 132 (1986). Holmes's Social Darwinism inordinately weds the power of speech to the acquisition of power, rather than primarily linking expression to free thought and knowledge. Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1654 n.234 (2013). Alexander Meiklejohn asserted that the First Amendment's "primary purpose" is "that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no counterbelief, no relevant information, may be kept from them." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88–89 (1948).

135. JOHN STUART MILL, ON LIBERTY 89 (Pelican Classics 1980) (1859).

136. *Id.*

137. *Abrams*, 250 U.S. at 620–21.

138. ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS chs. 2–4 (2002).

139. David M. Rabban, *Historical Perspectives on Holmes's Dissent in* Abrams, 51 SETON HALL L. REV. 41, 41–43 (2020).

like Zechariah Chafee, Jr., and other prominent intellectuals.[140] Their works had a profound effect on Holmes specifically and, through him, on First Amendment jurisprudence more generally.[141] Rabban was not the first to notice the change Holmes underwent. Even earlier, moderate Justice Felix Frankfurter recognized that Holmes's thoughts on speech had expanded to include greater tolerance for open debate and more contextual realism in reviewing incitement cases that later came before the Court.[142] His juridical development in this area contrasted with the growing censorial "hysteria," felt throughout the United States, that reached its zenith during the Red Scare.[143]

Holmes did not quite think he had articulated a new position in the dissent to *Abrams*; rather, he thought of it as an elaboration.[144] In this regard, he observed the distinction between speech posing immediate danger and the expression of views during the course of debate.

The year after *Abrams* was decided, Justice Brandeis began to take on a leading role in First Amendment jurisprudence. Like Holmes, he provided a theoretical basis of free speech and reviewed the circumstantial likelihood of criminal harm. In a dissent to *Schaefer v. United States*,[145] joined by Holmes, Brandeis argued that upon close review of the facts the publications at issue were not "even remotely or indirectly" obstructing recruitment.[146] That conclusion, however, was not based on any change in juridical prior, but only a lack of factual record supporting the conviction.[147] The effort was too

140. *Id.* at 57–59. Dewey also cautioned against Holmes's Social Darwinism: "At times, [Holmes's] realism seems almost to amount to a belief that whatever wins out in fair combat, in the struggle for existence, is therefore the fit, the good, and the true." John Dewey, *Justice Holmes and the Liberal Mind, in* MR. JUSTICE HOLMES 43 (Felix Frankfurter ed. 1931).

141. Rabban, *supra* note 139, at 56–58.

142. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 82 (2d ed. 1961).

143. *Id.* at 79.

144. Abrams v. United States, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting) (citations omitted) ("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. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.").

145. 251 U.S. 466 (1920).

146. *Id.* at 486 (Brandeis, J., dissenting).

147. *Id.* at 486–87.

"puny" to warrant conviction.[148] The same year, 1920, the pair dissented again in *Pierce v. United States*,[149] again deploying the "clear and present danger" language to argue that a defendant's pamphlets were not intended in their proximal result to create military insubordination.[150] These two dissents further articulated the First Amendment guarantee of the "fundamental right of free men to strive for better conditions through new legislation and new institutions."[151]

In 1927, Brandeis ruminated at length in his concurrence to *Whitney v. California*[152] about the power of speech and the danger to open society posed by censorship.[153] His manifesto on free expression presented arguments against state interference in the "dissemination of social, economic and political doctrine," even when they run counter to the views of "a vast majority of its citizens."[154] Unlike Holmes's populist notion of truth, Brandeis discussed the subjective and public values to "speak as you think" to discover and spread "political truth."[155] It is repression—not the venting of ideas—that breeds distrust in government; therefore, "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[156] The First Amendment protects against "the occasional tyrannies of governing majorities."[157] This positive statement of the fundamental right leaves open whether any restrictions can censor extreme speech, such as calls to insurrection, while maintaining the asserted Brandeisian and Holmesian search for truth.

3. Evolution of Incitement Doctrine

The majority of the Court did not shift to the more expansive views of free speech protection articulated by Holmes in his dissent to *Abrams* and Brandeis in his dissents to *Schaefer* and *Whitney* until 1969, when in *Brandenburg v. Ohio* it set the current test.[158] During that intervening period, Court majorities were more likely to uphold criminal convictions for contrarian speech, despite the similar lack of evidence that the two visionary jurists had flagged as dispositive to convictions for contrarian expressions.[159] The deference to legislative

148. Dennis v. United States, 341 U.S. 494, 505 (1951).
149. 252 U.S. 239 (1920).
150. *Id.* at 239, 255, 271–72 (Brandeis, J., dissenting).
151. *Id.* at 273.
152. 274 U.S. 357 (1927).
153. *Id.* at 372–80 (Brandeis, J., concurring).
154. *Id.* at 374.
155. *Id.* at 375.
156. *Id.*
157. *Id.* at 376.
158. 395 U.S. 444, 447 (1969).
159. Rabban, *supra* note 109, at 1303.

policy in cases like *Gitlow v. New York*[160] continued to build on the clear and present analogy of *Schenck*.

In *Gitlow,* which is today most commonly cited for its incorporation of the Free Speech Clause, the Court held that "a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means."[161] In the aftermath of World War I, the Court treated incitement as an unprotected category of speech.[162] Review of incitement convictions during this period tended to favor enforcement. A state could exercise its police power to penalize persons who threatened the "general welfare" through advocacy for the use of "force, violence, and unlawful means."[163] The problem with the State statute in that case was that it created a cause of action even against persons who made innocuous statements.[164] The majority nevertheless upheld Gitlow's conviction, despite the absence of any evidence that he intended to act either immediately or even in the near future upon the teachings articulated in the manifesto of the Left Wing of the Socialist Party.[165] The group advocated for workers' movements to join the Communist International of Revolutionary Socialism and lauded "proletarian dictatorship" with its "mass political strike[s] against capitalism and the state."[166]

In his dissent to *Gitlow*, Justice Holmes, joined by Justice Brandeis, continued to rely on *Schenck*'s clear and present danger formulation but took the majority to task for upholding a conviction of "a small minority," which "had no chance of starting a present conflagration."[167] They had just as little influence as the *Abrams* group or the *Schaefer* newspaper editors. Contrary to the Holmes-Brandeis argument, the *Gitlow* majority found the manifesto was more than "a philosophical abstraction" because it argued for the indispensability of "proletariat revolution and the Communist reconstruction of society" which could "kindle a fire" that might "burst into a sweeping and destructive conflagration."[168]

No immediate threat of communist takeover in New York was looming.[169] Holmes and Brandeis believed the document was no more than theory, not incitement to insurrection.[170] They shared the

160. 268 U.S. 652 (1925).
161. *Id.* at 664, 667.
162. *Id.* at 662.
163. *Id.* at 668.
164. *Id.* at 664.
165. *Id.* at 669.
166. People v. Gitlow, 187 N.Y.S. 783, 789 (N.Y. App. Div. 1921), *aff'd*, 136 N.E. 317 (N.Y. 1922), *aff'd sub nom.* Gitlow v. New York, 268 U.S. 652 (1925).
167. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).
168. *Id.* at 669 (majority opinion).
169. *Id.* at 671.
170. *Id.* at 673 (Holmes, J., dissenting).

skepticism about official truths and sided with measured tolerance as opposed to compelled orthodoxy.[171] In subsequent years the Holmes-Brandeis rationale came to be accepted by a majority on the Court.[172]

Much along the same lines as the State law upheld in *Gitlow*, the Court in *Dennis v. United States*[173] also found the federal Smith Act to be constitutional.[174] It did not target "peaceable, lawful and constitutional" transition, wrote the majority, but incitement by "violence, revolution and terrorism."[175] The statute contained a scienter element that made it illegal to publish or disseminate intentional advocacy calling for the overthrow of government.[176] The appeal was from the conviction of the General Secretary of the Communist Party-U.S.A. for conspiracy.[177]

The Supreme Court's reasoning in *Dennis* offers some insight into how a judge might interpret charges of incitement to insurrection in the cases of Donald Trump and his associates under Section 2383. Chief Justice Vinson's plurality opinion asserted that the First Amendment does not require government to "wait until the putsch is about to be executed" before acting to quell "a highly organized conspiracy" of "rigidly disciplined members."[178] Taking a lesson from recent history, he expounded on the efficacy of Nazi propaganda to demonstrate that under certain extreme circumstances a democracy could prevent an intentional incitement from burgeoning into circumstances where violent rebellion would be nearly certain to result.[179]

Under Hitler's charismatic leadership and popular, antisemitic periodicals of the 1920s, antisemitism increasingly became a political force reliant on a historical evil.[180] Between 1919 and 1923, the antisemitic vote was never greater than 8% of the total number.[181]

171. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 732–36, 766 (1975).

172. *See* Dennis v. United States, 341 U.S. 494, 507 (1951).

173. 341 U.S. 494 (1951).

174. *Id.* at 516.

175. *Id.* at 501.

176. *Id.* at 496.

177. *Id.* at 497.

178. *Id.* at 510–11 ("The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.").

179. *Id.* at 509–10.

180. RICHARD OVERY, THE PENGUIN HISTORICAL ATLAS OF THE THIRD REICH 18 (1996).

181. DONALD L. NIEWYK, THE JEWS IN WEIMAR GERMANY 51 (1980).

However, as Nazi antisemitic propaganda became more popular in the late 1920s and early 1930s, through boisterous speeches and publication of such racist screeds as Julius Streicher's *Der Stürmer*,[182] the Nazi Party's popularity grew enough for it to secure 18.3% of the vote in 1930, 37.4% in 1932, and finally 43.9% of the vote during the March 1933 election.[183]

The Court in *Dennis* upheld Chief Judge Hand's circuit court decision and the plurality adopted his balancing formula, which requires judicial determination of "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[184] Frankfurter's concurrence also sided with balanced consideration.[185] Balancing was the antithesis of the more absolutist approach that had been advocated by textualists like Professor Alexander Meiklejohn and Justice Black.[186] The absolutist view was too literalist in opposing regulations even when they had no more than incidental effects on speech.

Justice Douglas's dissent in *Dennis* invoked the First Amendment mandate that government guard the right to speak freely, which is enjoyed by "every religious, political, philosophical, economic, and racial group amongst us."[187] In a later case, he explicitly rejected judicial weighing of speech against other values.[188]

182. By the 1930s, Streicher's newspaper was used as a teaching tool by elementary school teachers. See RICHARD GUTTERIDGE, THE GERMAN EVANGELICAL CHURCH AND THE JEWS 1879–1950, at 161–62 (Harper & Row 1976); *see also* KARL D. BRACHER, THE GERMAN DICTATORSHIP 37–38 (Jean Steinberg trans., 3d ed. 1972).

183. OVERY, *supra* note 180, at 21.

184. *Dennis*, 341 U.S. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)). Hand's proportionality formula at the circuit court level in *Dennis* was curious given his direct incitement formula in Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917); although even in that earlier case he understood verbal advocacy to be a trigger to action. *Id.* at 540 ("One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action.").

185. *Dennis*, 341 U.S. at 539–40, 548–49 (Frankfurter, J., concurring) ("Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.").

186. Konigsberg v. State Bar of Cal., 366 U.S. 36, 62 (1961) (Black, J., dissenting); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 246–48.

187. *Dennis*, 341 U.S. at 584–85 (Douglas, J., dissenting).

188. Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) ("The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence.").

Yet, while championing the liberty of personal opinion, Douglas recognized that under the right conditions speech can "fan such destructive flames that it must be halted in the interests of the safety of the Republic."[189] Thus, he understood that in certain circumstances speech can burn down the edifice of the Constitution.

Although *Dennis* remains good law, never having been overturned, Professor Geoffrey Stone cautions that its holding might encourage abuse of civil liberties by military and executive powers, especially during times of war.[190] Justice Frankfurter too conceded the potential danger to personal autonomy were courts to become "embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[191] Although Frankfurter's juridical philosophy ordinarily required deference to Congress in passing laws like the Smith Act, his opinion was consistent with Stone's defense of courts as bulwarks against executive overreach.

While the outcome in *Dennis* has been largely put in doubt by today's more rigorous First Amendment jurisprudence,[192] the Court's error was mainly one of application, not of principle. Dennis created scarcely more danger to public order than the defendant in *Abrams*. However, the balancing formula used in *Dennis* should not be too readily discarded. Too absolutist a disregard of the underlying legislative concerns as to the possibility of violent insurrection would leave government without recourse to prosecute massive political movements, such as the one led by Donald Trump who advocated for millions of his followers to fight constitutional government in order to overturn the legitimate outcome of an election.[193]

B. Brandenburg *and Imminent Lawless Action*

The current, rigorous standard for incitement to harm or injury was articulated by the Court in *Brandenburg v. Ohio*.[194] The case involved incitement directed at specific groups, blacks and Jews.[195] However, like Donald Trump's advocacy, the incitement was not specific to time and place. Clarence Brandenburg's abstract threats of future violence made to a small group of racist devotees did not amount to intentional efforts to spark imminently likely violence or

189. *Dennis*, 341 U.S. at 584–85 (Douglas, J., dissenting).

190. Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2209 (2007).

191. *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring).

192. *See* Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131, 1132 (2004).

193. As Part I of this Article demonstrated, the attack at the nation's Capitol followed on the heels of his advocacy to fight like hell to prevent Congress from certifying the votes of the Electoral College. *See supra* Part I.

194. 395 U.S. 444, 447 (1969).

195. *Id.* at 446–47.

lawlessness.[196] The Court held unconstitutional a state statute that prohibited groups from teaching and advocating methods of sabotage and violence.[197]

Charges under that law had been brought against Brandenburg, a Ku Klux Klan speaker, after two journalists, whom the group had invited to the rally, recorded him on camera.[198] Brandenburg told the Klansmen that they were not a "revengent organization," but that at some undefined point in time it may be necessary for the "Caucasian race" to take some "revengeance."[199]

The Supreme Court reversed the conviction because it was "mere advocacy" rather than a call to imminent violent action.[200] The majority's test examined whether the advocacy aimed and was likely to incite others to commit "imminent lawless action."[201] The test was a clarification of the clear and present danger test, not an abandonment of it.[202] The newer approach agreed with First Amendment scholars, most prominently Harry Kalven and Robert McClosky, who separately believed the clear and present danger test was analytically unhelpful and outmoded.[203]

The new requirement that prosecution prove up intent, likelihood, and imminence were distinguishable from the rather loose interpretation of clear and present danger in *Whitney v. Califorinia*.[204] Indeed, the Court in *Brandenburg* expressly overturned *Whitney*, which had upheld the criminal conviction of an activist who had espoused communist economic theory but had rejected its violent tactics.[205] Curiously, the Court in *Brandenburg* mentioned *Dennis*'s rejection of *Whitney*'s error but did not overrule *Dennis*.[206] Imminence tilts the balance of adjudication on the scale of free speech, requiring a difficult burden of proof about circumstances within close proximity of the solicited unlawful conduct.

The solution of 1969 was far from an airtight prevention of prosecutorial overreach. Justice Douglas, in a speech delivered at Rutgers University, pointed out that the terminological ambiguity found in the clear and present danger test carried over into

196. *Id.* at 445–50.

197. *See* OHIO REV. CODE ANN. § 2923.13 (West) (quoted in *Brandenburg*, 395 U.S. at 445).

198. *Brandenburg*, 395 U.S. at 445.

199. *Id.* at 446.

200. *Id.* at 449.

201. *Id.* at 447.

202. Justice Douglas rejected the "clear and present danger" test in his concurrence to the case. *Id.* at 450 (Douglas, J., concurring).

203. Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1236 (1965); Harry Kalven, Jr., *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 297 (1968).

204. *See* Whitney v. California, 274 U.S. 357, 376–78 (1927).

205. *Brandenburg*, 395 U.S. at 449.

206. *See id.* at 447.

Brandenburg's imminent threat of harm formulation.[207] Lack of precision sets limits but also expands the likelihood of successful prosecution of demagogues like Donald Trump for calling on a mob to overthrow government. Neither test sets precise temporal limits on governmental powers, and each requires contextual analysis.

Judicial contextualization remains necessary after *Brandenburg* to determine the extent of likelihood that a speaker intends his words to influence others to commit illegal acts. Moreover, the *Brandenburg* Court did not clarify whether advocacy of only some or all unlawful conduct can be subject to criminal sanction. The opinion thus leaves unanswered questions. Clear, though, is the decision to strengthen earlier prohibitions against the prosecution of abstract principles.[208]

This does not mean the Court has entirely left obscure the matter of when words turn to actionable advocacy. Context matters here as in other areas of free speech law. To better understand the term "imminent" and how a court might apply it in cases of incitement, I turn to John Stuart Mill, the source of Holmes's conceptualization of the marketplace of ideas. Mill teaches that a statement that in one situation is a protected idea might pose danger to safety in another:

> An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.[209]

Understanding the risk posed under the circumstances is of critical importance for deciding whether the speaker intends to instigate insurrection or merely to let off steam. As for Donald Trump, he stood in front of the Capitol and falsely told a boisterous crowd that Democrats had stolen the election, knowing full well that the excited mob, which he had for months riled up at rallies and on television, was likely to act violently under those circumstances.[210]

207. William O. Douglas, *Remarks of Associate Justice William O. Douglas*, 28 RUTGERS L. REV. 616, 620 (1975) ("All the objections to the 'clear and present danger' test are equally applicable to the . . . Brandenburg test.").

208. Earlier cases had likewise prohibited prosecution for abstract views in favor of overturning existing order by violent means. See Yates v. United States, 354 U.S. 298, 318 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978); Herndon v. Lowry, 301 U.S. 242, 259–61 (1937).

209. Mill, *supra* note 135, at 119.

210. One crime that is clearly beyond the pale of constitutional protection is conspiracy that actively solicits unlawful action as part of a criminal scheme.

> [I]ndoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement, is not constitutionally protected when the group is of

For purposes of this Article, the question is in setting a test that will pass First Amendment review in order to determine whether Donald Trump intentionally called on followers to act unlawfully under circumstances that were clearly likely to incite an imminent effort at insurrection in violation of Section 2383, but incitement doctrine must first be clarified. In this regard, prosecutors should investigate whether evidence rendered it beyond a reasonable doubt that Trump's call to fight on behalf of his campaign to retain power drew people together on January 6 and provided the mob with a joint aim for violent and unlawful conduct. After all, he was neither a mere puny blowhard nor an unknown man. The power of his words and instructions are evident from his place atop the national government. The effectiveness of his call to overturn the results of an election provide evidence of the lethal circumstances his words engendered.

Care in interpretation is especially warranted to prevent prosecutors from manipulating the ambiguities of the *Brandenburg* test to pursue charges against political opponents. The test provides little guidance about the contexts that render intentional advocacy of violence criminally actionable. Presumably, at least the calls for insurrection must be made by a sufficiently popular leader in settings that are likely to spark insurrection.[211] The likelihood of insurrection must then be tied to something implicit in *Brandenburg* and consistent with Holmes's assertion in his *Abrams* dissent that unknown men pose no true danger of sedition or insurrection against the state.

The political speech interests involved require courts to take great care to preserve constitutional safeguards against arbitrary censorship. Nevertheless, even if it is not airtight, *Brandenburg*'s imminence requirement is more rigorous than *Dennis*'s test for whether the defendant had "intended to overthrow the Government 'as speedily as circumstances would permit.'"[212] In the latter case, judicial review failed to check government suppression of rather innocuous communications.[213]

While the definition of temporal imminence remains ambiguous, *Brandenburg* makes clear that free speech interests will be of

> sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.

Yates, 354 U.S. at 321. This formula preserves the general First Amendment principle of advocacy and discussion. *Id.* at 344 (Black, J., concurring in part and dissenting in part). Conspiracy, however, is beyond the scope of this Article as it is covered by 18 U.S.C. § 2384, while this Article examines the constitutional limits of enforcing 18 U.S.C. § 2383.

211. *But see supra* notes 180–83 and accompanying text (concerning the meteoric rise of the Nazi Party during the early twentieth century).

212. Dennis v. United States, 341 U.S. 494, 515 (1951).

213. *See id.* at 581–82 (Douglas, J., dissenting).

predominant value absent proof of intentional advocacy to orchestrate illegal violent action.[214] This intentionality element, as Professor Frederick Schauer points out, distinguishes incitement from circumstances where a hostile audience's negative reaction is undesired and, in some cases, unforeseen by the speaker.[215]

While the Court in *Brandenburg* separated the likelihood element from the imminence element, any judicial assessment of the two is intrinsically related. A court evaluating whether specific advocacy is likely to lead to lawless action must also reflect on particular circumstances—including crowd size, speaker popularity, prior planning, intra-group cohesion, etcetera. Moreover, a speech delivered in public is of greater likelihood to evoke action than might printed or digital materials read in private. The history of statements and their significance within a cultural milieu can help determine and inform the likelihood that speech will lead to mob action bent on carrying out charismatic leaders' autocratic aims.

C. Discontent, Imminence, and Incitement

Brandenburg established the modern standard for charging a defendant with incitement. To succeed, a finder of fact must find beyond a reasonable doubt that a speaker purposefully directed advocacy at followers who under the circumstances were ready, willing, and able to act violently or lawlessly. The high value of speech that First Amendment cases have articulated for the past century adds to the heavy burden of proof.[216] The outstanding question, one that the Supreme Court has never adequately addressed, is just how courts should measure imminence. Temporal proximity must be situationally determined. Consequently, imminence must be tied to the likelihood that incitement will illicit illegality, among which is insurrection.

Multiple historical examples demonstrate the long-term consequences of destructive messages.[217] To begin on a sprint

214. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

215. Frederick Schauer, *Free Speech Overrides*, 2020 U. CHI. LEGAL F. 255, 264–65 ("[T]here are many instances in which violence is the genuinely unintended (by the speaker) and truly undesired (by the speaker) byproduct of an otherwise lawful speech. Typically this occurs when an audience reacts violently to what a speaker non-violently has said, and this, in a nutshell, is the problem of the hostile audience.").

216. *See generally* Thornhill v. Alabama, 310 U.S. 88 (1940); *Brandenburg*, 395 U.S. at 444.

217. Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 740 (2000); *see generally* Alexandra B. Roginsky & Alexander Tsesis, *Hate Speech, Volition, and Neurology*, 3 J.L. & BIOSCIENCES 174 (2015).

through well-known examples of the effective incitements,[218] Germany has contributed immensely to human culture. However, its most inimical force was antisemitism, which has ancient roots. The Court has recognized this history in *Dennis*[219] and in Justice Jackson's dissent to *Terminiello v. City of Chicago*.[220] Anti-Jewish sentiment flourished in Germany long before Hitler's accession to Chancellorship, and its widespread prevalence among ordinary people contributed to the popularity of his fiery oratory and Nazi successes throughout the country.[221] In an empirical study, Professors Nico Voigtländer and Hans-Joachim Voth identify patterns of violence that demonstrate the long trail of abuses that occurred in at least several cities where mobs perpetrated pogroms during the Black Plague-era of the fourteenth century and attacks against Jews in the 1920s and 1930s.[222]

Antisemitism had an extensive pedigree in German Roman Catholicism and in German Lutheranism.[223] Martin Luther, a leading acolyte of the Protestant movement, expressed virulently violent attitudes against Jews, their rituals, and their teachings.[224] The staying power of Luther's advocacy and the sustained influence of his views later helped the Nazis gain support and recognition.[225] In *On the Jews and Their Lies*, a tract he wrote in 1543, Luther called for synagogues and schools to be burnt, Jewish houses to be "razed and destroyed," the Jews' Talmudic and prayer books to be confiscated, their rabbis to be muted, and even their worship of God

218. For a full exposition of historical examples of incitement that resulted in mass persecution based on antisemitism, racism, and ethnocentrism, see TSESIS, *supra* note 138, at chs. 2–5.

219. *See supra* notes 178–79 and accompanying text.

220. 337 U.S. 1, 22–24 (1949) (Jackson, J., dissenting).

221. Nico Voigtländer & Hans-Joachim Voth, *Persecution Perpetuated: The Medieval Origins of Anti-Semitic Violence in Nazi Germany*, 127 QUARTERLY J. OF ECON. 1339, 1340 (2012) ("When the Black Death arrived in Europe in 1348–50, Jews were often blamed for poisoning the wells. Many towns and cities (but not all) murdered their Jewish populations. Nearly 600 years later, defeat in World War I was followed by a countrywide rise in anti-Semitism.").

222. *Id.* at 1386 ("The correlation between medieval pogroms and twentieth-century anti-Semitism underscores the importance of deeper historical antecedents of cultural attitudes at the local level.").

223. J. F. C. HECKER, THE BLACK DEATH IN THE FOURTEENTH CENTURY 181–89 (B.G. Babington trans., A. Schloss ed., 1833); J.L. Talmon, *European History—Seedbed of the Holocaust*, *in* 2 THE NAZI HOLOCAUST 190 (Michael R. Marrus ed., 1989); JOSHUA TRACHTENBERG, THE DEVIL AND THE JEWS: THE MEDIEVAL CONCEPTION OF THE JEW AND ITS RELATION TO MODERN ANTISEMITISM (1943); Shmuel Ettinger, *The Origins of Modern Anti-Semitism*, *in* 2 THE NAZI HOLOCAUST, *supra*, at 179–208; LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933-1945, at 23 (1975).

224. *See* sources cited *supra* note 223.

225. *Id.*

to be censored on pain of death.[226] The Nazis carried out many of these designs.[227]

The Jewish experience in Nazi Germany is not the only example of the long fuse of racial hatred developed through cultural memes that contribute to a framework for full blown, popular violence. Correlation between cultural stereotypes and violent conduct puts into doubt the sufficiency of the *Brandenburg* imminence standard for identifying dangers of incitements against specific persons. One might think here of the oft repeated group defamation that Native Americans were savages who pillaged frontiersmen. That offensive stereotype later became much more than that. The false notion of landless savages became part of a campaign led by the American government, from President Thomas Jefferson's Administration through Andrew Jackson's, whose arguments justified Indian Removal from ancestral homes.[228]

Racial prejudice against persons of African dissent also spread gradually. When pro-slavery portions of the Constitution–especially the 3/5 Clause, Fugitive Clause, and Slavery Importation Clause–were ratified, the Civil War was not imminent.[229] Although, in the

226. MARTIN LUTHER, ON THE JEWS AND THEIR LIES, IN LUTHER'S WORKS: THE CHRISTIAN IN SOCIETY IV, at 101, 268–69, 286 (Helmut T. Lehmann & Franklin Sherman eds., Martin H. Bertram trans., Concordia Publ'g House 1971) (1543).

227. Luther's advocacy for the burning of synagogues preceded the conflagration that much inflamed Germans acted on in 1938 during Kristallnacht (The Night of Broken Glass), when ordinary people inspired by ancient and contemporary teachings engaged in the destruction of synagogues along with other rapine and the indiscriminate murder of Jews. WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 430–31 (1960). Jews were designated "unbelievers" on June 12, 1941, and the nation further followed through Luther's advocacy by prohibiting Jewish rituals. *See Chronology of Laws and Actions Directed Against Jews in Nazi Germany 1933–1945, in* THE HOLOCAUST YEARS: SOCIETY ON TRIAL 27 (Roselle Chartock & Jack Spencer eds., 1978).

228. Aboriginal inhabitants were said in American literature to be sorcerers and thieves; ultimately, this image of them became dominant in the public view rather than the depiction of those who demonstrated respect for native cultures. HELEN CARR, INVENTING THE AMERICAN PRIMITIVE 56 (1996); MARK TWAIN, ROUGHING IT 146–47 (Oxford Univ. Press 1996) (1880).

229. The Three-Fifths Clause reduced blacks to three-fifths the value of whites for purposes of representation; the Fugitive Slave Clause prohibited non-slaveholding states from emancipating runaway slaves and required their return to slave owners; and the Slave Importation Clause countenanced the African slave trade to continue until 1808. *See* U.S. CONST. art. I, § 2, cl. 3, partly repealed by U.S. CONST. amend. XIV, § 2; id. art. IV, § 2, cl. 3, affected by U.S. CONST. amend. XIII; id. art. I, § 9, cl. 1 (lapsed). For a detailed explanation of this point, see FREDERICK DOUGLASS, THE CONSTITUTION & SLAVERY, *in* 1 FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS (Philip S. Foner ed., 1950) (first published in The North Star, Mar. 16, 1849); WILLIAM M. WIECEK, SOURCES OF ANTISLAVERY CONSTITUTIONALISM, 1760-1848, at 62–63 (1977); Paul Finkelman, *The Color of Law*, 87 NW. L. REV. 937, 971 (1992).

short run, those Clauses provided common ground for the Thirteen Colonies to ratify the document, they also planted a slow growing tumor in the body politic that rendered Civil War more likely as the North moved away from that heinous practice and the South increasingly made it part of its identity.[230]

Colonists in North and South America justified subjugation of African Americans on the bases of racialist dogmas.[231] As with the persecution of Jews and Native Americans, the slave trade and the racism that perpetrators relied on to justify its inhumanity held to a set of long-established justifications for inequality.[232] That combustible dogma culminated to set off a key spark to Civil War.[233] Justice Taney's assertion in *Dred Scott v. Sandford*[234] that blacks were "a subordinate and inferior class of beings" further contributed to the growing national divide.[235]

These and other historical examples demonstrate the independent insufficiency of *Brandenburg*'s imminence requirement. They by no means gainsay its usefulness but demonstrate the need for courts to review evidence of the contexts in which statements calling for violence are made in order to evaluate the likelihood that inflammatory speech will create the impetus for unlawfulness, even when its sparks take time to spread into sustained conflagrations. More accurate in predicting the power of speech to incite audiences are the circumstances surrounding the advocacy, the intent of speakers, and their abilities to tap into popular sentiments.

The reasoning contained in Holmes's dissent to *Abrams* and in Brandeis's concurrence to *Whitney* counsel state vigilance to

230. *See generally* MICHAEL F. CONLIN, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR (2019) (explaining how the Constitution's direct and indirect pro-slavery clauses allowed the divide between the North and South to deepen, rather than put the issue of slavery to bed).

231. Lunabelle Wedlock, *The Reaction of Negro Publications and Organizations to German Anti-Semitism*, 3 HOW. U. STUD. IN SOC. SCIS. 195, 203 (1942).

232. Religious justifications for enslaving Blacks continued to be effective for gaining popular Southern support for slavery. *See, e.g.*, ALEXANDER MCCAINE, SLAVERY DEFENDED FROM SCRIPTURE AGAINST THE ATTACKS OF THE ABOLITIONISTS (W.M. Wooddy 1842); IVESON L. BROOKES, A DEFENCE OF SOUTHERN SLAVERY AGAINST THE ATTACKS OF HENRY CLAY AND ALEX'R CAMPBELL, *in* A DEFENSE OF SOUTHERN SLAVERY AND OTHER PAMPHLETS (Negro Univ. Press 1969) (1831); Samuel Cartwright, *Natural History of the Prognathous Species of Mankind*, *in* SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH (Eric L. McKitrick ed., Prentice-Hall 1963) (1857).

233. *See* PROSLAVERY THOUGHT, IDEOLOGY, AND POLITICS (New York: Garland Science, 1989).

234. 60 U.S. 393 (1857).

235. *Id.* at 417.

safeguard the marketplace of ideas and the political playing field.[236] The shortcomings of *Brandenburg*'s imminence standard does not gainsay the Court's carefully wrought bulwark against state interference with abstract advocacy. The First Amendment protects the right of speakers and audiences to hone ideas and prevents state interference with their contents, creativity, leanings, or perspectives. For speech to be actionable, as Justice Douglas stated for the Court in *Terminiello*, it must go "far above public inconvenience, annoyance, or unrest."[237]

Determining what constitutes incitement to imminent insurrection requires contextual analysis of the speaker's intent, temporal proximity, contextual likelihood, and probability of the harm, as well as the magnitude of any imminent injury. There is no prior restraint where a court determines that the speaker's doggerel set off violent or lawless action constituting an insurrectionary effort to overturn constitutional government. That much appears to be the case with Trump's speech to his ardent followers on January 6, 2021.

His particularized message was understood. His supporters heard his call to attack the seat of government. One of them even asserted that the president's tweet calling on his supporters to rally in Washington D.C. on January 6 was an incitement to insurrection: he wrote that Trump "can't exactly openly tell you to revolt. This is the closest he'll ever get."[238] Groups planning to disrupt the count of electoral votes set up encrypted communications.[239] More openly, on December 22, 2020, the Florida leader of the Oath Keepers told followers on Facebook, "[Trump] wants us to make it WILD that's what he's saying."[240] When their leader spoke, members of the Oath Keepers took notice and understood the statements were an instigation to revolt against the presidential election results and to maintain their leader in power through acts of wild illegality.

236. Abrams v. United States, 250 U.S. 616, 630 (1919); Whitney v. California, 274 U.S. 357, 379 (1927).

237. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

238. Alan Feuer et al., *New Focus on How a Trump Tweet Incited Far-Right Groups Ahead of Jan. 6*, N.Y. TIMES (Mar. 29, 2022), https://www.nytimes.com/2022/03/29/us/politics/trump-tweet-jan-6.html.

239. Louis Beckett, *Capitol Attack: More than 60 Proud Boys Used Encrypted Channel to Plan, Indictment Says*, THE GUARDIAN (Mar. 20, 2021, 2:58 PM), https://www.theguardian.com/us-news/2021/mar/20/four-proud-boys-leaders-indicted-capitol-riot-donald-trump.

240. Dan Mangan, *Oath Keepers Boss Told Followers Before Capitol Riot that Trump 'Wants to Make it WILD,' Court Document Says*, CNBC (Feb. 19, 2021, 4:39 PM), https://www.cnbc.com/2021/02/19/oath-keepers-boss-quoted-trump-before-capitol-riot.html.

III. PRINCIPLE AND CRIMINAL PROSECUTION

This Part addresses whether Supreme Court incitement doctrine can be squared with prosecution under Section 2383. Is it possible to prosecute cases under the statute without violating the First Amendment? If so, what are the parameters of such prosecution and what aspects of free speech doctrine are relevant?

Election law scholar Richard Hasen argues that "by far the most likely way in which election subversion would infect United States elections in the near term is through a respectable bloodless coup dependent upon technical legal arguments overcoming valid election results."[241] Whether or not his prognosis is correct, what seems clear is that, at least in the near and long terms, mob violence remains a real threat. And January 6, 2021, proved that such violence can penetrate the seat of representative democracy. In the future, Trump or some other demagogue may again resort to mobocracy in an effort to overthrow the rule of law. What is needed is punishment and deterrence. But is such advocacy actionable without violating core principles of the First Amendment? Failure to prosecute would be a sign of weakness, but prosecution could violate constitutional liberty. The trick, then, is to articulate how free speech rights can be protected without compromising with the forces of autocracy, oligarchy, or plutocracy.

Incitement is one of the low value categories that the Court has repeatedly found to be unprotected under the First Amendment, what under Professor Thomas Emerson's well known dichotomy might be called unprotected "action" or conduct rather than constitutionally recognized free speech.[242] A variety of other expressive content gets no First Amendment protection, including obscenity,[243] true

241. Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 284 (2022).

242. Simply asserting the value of speech does not get at the fuller range of protections. Among expressions that are protected, he lists "dramatic performances . . . the holding of a meeting . . . gestures, display of symbols, and door-to-door canvassing . . . burning a draft card or flag," to name just a few expressive forms of conduct. THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 293, 445 (1970). Emerson's dichotomy between expression and conduct, however, is too rigid and requires circumstantial and nuanced analyses. Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 319–20 (1978) (pointing out "there is substantial doubt whether Professor Emerson in truth discerns a principled distinction between action and expression"); John P. Yacavone, *Emerson's Distinction*, 6 CONN. L. REV. 49, 63 (1973) ("Searching for a single characteristic or class of characteristics of protected conduct, and then examining an individual instance of conduct to see if it has the required characteristic(s) is a futile approach to the problem—and this is precisely Emerson's program.").

243. Miller v. California, 413 U.S. 15, 20 (1973).

threats,[244] military secrets conveyed to the enemy,[245] securities disclosures,[246] and criminal solicitations.[247] The social harms in such cases outweigh whatever interest speakers have in their expression. Nevertheless, government cannot arbitrarily restrict even violent advocacy to suppress views of political, personal, and informational value.

Subpart III.A below considers the historical roots of American conceptions of free speech. Subpart III.B reviews European Court of Human Rights decisions that inform the extent to which incitement can be curtailed without violating central commitments to free and open debate. Subpart III.C returns to the effort to define a standard that would both be protective of abstract advocacy and muscular enough to convict truly dangerous demagogues like Donald Trump, who intentionally advocate behavior in circumstances where their advocacy is likely to result in violent insurrection against constitutional order.

A. Historic and Abstract Core

United States revolutionary history has special implications to the protection of free speech values and security to prevent revolutionary insurrection. The nation's founding document, the Declaration of Independence, contains not only statements defining the nation's sovereign principles but also the limits of insurrectionary movements.[248] The document's justifications for the violent overthrow of British autocracy raise intriguing questions about whether speech advocating rebellion can be checked by the government.

244. Virginia v. Black, 538 U.S. 343, 347–48 (2003).

245. 18 U.S.C. § 794(b) ("Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.").

246. 15 U.S.C. §§ 77h–77j. Disclosure requirements apply when a company reaches a certain threshold of shareholders and assets. 15 U.S.C. §§ 78a–78mm (2012). At that point, the company must file and publish a yearly report of its business operations that must be updated each quarter. 17 C.F.R. § 249.308a (2006).

247. United States v. Williams, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection.").

248. Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369, 369–70 (2016).

1. The Declaration of Independence and Anti-Imperialism

The Declaration of Independence is a remonstrance against autocratic power. The document incorporates personal liberty and equality into the central theme of the nation.[249] It further adopts a representative model of government that is designed to prevent tyranny of the majority against vulnerable political, racial, and economic minorities.[250] The document sets a founding principle against demagogic rule. In other words, it does not justify all violence against government, and certainly not against representative democracy, but only violence that targets oppressive rule by a central power unwilling to grant elective franchise.

The newly formed nation's commitment to representative governance appears in the Declaration's statement that, in order "to secure [unalienable] rights," government must exercise authority "deriving their just powers from the consent of the governed."[251] When political institutions are not answerable to the people, the document goes on to say, "it is the Right of the People to alter or to abolish it, and to institute new Government" not for mere trivial reasons but to effectuate their safety and happiness.[252] That central object of nationhood, as the Preamble to the Constitution further clarifies, should not favor any person, faction, or party that places its priorities above the general welfare.[253]

The statement confirming the people's right to absolve the ties of current government and begin afresh, is not a carte blanche. The general gist of the Declaration is that the inborn equality in life, liberty, and the pursuit of happiness is fundamental to the exercise of fair political order.[254] The document makes clear that not just any insurrection is legitimate, but only such as empowers the people to select representative government. Had the insurrection Trump sought to perpetrate been successful, on the other hand, it would have disfranchised well over a million voters.[255]

249. *Id.* at 373.

250. THE DECLARATION OF INDEPENDENCE para. 2, 5 (U.S. 1776).

251. *Id.* at para. 2.

252. *Id.*

253. U.S. CONST. pmbl.

254. THE DECLARATION OF INDEPENDENCE para. 2.

255. Hope Yen et al., *AP FACT CHECK: Trump's Made-up Claims of Fake Georgia Votes*, AP NEWS (Jan. 3, 2021), https://apnews.com/article/ap-fact-check-donald-trump-georgia-elections-atlanta-c23d10e5299e14daee6109885f7dafa9 (seeking the disfranchisement of "250 (thousand) to 300,000 ballots"); Salvador Rizzo, *The Trump Campaign Was Not Denied Access to Philadelphia's Ballot Count*, WASH. POST (Nov. 19, 2020, 3:00 AM), https://www.washingtonpost.com/politics/2020/11/19/trump-campaign-was-not-denied-access-philadelphias-ballot-count/; Molly Beck et al., *Trump Wants To Throw Out Ballots from 238,000 Wisconsin Voters*, MILWAUKEE J. SENTINEL (Nov. 27, 2020, 6:37 PM), https://www.jsonline.com/story/news/politics/elections/2020/11/27/trump-wants-

The Declaration repeatedly condemns executive overreach, oppression, and abuse of power. Hence, its terms only justify violent overthrow "whenever any Form of Government becomes destructive of" the ends of representation and equal liberty.[256] Paragraphs and sentences against the rule of King George III condemn his interference with ordinary legislative processes to pass "wholesome and necessary laws."[257] Representational democracy was an essential facet of the sovereignty claimed by the Americans and directly tied to the famous slogan of 1764 and beyond: "No taxation without representation!"[258] Trump's effort at violent political insurrection, however, tried to deny political participation to voters by violently rejecting their votes for presidential electors. His resort to violence to prevent the effect of a legitimate and fair election was unjustified by anything in the Declaration.

In addition to seeking to disfranchise voters, Trump tried to convince state election agencies and Vice President Pence to disregard electoral votes.[259] That effort was antithetical to the core of representative democracy in the Declaration and the Constitution. Trump sought to dispossess the people of their vote by filing frivolous lawsuits and later directing a mob to attack the Capitol in order to reject votes of duly elected presidential electors.[260] Trump's effort to abuse democratic institutions and to instigate mob violence to achieve anti-democratic insurrection echoes Nazi propaganda minister Joseph Goebbels' quote in an epigraph to this Article.[261]

throw-out-ballots-238-000-wisconsin-voters/6437897002/ ("The Trump campaign is seeking to disqualify 238,420 ballots cast during the Nov. 3 election between Dane and Milwaukee counties."); Dan Mangan, *Trump Campaign Says it Is Suing to Stop Michigan and Pennsylvania Ballot Counts*, CNBC (Nov. 7, 2020, 11:46 AM), https://www.cnbc.com/2020/11/04/trump-sues-to-stop-michigan-ballot-count-demanding-access-to-tally-sites.html ("President Donald Trump's campaign said Wednesday that it had filed suits to halt the counting of ballots in Michigan and Pennsylvania.").

256. THE DECLARATION OF INDEPENDENCE para. 2.

257. *Id.* para. 3.

258. DANIEL DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES, FOR THE PURPOSE OF RAISING A REVENUE, BY ACT OF PARLIAMENT 3–4, 8, 34 (1766); PATRICK HENRY, VIRGINIA RESOLVES ON THE STAMP ACT (1765); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 94–95 (1766).

259. Jamie Gangel et al., *Memo Shows Trump Lawyer's Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 PM), https://edition.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html.

260. *See, e.g.*, Jan Wolfe, *Pro-Trump Lawyers Ordered to Pay $175,000 for 'Frivolous' Election Lawsuit*, REUTERS (Dec. 2, 2021, 5:56 PM), https://www.reuters.com/world/us/pro-trump-lawyers-ordered-pay-175000-frivolous-election-lawsuit-2021-12-02/.

261. Joseph Goebbels, *Aufsätze aus der Kampfzeit,* DER ANGRIFF, April 30, 1928, at 71–73.

Nothing in America's Creed[262] allowed for such abuse. The effort to overturn a duly held and fair election were not the form of abuses the Declaration of Independence condemned. The authority of government to bring persons to justice under Section 2383 must refer to the intentional, reasonably clear, imminent, and likely attempts to steal an election, which are against the Declaration's commitment to unalienable liberal equality.

The violent insurrection attempted on January 6, 2021, at the US Capitol does not meet the anti-tyranny norms expounded by the founding generation in the Declaration of Independence. Trump cannot use it as a defense. At his instigation, zealots sought to undermine the founding document's core principle of collective sovereignty through representative government. Trump advocated for his followers to violently reject the outcome of the 2020 presidential election, seeking their support to displace representative democracy on his political say-so, though no evidence existed of widespread electoral fraud or corruption.[263] That was by no means consistent with anything like the Declaration's reference to "a long train of abuses"[264] and the executive branch's "repeated injury," perpetrated against the people despite "repeated Petitions" for redress.[265]

The document does not, however, provide a duration of time for which the people must seek peaceful approaches to right government; nevertheless, it appears that only extensive, long-term suffering justifies so grave an action, while "transient causes" must be dealt with through legal channels.[266] Even stronger language in the Declaration asserts that only "absolute despotism" qualifies as adequately destructive against the people's fundamental rights, such as the entitlement to pursue happiness, to warrant an overthrow of the existing legal order.[267] Therefore, the document provides the Trump campaign with no justification for incitement to insurrectionary violence.

2. Core of Free Speech

The previous Subpart distinguished the Declaration of Independence's justification for relying on force to expand representation from incitement to insurrection to restrict it; this Subpart turns to core principles of speech protected by the First

262. *See generally* Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679 (2009).

263. Jim Rutenberg et al., *Trump's Fraud Claims Died in Court, But the Myth of Stolen Elections Lives On*, N.Y. TIMES (Oct. 11, 2021), https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html.

264. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

265. *Id.* para. 30.

266. *Id.* para. 2.

267. *Id.*

Amendment. Constitutional values that frame the issue guarantee "genuinely serious literary, artistic, political, or scientific expression."[268] Protection of the free trade in ideas extends not only to academic abstraction but also to advocacy of practical strategy.[269] Judicial review extends to state enforced orthodoxy, whether it is imposed by a censorial autocrat or legislative majority.

The most rigorous level of scrutiny extends to the review of state actions that restrict the expression of philosophical, religious, historical, social scientific, and artistic perspectives.[270] The expansive protection of expression is consistent with John Stuart Mill's assertion that all people enjoy "absolute freedom of opinion and sentiment," which extends to "all subjects, practical or speculative, scientific, moral or theological."[271] Restrictions on views about such subjects, even when they drift into advocacy for toppling political order, present substantial dangers to the free exchange of ideas.[272] A content neutrality principle secures the expression and reception of ideas.[273]

While the Supreme Court has not reviewed Section 2383, a case from 1937 provides a starting point for a modern interpretation of insurrection. The case arose from a state, rather than federal, law. The Supreme Court in *Herndon v. Lowry*[274] found unconstitutional a Georgia statute that prohibited persuasion of others to resist lawful authorities.[275] The criminal conviction from which the case arose, the Court held on appeal, violated the defendant's due process rights because the State arbitrarily prosecuted him for possessing pamphlets that advocated the "experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the

268. Miller v. California, 413 U.S. 15, 22–23 (1973).

269. Thomas v. Collins, 323 U.S. 516, 537 (1945).

270. United States v. Alvarez, 567 U.S. 709, 731–32 (2012) (Breyer, J., concurring) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny.").

271. MILL, *supra* note 98, at 71.

272. *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting) ("[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat.").

273. *Id.* at 715, 717.

274. 301 U.S. 242 (1937).

275. *Id.* at 263–64. *See* GA. CODE ANN. § 26-902 (1933); Lowry v. Herndon, 186 S.E. 429, 429 (Ga. 1936), *rev'd*, 301 U.S. 242 (1937) (providing the statutory language at issue: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.").

working class."[276] Such a declaration of political views, wrote Justice Owen Roberts for the Supreme Court of the United States, had targeted a "vague declaration" that fell short "of an attempt to bring about insurrection either immediately or within a reasonable time, but amounts merely to a statement of ultimate ideals."[277] Rather than being insurrectionary, the document in question provided guidance to Communist Party members to vote for:

> 1. Unemployment and Social Insurance at the expense of the State and employers; 2. Against Hoover's wage-cutting policy. 3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes and from forced collection of rents or debts. 4. Equal rights for the Negroes and self-determination for the Blank Belt. 5. Against capitalistic terror: against all forms of suppression of the political rights of the workers. 6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union.[278]

Suppression in the name of preventing insurrection lacked any showing of proximate danger nor any proof of defendant's intent to instigate insurrection.[279] The statute simply prohibited ideological speech and, hence, the Court found it to be unconstitutional.[280]

Over thirty years later, in *Brandenburg v. Ohio*,[281] the Court explained that *Herndon* set the doctrinal principle that abstract statements of social, moral, economic, or political agendas or "even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[282]

276. *Herndon*, 301 U.S. at 249.

277. *Id.* at 250.

278. *Id.*

279. *Id.* at 262.

280. *Id.* at 263–64.

281. *See supra* text accompanying note 43.

282. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (per curiam) (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)) (citing *Herndon*, 301 U.S. at 259–61). Hence descriptions of violence, even those like *The Turner Diaries* which inspired the Oklahoma City bombing, are not actionable because they are works of literature. Bill Williams, *Where Religion Meets Terrorism*, HARTFORD COURANT (Mar. 11, 2000, 12:00 AM), https://www.courant.com/news/connecticut/hc-xpm-2000-03-11-0003110372-story.html ("Convicted bomber Timothy McVeigh was influenced by a book called '*The Turner Diaries*,' in which the fictional hero blows up a federal building. The book has sold 200,000 copies, many of them at gun shows."); Tim Rutten, *Pausing During Holy Season to Spread Hatred in Egypt*, L.A. TIMES (Oct. 30, 2002), https://www.latimes.com/archives/la-xpm-2002-oct-30-et-rutten30-story.html (stating that McVeigh slept with *The Turner Diaries* under his pillow in an article primarily about antisemitic Egyptian television series).

Advocacy for abstract political ideas, policies, programs, or proposals is protected by the First Amendment.[283] In contemporary American politics, left-wing politicians—with Alexandria Ocasio-Cortez, Ilhan Omar, and Rashida Talib currently headlining this pack—speak of radical and often anarchistic shifts to the existing liberal order, calling for instance for such radical changes to the rule of law as defunding the police and opening US borders.[284] Their political statements, diatribes, and attacks invoke various political strategies, which are contrary to moderate Democratic Party policies.[285] Yet, they are free to speak because none of that group advocates for mob-imposed, extraconstitutional conduct.

Disputatious views, as Justice Brandeis explained in his concurrence to *Whitney*, are intrinsic to pluralistic democracy.[286] "[A] State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine" even when "a vast majority of its citizens believes" the heterodox views "to be false and fraught with evil consequence."[287] That form of populism may call for radical alterations to existing order that would eliminate basic elements of

283. *Herndon*, 301 U.S. at 262.

284. Sarah Ferris et al, Hill Democrats Quash Liberal Push to 'Defund the Police,' POLITICO (June 8, 2020, 7:20 PM), https://www.politico.com/news/2020/06/08/defund-police-democrats-307766; *Nightline: S41 E112*, ABC NEWS (June 8, 2020), https://abc.com/shows/nightline/episode-guide/2020-06/08-monday-june-8-2020; Peter Nickeas et al., *Defund the Police Encounters Resistance as Violent Crime Spikes*, CNN (May 25, 2021, 6:24 PM), https://www.cnn.com/2021/05/25/us/defund-police-crime-spike/index.html; *Where 2020 Democrats Stand on Immigration*, WASH. POST (Apr. 8, 2020), https://www.washingtonpost.com/graphics/politics/policy-2020/immigration/; *Ilhan Omar*, IMMIGRATION, https://omar.house.gov/issues/immigration; *Rashida Tlaib on Immigration*, ON THE ISSUES, https://www.ontheissues.org/MI/Rashida_Tlaib_Immigration.htm.

285. *Cf.* Edward Helmore, *House Approval of Border Bill Triggers Democratic Progressive-Moderate Split*, THE GUARDIAN (July 7, 2019, 14.50 EDT), https://www.theguardian.com/us-news/2019/jul/07/house-border-bill-funding-democratic-progressive-moderate-split; Mike Lillis & Scott Wong, *Democrats Rush to Biden's Defense on Border Surge*, THE HILL (Mar. 13, 2021, 12:34 PM ET), https://thehill.com/homenews/house/543038-democrats-rush-to-bidens-defense-on-border-surge; Anita Kumar, *The Border Turned Out to Be a Better Attack on Biden than Even Republicans Thought*, *Politico* (Apr. 23, 2021, 4:30 AM EDT), https://www.politico.com/news/2021/04/23/gop-biden-immigration-border-problems-484383.

286. Whitney v. California, 274 U.S. 357, 377–78 (1927) (Brandeis, J., concurring).

287. *Id.* at 374. For assessments and critiques on Brandeis's concurrence, see generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

the police state and immigration administration, but it does not direct followers to engage in violent overthrow of existing order.

The dearth of US mandatory authority on federal power to prevent insurrection requires judges to benefit from the insights of persuasive authority. The next Subpart deals with European Court of Human Rights opinions that help to answer when incitement to insurrection is actionable without infringing on free speech principles.

B. International Norms, Proportionality, and Militant Democracy

The scarcity of US federal court decisions on this subject renders valuable the articulation of foreign insights about the types of advocacy that constitute intentional incitement that is likely to threaten constitutional order. The reasoning in pertinent foreign judgements further helps to distinguish between free speech and incitement.

At the outset, it should readily be acknowledged that significant difference exists between the Continental and US approaches to free speech. The proportional approach taken by the European Court of Human Rights ("ECtHR") is distinct from the categorical analysis adopted in US free-speech doctrine. Both, nevertheless, recognize the very real danger of censorship designed to suppress controversial conversations and associations—academic, visceral, or of some other type. Government overreach into people's political opinions violates the representational system of government that was articulated in the creeds of the Declaration of Independence and the European Convention on Human Rights ("ECHR").[288]

The ECHR contains a provision that prohibits persons from abusing fundamental liberties, including speech, in order to undermine the very foundation of those rights. Article 17 provides:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.[289]

A balance is drawn by Article 17 between speech and security. The ECHR's Article 10 provides that freedom of expression is a right

288. *See supra* Subpart III.A.1 (on the Declaration of Independence's values); Freedom and Democracy Party v. Turkey, 1999-VIII Eur. Ct. H.R. 293, 315 ("It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself"); Tănase v. Moldova, 2010-III Eur. Ct. H.R. 361, 408.

289. Convention for the Protection of Human Rights and Fundamental Freedoms art. 17, Nov. 4, 1950, 213 U.N.T.S. 221.

enjoyed by all natural persons.[290] Article 10 safeguards the ability to impart and receive ideas. The exercise of expression comes with responsibilities expected of citizens who reside in a democratic society, including acting consistent with national security and not abusing propaganda to undermine civil liberties.[291] Comparable to United States case law, in Europe, the ECtHR has long regarded incitement to be of low social value.[292]

The first decision of the ECtHR, *Lawless v. Ireland*,[293] interpreted international human rights law.[294] The Court identified emergency situations as those exceptional occurrences where imminent danger or crisis affects the general public, presenting a threat to "organised life of the community."[295] Later decisions recognized that for "separatist discourse" to justify government interference with expression, there had to be "present a clear and imminent danger" to national security.[296]

Interestingly, the European Court of Human Rights has repeatedly signaled its agreement with Justice Holmes's "clear and imminent" danger test from his dissent to *Abrams*.[297] Thus, at least on their face, the approaches do not differ much. Where there remain core differences between the proportionality analysis in Europe and the categorical libertarianism employed in the US, an American court would be required to adapt to precedents.

At the very least the overlap between US and EU jurisprudence provides a ready bridge for dialogue. Courts can look to European

290. *Id.* art. 10.

291. *See id.*

292. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that unprotected categories of speech are 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").

293. 3 Eur. Ct. H.R. (ser. A) (1961).

294. *See id.*

295. Oren Gross, *"Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 456 (1998) (quoting Lawless v. Ireland (No. 3), 1 Eur. Ct. H.R. (ser. B) at 82 (1961)).

296. EUROPEAN CT. OF HUM. RTS., GUIDE ON ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF EXPRESSION 96 (2022), https://www.echr.coe.int/documents/guide_art_10_eng.pdf; *see, e.g.*, Moseyev v. Russia, App. No. 78618/13, ¶¶ 11–12 (Mar. 1, 2022), https://hudoc.echr.coe.int/eng?i=001-215914.

297. Abrams v. United States, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting). *See, e.g.*, Mouvement raëlien suisse v. Switzerland, 2012-IV Eur. Ct. H.R. 373, 443 n.2 (Pinto de Albuquerque, J., dissenting); Karataş v. Turkey, 1999-IV Eur. Ct. H.R. 81, 118 n.1 (Bonello, J., concurring); *id.* at 121 (Wildhaber, Pastor Ridruejo, Costa, & Baka, JJ., dissenting in part) ("Unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts and theories in favour of a clash of might and power.").

holdings as persuasive authorities. In the United States and on the Continent, simply yelling slogans against any governing authorities is no indication of clear and imminent interference with the rule of law.[298] For example, the ECtHR held that the Turkish government overstepped its authority by fining an orator who shouted slogans in support of an opposition leader, Abdullah Öcalan, who himself had been imprisoned for helping found an opposition political party, the Kurdistan Workers' Party, which the Turkish government regards to be a terrorist organization.[299]

European decisions seek to provide a balanced analysis of free speech and government interests. At bottom, without a clear and imminent risk and "impact on national security or public order," censorship imposed on sloganeering interferes with what is "necessary in a democratic state."[300] Political expression, whether on the Continent or in the United States, is protected even when it adopts generalized statements in support of violence.[301] Such speech is not uncommon at demonstrations and is protected by the principle against government censorship. It goes without saying that freedom of thought and expression are essential to open representative government.

The limitation on government's authority to curtail speech applies even in those cases where a group seeks political autonomy and even abstractly advocates for secession. The essence of democracy prohibits the suppression of views, no matter how shocking to those in authority, other than in cases of incitement to violence or suppression of democratic institutions.[302] Moreover, as in Justice Holmes's dissent to *Abrams*, ECtHR cases recognize that persons who lack broad popular appeal, recognition, and influence are more unlikely to pose a clear and imminent danger.[303] Censorship of minority perspectives is particularly suspect because it empowers majorities to arbitrarily condition the enjoyment of civil liberties, such as free expression, assembly, and religion.[304]

298. Kılıç and Eren v. Turkey, App. No. 43807/07, ¶¶ 29–30 (Nov. 29, 2011), https://hudoc.echr.coe.int/eng?i=001-107591.

299. *See* Bülent Kaya v. Turkey, App. No. 52056/08, ¶ 42 (2013), https://hudoc.echr.coe.int/eng?i=001-127114; Richard McHugh, *Abdullah Öcalan*, BRITANNICA, https://www.britannica.com/biography/Abdullah-Ocalan (last visited Nov. 22, 2022).

300. Gül v. Turkey, App. No. 4870/02, ¶ 42 (June 8, 2010), https://hudoc.echr.coe.int/eng?i=001-127114. The dissent also relies on the clear and imminent danger test. Id. (Sajó & Tsotsoria, JJ., dissenting).

301. *Id.* ¶ 41.

302. Stankov v. Bulgaria, 2001-IX Eur. Ct. H.R. 273, 302–04.

303. Terentyev v. Russia, App. No. 10692/09, ¶ 81 (Aug. 28, 2018), https://hudoc.echr.coe.int/eng?i=001-185307.

304. Alekseyev v. Russia, App. Nos. 4916/07, 25924/08, & 14599/09, ¶ 81 (Oct. 21, 2010), https://hudoc.echr.coe.int/eng?i=001-101257. The same principle of free expression holds true when the suppression targets members of minority

ECtHR cases, just as American ones, render suspect criminal convictions for theoretical statements about engaging in unlawful conduct.[305] While there is a widespread recognition that constitutional democracies must provide the breathing space for persons to join contrarian associations with heterodox views, there is likewise a consensus that regulation of incitement to violence and advocacy against democratic order is within lawfully constituted authority.[306] Leaders and political parties who incite followers to violence or insurrectionary activity encourage the destruction of democratic institutions and are unprotected by the ECHR.[307] The role of courts is to identify conduct that aims at violence or the overthrow of democratic order, and to narrowly construe the limits of state power to enforce laws to cripple speech.[308]

European cases in this area also help to define prosecutorial overreach. In one case, the ECtHR found it illegitimate for Armenian authorities to prevent a newspaper from publishing political protest.[309] Armenian authorities had claimed it necessary to prevent violence of a type that had occurred earlier but had been instigated by the police.[310] Protestors had a right to vent their grievances against policy in a public square.[311] Moreover, there were other ways to prevent harm to the state than to suppress expression. "States had at their disposal a wide variety of other effective means to protect public order, including provisions governing incitement to violence."[312] In a separate case, the ECtHR found it was overreach for Turkey to convict a speaker who, though she said at a demonstration that the country's Ministry of Justice was run by fascists and murderers, had not incited anyone to violence nor insurrection.[313]

religious groups. Barankevich v. Russia, App. No. 10519/03, ¶ 31 (July 26, 2007), https://hudoc.echr.coe.int/eng?i=001-81950.

305. *See, e.g.*, Kudrevičius v. Lithuania, 2015-VI Eur. Ct. H.R. 53, 95–96.

306. *Id.* at 97–98. ("Any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.").

307. Batasuna v. Spain, 2009-III Eur. Ct. H.R. 321, 359; Fáber v. Hungary, App. No. 40721/08, ¶ 37 (July 24, 2010), https://hudoc.echr.coe.int/eng?i=001-112446.

308. *See* Kuznetsov v. Russia, App. No. 10877/04, ¶ 45 (Oct. 23, 2008), https://hudoc.echr.coe.int/eng?i=001-89066.

309. Dareskizb Ltd. v. Armenia, App. No. 61737/08 (Sept. 21, 2021), https://hudoc.echr.coe.int/eng?i=001-211813.

310. *Id.* ¶¶ 61, 70, 76, 78.

311. *See id.* ¶ 28.

312. *Id.* ¶ 70.

313. Birol v. Turkey, App. No. 44104/98, ¶ 29 (Mar. 1, 2005), https://hudoc.echr.coe.int/eng?i=001-68429; *see also* COUNCIL OF EUR. PUBL'G,

As different as European proportionality review is from US categorical reasoning, they are not entirely distinct. The ECtHR in fact links proportionality with the requirement that proof of incitement to violence be clear and imminently dangerous, demonstrating an undeniable overlap with US incitement law.[314] In *Taranenko v. Russia*, even where an organization, the National Bolshevik Party, held an unauthorized meeting, failed to comply with security and identity checks, and refused to leave the premises on demand of security guards, the ECtHR nevertheless found the arrest and subsequent criminal conviction were disproportionately excessive.[315] The decision was grounded on a review of evidentiary circumstances posing no clear or imminent danger of criminal conduct.[316] The conviction was overturned because the Russian authorities sought to prevent criticism leveled against President Vladimir Putin.[317]

Other ECtHR opinions stress the need for judicial review to safeguard the expression of abstract ideas.[318] This is closely allied with the approach of the United States Supreme Court discussed in Subpart III.A, above. That does not, however, mean that prosecutors and nations must fall on their swords when faced with insurrection.

The ECtHR in *Vona v. Hungary* found there was cognizable public harm that justified the restriction imposed by authorities on the Hungarian Guard Movement ("Movement"), which marched in a village with a large Roma population shouting slogans about supposed "Gipsy criminality" and expressing racial hatred of Jews.[319] On the other hand, the Court found the country violated the ECHR when it ordered the Movement to disband without proof that the organization justified or propagated "an ideology of oppression serving 'totalitarian groups.'"[320] Preventative steps would only be permissible if the group were to take "concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy," even when "that movement has not made an attempt to seize power and the risk of its policy to democracy is not imminent."[321] This is a remarkable statement because it

FREEDOM OF EXPRESSION IN EUROPE: CASE-LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 115–16 (2007), https://www.echr.coe.int/Documents/Pub_coe_HFfiles_2007_18_ENG.pdf.

314. *See* Taranenko v. Russia, App. No. 19554/05, ¶¶ 80–89 (May 15, 2014), https://hudoc.echr.coe.int/eng?i=001-142969.

315. *Id.* ¶¶ 95–97.

316. *Id.* ¶¶ 7, 10–11 (Pinto de Albuquerque, Turković, & Dedov, JJ., concurring).

317. *See id.* ¶¶ 28, 95–97.

318. *See, e.g.*, Vona v. Hungary, 2013-IV Eur. Ct. H.R. 237, 250–52.

319. *Id.* at 253, 257.

320. *Id.* at 258.

321. *Id.* at 267. As applied to a specific demonstration, however, the ECtHR found "paramilitary demonstrations expressing racial division" to be unprotected

indicates the ECtHR's acknowledgement that a strict imminence requirement would leave unimpeded long-range planning of violence or destruction to democratic order.

Such pronouncements are tempered by other cases, such as *Terentyev v. Russia*,[322] which found prosecution legitimate only when a defendant poses a "real risk of physical violence."[323] The contrast should be as between real, violent threats to democratic order and benign, controversial assertions. The expression of moral and ethical outrage at authorities appealing to audiences' emotions are not actionable.[324] There is also European law that recognizes that demagogues can manipulate world events to further their personal interests. The ECtHR in *Hizb Ut-Tahrir v. Germany*,[325] decided in 2012, clarified that calls to commit violence fell outside the ECHR.[326] The case upheld conviction against an international Islamic organization that did not simply call for but actively took steps to overthrow the State of Israel and to kill its Jewish inhabitants.[327] The ECtHR's decision carefully parsed the offending organization's views and its efforts to participate in global violence.[328] This it held to be no merely peaceful opposition.

Given the susceptibility of democracies to anti-democratic manipulation, political scientist Professor Karl Loewenstein, a Jewish emigree from Germany after Hitler's rise to power, articulated the concept of militant democracy. He warned that democracies should not stand idly by to let authoritarian forces hijack their pluralistic institutions.[329] Pointing out how National Socialists in Weimar Germany and Fascists in Italy manipulated democratic operations Loewenstein observed, "[d]emocracy, faithful to its avowed principles, tendered to a ruthless enemy the most effective weapons for its own destruction."[330] As opposition members in the respective countries, Nazis and Fascists exploited democratic institutions of free

under the Charter. *Id.* at 270. The organized activists were members of a threatening group. *Id.* at 270–71. The *Vona* decision, then, found the Movement's intimidating marches did provide Hungarian authorities with cause to dissolve it. *Id.* at 272–73. *See* PAULIEN ELSBETH DE MORREE, RIGHTS AND WRONGS UNDER THE ECHR 55–56 (17th ed. 2016), https://docslib.org/doc/5809412/rights-and-wrongs-under-the-echr.

322. App. No. 10692/09 (Aug. 28, 2018), https://hudoc.echr.coe.int/eng?i=001-185307.

323. *Id.* ¶ 77.

324. *Id.* ¶ 84.

325. App. No. 31098/08 (June 12, 2012), https://hudoc.echr.coe.int/fre?i=001-111532.

326. *Id.* ¶¶ 89–90.

327. *Id.* ¶¶ 72–75.

328. *Id.* ¶ 62.

329. Karl Loewenstein, *Autocracy Versus Democracy in Contemporary Europe, I*, 29 AM. POL. SCI. REV. 571, 592–93 (1935).

330. *Id.* at 579.

speech, assembly, and association working assiduously to gain victory and despotically suppress opposition groups.[331] Loewenstein adopted a metaphor to describe the susceptibility of liberal institutions: "[D]emocratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city."[332] Where democratic societies face emergency circumstances that threaten their very survival, Loewenstein argued, even inclusive governments have authority to limit certain liberties to prevent a downward cascade toward intolerance and demagoguery.[333]

Although the United States Supreme Court has not adopted the term "militant democracy" nor espoused Loewenstein's principles, his recognition that democracy is vulnerable to destruction from within is not entirely unknown in the US Reporter. Four years after the victory in Europe, Justice Jackson adjured his colleagues that democracy requires order as well as liberty.[334] Without "a little practical wisdom," the Court's civil libertarian doctrine could "convert the constitutional Bill of Rights into a suicide pact."[335] Judges are central to the constitutional protection of civil liberties against the sheer abuse of power that is directed at quelling oppositional opinions. Yet, the protection of ideas has never extended to violent advocacy when directed at energizing an inflamed crowd under such narrow circumstances when and where a mob is ready, willing, and able to imminently resort to physical attacks.[336] Words shape ideas. They benefit the needs and interests of speakers and audiences; indeed, open dialogue is undeniably intrinsic to the First Amendment. However, the safeguard of ideas, communication, and information does not extend to calls to zealous followers to violently overturn demonstrably valid election results.

C. Prosecuting Incitement to Insurrection

Trump's orchestration of the rally by the White House on January 6 and his continued extra-legal efforts to retain the

331. *Id.* at 579–80.

332. Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 424 (1937).

333. *Id.* at 424, 432.

334. Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

335. *Id.*; *see also* Jean-Paul Sartre, *What is Literature?*, 15 PARTISAN REV. 21 (1948), *quoted in* Adrian H. Jaffe, *Emerson and Sartre: Two Parallel Theories of Responsibility*, 2 COMPARATIVE LITERATURE STUDIES 113, 114 n. 2 (1964) ("Words are loaded pistols; if a man speaks, he fires. He may be silent, but since he has chosen to fire, he must do it like a man, by aiming at targets, and not like a child, at random, by shutting his eyes and firing madly for the pleasure of hearing the shot go off.").

336. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

presidency for a second term raise serious concerns in the United States about the manipulation of democratic institutions. Just nine months before the insurrection attempt, he asserted an inflexible and absolutist perception of executive power: "When somebody is a president of the United States, the authority is total."[337] Trump's sentiment seemed to be stated off the cuff, but his conduct showed the sincerity of his conviction. He sought to rein in the office of the Vice President, though he is independently elected, and to demand of him that the results of a fair national election be overturned.[338] After the election, political sociologist Larry Diamond told a journalist from *The Hill*: "[E]ven with Trump out of office 'much of one of the two political parties . . . is basically pursuing an agenda that is hostile to democracy.'"[339]

Trump's speech enflamed followers to a violent fever pitch to overthrow constitutional order. According to the testimony of a confidant, he knew some of those in the crowd carried weapons but nevertheless told them to "[f]ight like hell."[340] He engaged in a concerted effort, beginning in the summer of 2020, months before the presidential election, and sought to organize supporters of the January 6 rally, who met two months after voters had gone to the polls, to engage them in criminal conduct to keep him in the office of president.[341] His advocacy to the mob sought to drum up efforts to undermine, interfere with, and overturn the reporting of ballots by the Electoral College electors.[342]

337. Meagan Flynn & Allyson Chiu, *Trump Says His 'Authority Is Total,'* WASH. POST (Apr. 14, 2020, 6:36 AM), https://www.washingtonpost.com/nation/2020/04/14/trump-power-constitution-coronavirus/; *Donald Trump: 'When Somebody Is President of the United States, the Authority Is Total,'* THE GUARDIAN (Apr. 14, 2020, 2:01 AM), https://www.theguardian.com/us-news/video/2020/apr/14/donald-trump-when-somebody-is-president-of-the-united-states-the-authority-is-total-video.

338. Roche, *supra* note 57; Ben Riley-Smith, *Trump Pressuring Pence to Overturn Election Result*, KINGSTON WHIG-STANDARD (Jan. 6, 2021), at B2.

339. Niall Stanage, *The Memo: Media Obsess Over Trump's Past as He Eyes Comeback*, THE HILL (Dec. 4, 2021), https://1.next.westlaw.com/Document/I30ad1c27553d11ec9f24ec7b211d8087/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=2021+WL+5757324.

340. Jonathan Allen, *'They're Not Here to Hurt Me': Former Aide Says Trump Knew Jan. 6 Crowd Was Armed*, NBC (June 28, 2022, 11:08 PM), https://www.nbcnews.com/politics/congress/jan-6-panel-looks-trump-white-house-cassidy-hutchinson-testimony-rcna35550.

341. *See supra* text accompanying notes 35–42.

342. I am reminded here of Professor Herbert Wechsler's cautious formula of constitutional adjudication of legislative efforts against subversion of American democratic order. While his proposed requirement that the substantive danger be calculable seems precisely on point by requiring evidence and not merely speculation about incitement, his immediacy criterion appears so stringent as to allow for the development of revolutionary aims until practically the very

To prevent a similarly violent gambit in the future by a candidate or public official, this Article argues that the clear and imminent threat test allows for the prosecution of insurrectionary leaders who intentionally fire up mobs in order to gain or retain political offices through subterfuge, intimidation, threats, and brute force. The combination of circumstantial clarity, practical likelihood, and proximity are questions to be resolved at trial by impartial jurors. The beyond a reasonable doubt standard sets a high burden of proof that further protects speech. While not requiring proof of immediate danger, the bar should be set high enough to safeguard the expression of dissenting ideas, while also preventing popular leaders with large followings from manipulating the First Amendment as a shield to later ward off criminal responsibility.

Any cause of action for alleged incitement to insurrection would impact speech and, therefore, requires procedural protections against excessively aggressive prosecutions that aim to exclude information from being debated in the marketplace of ideas. The lack of guiding precedents on the interpretation of that law requires courts to reflect on normative standards that strongly favor free speech, except under those circumstances where an advocate, whose intent it is to cause a violent uprising or other serious unlawful conduct, poses a clear and immediate threat to public safety and democratic order. Such a standard would also require that the incitement be temporally proximate to the potential unlawful conduct and be likely to instigate followers to suspend the essential operations of representative government.

Incitement to insurrection charges arise from advocacy to commit actual acts of illegality, aggression, or violence by popular leaders who organize, set in motion, and drum up unruly crowds against the operation of democratic mechanisms, especially those essential to electoral representation. This is consistent with the Declaration of Independence's core purpose of placing sovereignty in the hands of the people rather than the nation's executive officer,[343] who, like Donald Trump, whips up violently inclined gatherings that are then set in motion by his repeated calls to retain political office, contrary to the will of the electorate. He set in motion plans that culminated in the January 6, 2021, riot as Congress met for the formality of certifying the results from the November 2020 election. Furthermore, he rallied followers for the express and stated reason to fight like hell to prevent certification of results that, without any basis in evidence, he argued were stolen from him by elections officials in cities such as Philadelphia, Milwaukee, Atlanta, and Detroit.[344]

moment of execution. Herbert Wechsler, *Symposium on Civil Liberties*, 9 AM. L. SCH. REV. 881, 887–88 (1941).

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

344. Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM),

Proof as to the intent of inflammatory advocacy is necessary to establish culpability. *Mens rea* can be discerned by direct or circumstantial evidence. Prosecutors must demonstrate causality between advocacy and action. The charismatic appeal of political leaders upon followers is difficult to qualify (much less quantify).[345] Evidence must be tendered that proves beyond a reasonable doubt that instigation to political violence was substantially likely to result in insurrection. The heckler's veto doctrine, as the Court articulated it in cases like *Terminiello*,[346] restricts law enforcement from silencing disfavored views, but that judicial construct provides little guidance of how to bridge the gap with *Brandenburg*'s test of imminence. In the former case, the Court held that the police cannot prevent a person from speaking when he has created dangerous mayhem that included a crowd launching projectiles and destroying property.[347] Contrary to the majority, Justice Jackson in dissent to *Terminiello* drew attention to evidence that disorder had actually followed as proof of the danger caused by Terminiello's antisemitic speech.[348] Jackson's retrospective approach is consistent with the reasoning of the ECtHR cases. The majority in *Terminiello* left uncertain how a trier of fact can determine in retrospect whether danger was imminent at the time of the advocacy. In part, the answer must be: contextually. The answer to that inquiry will not always be undisputable, even when a demagogue's speech and advocacy of violence precede the use of force.[349] By retrospectively reviewing how speech affected a mob, the Court should require judges to identify the likelihood of the harm, rather than trying to simply rule on the speaker's frame of mind on the basis of his spoken words.

Such an approach goes beyond *Brandenburg*'s test. It prevents prior restraints from being enforced and preserves abstract arguments against government overreach. Viewpoints that support violence are protected under the First Amendment.[350] Open and free discourse cannot be curtailed unless evidence demonstrates beyond a

https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group; Philip Rucker et al., *Trump Uses Power of Presidency to Try to Overturn the Election and Stay in Office*, WASH. POST (Nov. 19, 2020, 11:02 PM), https://www.washingtonpost.com/politics/trump-uses-power-of-presidency-to-try-to-overturn-the-election-and-stay-in-office/2020/11/19/bc89caa6-2a9f-11eb-8fa2-06e7cbb145c0_story.html.

345. *See generally* JULIA SONNEVEND, CHARM: HOW MAGNETIC PERSONALITIES CAPTURE OUR HEARTS, MINDS AND POLITICS (forthcoming 2023).

346. *See supra* text accompanying notes 236–37.

347. For a detailed discussion of the facts reading up to Terminiello's arrest and conviction, see City of Chicago v. Terminiello, 79 N.E.2d 39 (Ill. 1948), *rev'd*, 337 U.S. 1 (1949).

348. Terminiello v. City of Chicago, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).

349. *Id.*

350. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam).

reasonable doubt that the circumstances under which insurrection was incited created a real, genuine, and criminally provable threat to orderly society and democratic order.

A speaker who is naught but an "unknown man,"[351] expressing a silly view to a small group of friends or followers, poses no danger of soliciting insurrection. A person with a large scale following like Donald Trump's, on the other hand, can rely on political popularity to advance mob rule in order to undermine representative government. Words that call on ardent, inflamed, and motivated followers to commit illegal acts meant to alter electoral results can become a means to autocratic rule by someone who enjoys widespread support.

Historical evidence is pertinent for determining the extent to which inflammatory speech is likely and intentionally meant to stimulate an audience's violent response. Surrounding circumstances provide prosecutors and defendants valuable details about the likelihood of criminal conviction for incitement to insurrection under Section 2383.

There are numerous examples of tyrannical leaders who relied on violent advocacy to gain political offices.[352] For example, violent rhetoric in post-World War I Germany catapulted a previously nascent autocratic movement into the Chancellorship and unilateral law and order in the Reichstag.[353] A rapid ascent from obscurity to power occurred with the mesmerizingly powerful demagoguery of Adolf Hitler, who was no more than a small-fry and blowhard in 1923 when he and his followers staged an unsuccessful putsch at the Munich Beer Hall.[354] Insurrectionary speech was essential to the rise of the Nazi Party.

Donald Trump's repute was national and international. Thus, his call to action was much more effective than might be rhetoric that fires up a hungry but spontaneous mob as described in Mill's example from *On Liberty*, which we encountered earlier. Trump's influence over the crowd who assembled at his urging in Washington, D.C., on January 6 was of far greater magnitude. He was the leader of the Republican Party and President of the United States. Under the circumstances he effectively brought together supporters to "stop the

351. Abrams v. United States, 250 U.S. 616, 628 (1919).

352. Tsesis, *supra* note 4, at 1065–66.

353. Tsesis, *supra* note 138, at chs. 2–4 (describing the relationship between hate speech and support for Hitler's chancellorship).

354. Hanno Scheuch, *Austria 1918-55: From the First to the Second Republic*, 32 HIST. J. 177, 184 (1989) (noting the decline of the German Nazi party after the Beer Hall Putsch); Peter D. Stachura, NATIONAL SOCIALISM AND THE GERMAN PROLETARIAT, 1925-1935: OLD MYTHS AND NEW PERSPECTIVES, 36 HIST. J. 701, 705 (1993) (discussing how little support from workers the Nazis had at the time of the Beer Hall Putsch).

steal," in his words,[355] and to attack the institution of government on the Hill in order to suppress the votes of the 2020 election. While he did not directly tell them to attack the Capitol building, Trump created the charged circumstances that justified their mob action to violently attempt to suppress the electors' choices for president. Moreover, and perhaps even more incriminatingly, aides told him some in the crowd had weapons.[356]

Trump was not speaking in abstractions; rather, his call to alter the results of the election by force was specific to the election of 2020. He was not merely asserting the need to stop the steal of elections in theory, but in reality. The call to insurrectionary action was tied to a specific event at a particular time: Congress' meeting to count electorate votes, pursuant to Article II, Clause 3 of the US Constitution and 3 U.S.C. § 15, which create procedures for certifying the results of presidential elections.[357] He advocated that the assembled crowd commit violent crimes against representative government. While he did not have a detailed plan of the attack, he went so far as to tell followers to fight at the Capitol, putting them on a collision path with the police stationed there.

Trump created the popular furry. He then unleashed a frenzy against the nation in order to retain power. Holding him accountable for that action under Section 2383 should not be an attempt to suppress views nor be any form of political payback.

Prosecution for incitement to insurrection should target a substantive evil that was extremely serious, likely to occur under the circumstances, and intended to energize a mob primed for violence. The attack demonstrates that the situation under which this advocacy occurred rendered it likely to threaten representative democracy and to forcefully replace it with a lawless movement that was prepared to follow an authoritarian and oligarchic leader, even when they encountered armed Capitol police. The clear and imminent danger standard functions as a barrier against imposing penalties for relatively innocuous statements. The test, however, is arguably too formalistic in its requirement of prosecutorial proof of near immediate proximity between a suspect communication and a mass crime, like insurrection. Some of the worst evils in human history were perpetrated after long and developed advocacy of specific

355. *Transcript of Trump's Speech at Rally Before US Capitol Riot*, AP NEWS (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27 ("We will stop the steal.").

356. Anumita Kaur, *'I Don't F— Care That they Have Weapons': Trump Demanded Security Allow Rioters Anyways, Aide Says*, LA TIMES (Jun. 28, 2022, 11:23 AM), https://www.latimes.com/politics/story/2022-06-28/trump-rally-weapons-hutchinson-jan-6.

357. U.S. CONST. art. II, § 1, cl. 3; 3 U.S.C. § 15 (2018).

harms against identifiable groups.[358] The government's interest in protecting its citizens and representative democracy as a whole are greater where the popular, well-connected, and lavishly funded speaker's aim is to energize loyal followers to commit specific crimes at a given time to overturn the results of a presidential election.

This is not to say that all expressions of violence are actionable. First Amendment protections extend to abstractions, parodies, fantasies, and jokes.

However, under Section 2383, criminal charges can be brought against anyone who instigates loyalists to engage in violent havoc aimed at undermining representative democracy. Certainly, the more proximate is the call to illegality, the more certain of conviction the prosecution can be. Where the advocacy draws upon previous statements, orchestrates a plan, and even sets the date for its perpetration, it is readily understandable to loyalists to be a call to insurrection. This is not a form of prior restraint but a criminal provision proscribing conspiracy to undermine democratic elections.

Rhetoric widely available prior to the attack increased the likelihood that even subtle statements would be understood as instigations rather than jokes or abstractions. Since the summer of 2020, Trump advocated for the overthrow of election results and persisted with that message until his plan to overturn the will of American voters reached its climax after that year's presidential election.[359] His January 6, 2021, speech was delivered to an audience assembled at his invitation within a short march to the Capitol. He repeatedly invoked affective tropes—such as "stop the steal" and "fight like hell"—that he and spokespersons repeated since the previous summer.[360] With that, they had prepared followers anxious to act consistent with his will to violently take the reins of government. Trump's speech that day was rendered even more dangerous because, during the September 2020 presidential debate, he refused to reject white supremacy and told militia men, the "Proud Boys, [to] stand back and stand by."[361] The message was easily understood by them. An influential member of the group wrote on

358. *See* discussion *supra* Subpart II.C.

359. Atlantic Council's DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/ (providing a historical summary of Trump's rhetoric calling to "Stop the Steal" dating back to 2016); Amy Sherman, *A Timeline of What Donald Trump Said Before the Capitol Riot*, POYNTER (Feb. 11, 2021), https://www.poynter.org/fact-checking/2021/a-timeline-of-what-donald-trump-said-before-the-capitol-riot/ (reporting that Trump's use of "fight like hell" began two days prior to the insurrectionary riot at the Capitol); 167 CONG. REC. S590 (daily ed. Feb. 9, 2021).

360. Atlantic Council's DFRLab, *supra* note 359.

361. *Id.*

Twitter, "Trump basically said to go fuck them up! that makes me so happy."[362] The Proud Boys knew that the President was entrusting them to organize extra-legal conduct contrary to the will of the American people, hence members of that organization were central to the march that led up the steps of Congress and the violence that transpired in its chambers.[363]

A test that is excessively rigid leaves little room for prosecution of serious efforts to insurrection. Professor Redish argues that the "all-purpose imminence requirement pushes first amendment protection to the impractical extreme."[364] He concludes, instead, that criminal punishment for violent advocacy does not violate speech rights "so long as it is clearly probable that it would be acted upon."[365] This statement would best be moderated through persuasive authority from the ECtHR, which has directly addressed abuses of civil liberties by governments like those of Russia and Turkey, which suppressed communications for purely political reasons.[366]

The history of incitement—whether in Germany before and after the Holocaust or in the antebellum United States—demonstrates the inaccuracy of Justice Holmes's presumption that if given time to flourish more speech can always be counted on to bear truth. His is an especially trite presumption in the dissent to *Abrams* when a powerful, popular leader is given time and space to advocate the use of violent conduct to foment insurrection.[367]

The intent of Trump's strategists—like Roger Stone, Ali Alexander, and Stephen Bannon—should also be the subject of criminal investigation.[368] Under current doctrine, imminence is more difficult to justify when there is careful development, organization, and transmission of an orchestrated script drawn to inflame a maximum number of the population. History is replete with

362. *Id.*

363. Rachel Treisman, *Prosecutors: Proud Boys Gave Leader 'War Powers,' Planned Ahead for Capitol Riot*, NPR (Mar. 2, 2021, 4:00 PM), https://www.npr.org/2021/03/02/972895521/prosecutors-proud-boys-gave-leader-war-powers-planned-ahead-for-capitol-riot.

364. Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1181 (1982).

365. *Id.*

366. Bülent Kaya v. Turkey, App. No. 52056/08 (2013) (online summary PDF).

367. *See supra* notes 133–38 and accompanying text.

368. *See* Alan Feuer, *Group Chat Linked to Roger Stone Shows Ties Among Jan. 6 Figures*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/20/us/politics/roger-stone-jan-6.html; Luke Broadwater, *House Finds Bannon in Contempt for Defying Jan. 6 Inquiry Subpoena*, N.Y. TIMES (Jan. 6, 2022), https://www.nytimes.com/2021/10/21/us/politics/bannon-contempt-jan-6-subpoena.html.

examples of dangers posed by unlawful advocacy to commit violence against racial, ethnic, and nationality groups.[369]

Professor Larry Alexander points out that *Brandenburg*'s imminence component is inconsistent with the crime of solicitation, which can be prosecuted even if the advocacy is to commit a crime at some future time.[370] Danger arises when a demagogue with a popular following intentionally attacks the key components of representative democracy, free elections, and rallies followers at a particular time and place to insurrectionary action.

Any risk of excessive prosecution for incitement to insurrection under Section 2383 should be strongly tempered with principles of expression essential to speakers, audiences, governments, societies, culture, theories, and the arts. The First Amendment rejects the persecution of persons for unorthodox views about matters such as philosophy, sociology, and politics. That provision of the Constitution preserves speech but not the intentional incitement that under circumstances such as those that culminated in the January 6, 2021, attack is likely to set off a riot bent on overturning the operation of representative democracy. Donald Trump mounted a deliberate campaign to inflame his followers to violently overturn the constitutional rule of law.

CONCLUSION

Incitement to insurrection charges raise a host of First Amendment concerns. Enforcement of such laws poses a risk of state manipulation designed to suppress unorthodox views. The special role of speech for self-expression, political participation, and expansion of knowledge requires vigilance and deference to the interests of speakers and audiences. However, where there is clear proof that imminent harm is likely to occur under the circumstances, public order requires action to prevent populist leaders from staging mob attacks. Prior advocacy leading up to the act of violence also demonstrates intent, planning, and the reasonably predictable likelihood of harm. The clear and imminent standard of review has the virtue of being within the free-speech tradition of the United States and of borrowing persuasive wisdom from the European Court of Human Rights. That test preserves free discourse, unencumbered by arbitrary state regulations, while also recognizing the need to safeguard security and institutions of representative government.

Contextual judicial reasoning is critical for assessing whether relevant incitement occurred in private or public settings; whether the speaker addressed an audience who understood the calls for

369. Tsesis, *supra* note 4, at 1065–66.

370. Larry Alexander, *Inciting, Requesting, Provoking, or Persuading Others to Commit Crimes: The Legacy of* Schenck *and* Abrams *in Free Speech Jurisprudence*, 72 SMU L. REV. 389, 394 (2019).

violent overthrow of constitutional institutions; whether combustible language was used under circumstances foreseeably likely to endanger public order; and how closely the violence perpetrated resembled that advocated by the orator or pamphleteer. Crucial to the promotion of core constitutional norms of justice, liberty, and the general welfare is a standard that safeguards speech, no matter how contrarian, but also takes seriously any intentional and direct threats to scuttle the orderly enforcement of the autonomy and equality guaranteed by the Constitution. The appropriate test is one that preserves the free expression of ideas while rendering it criminal under Section 2383 for a popular leader to direct a mob that is ready, willing, and able to carry out specific acts of violence and criminality. Incitement to insurrection is a low value category of speech that does not warrant First Amendment protection.