

2023

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Lauren M. Hausman

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Recommended Citation

Lauren M. Hausman, *THE FALLIBILITY OF THE BRANDENBURG TEST THROUGH THE LENS OF THE CAPITOL INSURRECTION*, 45 W. New Eng. L. Rev. 22 (2023), <https://digitalcommons.law.wne.edu/lawreview/vol45/iss1/2>

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THE FALLIBILITY OF THE BRANDENBURG TEST THROUGH THE LENS OF THE CAPITOL INSURRECTION

Cover Page Footnote

Lauren M. Hausman, The Fallibility of the Brandenburg Test Through the Lens of the Capitol Insurrection, 45 W. New Eng. L. Rev. 22 (2023)

THE FALLIBILITY OF THE *BRANDENBURG* TEST THROUGH THE LENS OF THE CAPITOL INSURRECTION

LAUREN M. HAUSMAN*

This Article explores the insurrection that occurred at our Capitol in relation to the Brandenburg test. The paper seeks to discuss whether free speech has gone too far, whether Brandenburg needs reform, and how we could effectuate such changes. While the Article certainly has political undertones, sincere efforts were made to present the facts in a more neutral fashion. Despite the political nature of the article, I wholeheartedly believe that discussing the insurrection is critical to not only our nation's history, but to the law.

INTRODUCTION

The ever-exhausted platitude that “actions speak louder than words” no longer stands true. When words incite violent actions, those words are deafening. While free speech is woven into the very fiber of this country’s being, that freedom cannot go unchecked.

We are at a juncture where the cost of free speech is something we cannot afford to pay. And while speech can be powerful without being detrimental, we are at a critical point. This Article begins with a historical background. The section explains the scope of protected speech, in addition to how and why free speech is in our nation’s most foundational document. Section II explores the inception of the *Brandenburg* test and its progenies to analyze how free speech has been defined. Section III details what occurred on January 6, 2021, at our Capitol. The section looks at events that led up to the insurrection, as well as what happened that day. Section IV details the negative impacts of the insurrection and proposes solutions.

This Article explores (and fashions) a new test to replace

* Lauren M. Hausman is an Intellectual Property Attorney based in South Florida. The views expressed herein are her own, and do not reflect the views of her employer. She graduated from Elon University School of Law, magna cum laude, in 2021. She has a Master of International Business from University of Florida, 2019, and a Bachelor of Science in Business Administration from University of Florida, 2018. She extends her deepest gratitude to Professor Enrique Armijo, Elon University School of Law, for his guidance and support with this article. Professor Armijo’s First Amendment Speech class truly inspired Lauren. Next, she would like to thank Alaina Cooper for her unwavering love and support throughout their law review experience and life. Lastly, she would like to thank the Editorial Board and Staff of the Western New England Law Review for their feedback and hard work in bringing this article to life.

Brandenburg. In the age of mobility and media, the standard for “incitement” is too high and First Amendment speech protections are too broad. The new test will build off *Brandenburg* and add factors to help the court answer the two elements in the original test.

To reiterate, this Article is not meant to bolster or bash either political party. Nor is it intended to serve as political commentary on Trump’s presidency or policies. This Article serves to focus on an incident that occurred during Trump’s administration to prove how fallible the *Brandenburg* test is and how dangerous unabated free speech can be to a nation.

I. HISTORICAL BACKGROUND ON FIRST AMENDMENT SPEECH

In 1788 the United States ratified its Constitution.¹ James Madison later proposed seventeen amendments to the Constitution.² In 1791, the states ratified ten of the amendments, which were (and still are) known as the Bill of Rights.³ Of the first ten amendments, “[t]he First Amendment enshrines five of our nation’s most precious freedoms: Freedom of religion, freedom of speech, freedom of the press, freedom of assembly and freedom to petition the government.”⁴

In relevant part to this Article, we focus on the fact that “Congress shall make no law . . . abridging the freedom of speech.”⁵ The Founding Fathers clearly placed great value on free speech as evidenced by their decision to not only place its protection within the First Amendment, but to ratify the amendment at all.⁶ “Jefferson once wrote, ‘Our liberty depends on the freedom of the press, and that cannot be limited without being lost.’”⁷ Jefferson appreciated that “when it c[ame] to expressing ourselves, . . . we each have a right to speak without the government’s

1. NCC Staff, *The Day the Constitution Was Ratified*, NAT’L CONST. CTR. (June 21, 2022), <https://constitutioncenter.org/interactive-constitution/blog/the-day-the-constitution-was-ratified> [<https://perma.cc/H7VE-G957>].

2. *Id.*

3. *Id.*

4. Tony Mauro, *Former Judge Michael Luttig Talks First Amendment, Impeachment and Coca-Cola*, NAT’L L.J. (Apr. 19, 2021, 2:30 PM) (emphasis added), <https://www.law.com/nationallawjournal/2021/04/19/former-judge-michael-luttig-talks-first-amendment-impeachment-and-coca-cola> [<https://perma.cc/A5FF-NH82>].

5. U.S. CONST. amend. I.

6. See *The Day the Constitution Was Ratified*, *supra* note 1 (noting that only ten of Madison’s proposed seventeen amendments were ratified).

7. Timothy Snowball, *The Founding Fathers of Our Limited Government: Thomas Jefferson and the Freedom of Speech*, PAC. LEGAL FOUND. (July 24, 2019), <https://pacificlegal.org/the-founding-fathers-of-our-limited-government-thomas-jefferson-and-the-freedom-of-speech/> [<https://perma.cc/TQQ6-F6PW>].

permission.”⁸

Despite how great free speech is, its notion and breadth have frequently left the Supreme Court in a legal quandary, where the bench must answer what protections the amendment actually provides.⁹ Free speech includes as many rights as it does not.¹⁰ Free speech allows individuals the right to: not speak;¹¹ wear the clothes they want;¹² employ certain offensive phrases and words to express a political message;¹³ contribute money to political campaigns;¹⁴ promote and advertise professional services and commercial products;¹⁵ and participate in symbolic speech, like burning the American flag.¹⁶

Free speech does not protect an individual’s right to: incite actions that would harm others;¹⁷ distribute or make obscene materials;¹⁸ burn draft cards to protest war;¹⁹ or allow students to engage in certain activities in school (e.g., run articles in a school newspaper where the school administration explicitly objected, give obscene speeches, or advocate for illegal drug use at school-sponsored events).²⁰

Uniquely, despite what constitutes permissible or impermissible

8. *Id.* Jefferson valued free speech, which was made evident by his opposition to the Alien and Sedition Acts. *Id.*

9. *What Does Free Speech Mean?*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-https://perma.cc/5FSG-48TT>.

10. *Id.*

11. *W. Va. Bd. Educ. v. Barnette*, 319 U.S. 624 (1943) (finding that an individual had the right to not salute the American flag).

12. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (permitting students to wear black arm bands to protest the Vietnam war because students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

13. *Cohen v. California*, 403 U.S. 15, 26 (1971) (finding that Cohen could wear a jacket that said “Fuck the Draft”).

14. *Buckley v. Valeo*, 424 U.S. 1 (1976) (noting, though, that there are still limitations on this right).

15. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

16. *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

17. *Schenck v. United States*, 249 U.S. 47 (1919) (providing the example of yelling “fire” in a crowded movie theatre).

18. *Roth v. United States*, 354 U.S. 476 (1957).

19. *United States v. O’Brien*, 391 U.S. 367 (1968).

20. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (limiting what students were able to print in the school’s newspaper); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (enforcing a school’s disciplinary code where a student gave an “obscene” nomination speech during student elections); *Morse v. Frederick*, 55 U.S. 393, 397 (2007) (punishing a student who held a banner that said, “BONG HiTS 4 JESUS.”).

speech, when we look at speech in its entirety, we find that “[f]reedom of expression is a fundamental human right.”²¹ Free speech is a weapon of change.²² In fact, a lack of free speech—in the form of representation—birthed our nation.²³ I contend one reason people recoil at the notion of limiting free speech is because it is intrinsic to our identity. We find fear in the small, gray area of limited free speech or censorship.

While in the legal vernacular to censor means “to officially inspect (especially a book or film) and delete material considered offensive.”²⁴ Colloquially, censorship is usually thought of in terms of “individuals or groups try[ing] to prevent others from saying”²⁵ whatever they want. Presently, censorship is primarily thought of in the colloquial context. Even if the mere ideation of censoring people seems contrary to societal values, speech may very well be appropriately restricted when “it will clearly cause direct and imminent harm to an important societal interest.”²⁶

However, it is important to note that limits are not necessarily impediments to free speech. The goal of placing outer bounds on the broad range of free speech is not to censor individuals with opposing viewpoints, but simply to ensure civility. In fact, placing limits on speech vis-à-vis refining the *Brandenburg* test should not cause alarm regarding censorship for two reasons. First, *Brandenburg* relegates “whether or not the speech offends”²⁷ to the furthest of all backburners; “all that matters is the likelihood that the harm of imminent lawlessness will result.”²⁸ Second, *Brandenburg* is not entirely meritless. The test nobly attempts to furnish “a very speech protective way of drawing the definitional line between advocacy of illegal action that is encompassed within the First

21. *Why Is Free Speech Important?*, INDEX ON CENSORSHIP (Apr. 13, 2016), <https://www.indexoncensorship.org/2016/04/free-speech-important/> [https://perma.cc/T9D8-ELD8].

22. *Id.*

23. *Revolutionary War*, HISTORY, <https://www.history.com/topics/american-revolution/american-revolution-history> [https://perma.cc/N8HR-FGXC] (Sept. 20, 2022) (teaching that the brewing tensions that sparked the American revolution stemmed from the Colonies’ lack of representation in Parliament).

24. *Censor*, BLACK’S LAW DICTIONARY (5th ed. 2016).

25. Elizabeth R. Purdy, *Censorship*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/896/censorship> [https://perma.cc/59MD-FGZA].

26. *What Is Censorship?*, ACLU, <https://www.aclu.org/other/what-censorship> [https://perma.cc/DF7N-DUW9].

27. John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 669 (1994).

28. *Id.*

Amendment and such speech that is not.”²⁹ Foundationally, *Brandenburg* has the right intention; it just falls short in execution.

II. THE HISTORY OF THE *BRANDENBURG* TEST

A. *The Brandenburg Case*

In 1969, the Supreme Court determined when inflammatory speech made to advocate for illegal action could be restricted.³⁰ The answer came in the form of a new test, which unsurprisingly took the name of the case’s appellant—the *Brandenburg* test.³¹

The government is well within its bounds to restrict speech that advocates for the use of force or crime if such speech satisfies the two elements of the *Brandenburg* test.³² “*Brandenburg* brings together the incitement test urged by [Learned] Hand and the ‘clear and present danger’ test urged by Justices Holmes and Brandeis.”³³ The two elements to determine if the speech is precluded from First Amendment protection are if the speech is: (1) “directed to inciting or producing imminent lawless action,” and (2) “likely to incite or produce such action.”³⁴

In *Brandenburg v. Ohio*, the appellant was a leader of the Ku Klux Klan group.³⁵ At a Klan rally, members wielded firearms, burned a cross, spewed racial epithets, and made plans to march on Congress.³⁶ At the rally, the appellant said, “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.”³⁷ Despite *Brandenburg*’s threats stated at the rally, the Court found that the Ohio Criminal Syndicalism Act could not be sustained.³⁸

The Court got this case wrong. Regardless of the Ohio Criminal Syndicalism Act, *Brandenburg*’s speech should not have been protected.

29. Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment,”* 39 AKRON L. REV. 483, 507 (2006).

30. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

31. *Id.* at 447.

32. *Brandenburg Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/brandenburg_test [<https://perma.cc/N4SN-CUDE>].

33. *Advocacy of Unlawful Action and the “Incitement Test”*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/incitement.htm> [<https://perma.cc/9DHA-Z3Q8>].

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

35. *Id.* at 444.

36. *Id.* at 445–46.

37. *Id.* at 446.

38. *Id.* at 448. The appellant was convicted under the Ohio Criminal Syndicalism Act. *Id.* at 444.

A threat of revenge cloaked as free speech does not further any societal benefits. White supremacy does not belong in free speech's safe repose. Further, if the Court would have considered the totality of the circumstances, maybe the outcome would have been different. The Court deemed that Brandenburg's speech did not meet the imminency prong. Brandenburg saying "there *might* have to be some revengeance taken"³⁹ seemed to lack urgency or any cognizable timeline. Additionally, the speech was given in a field, placing the Klansman in a geographic situation where immediate violence would not ensue. However, the threat was likely to produce such action if that was Brandenburg's will when he called upon his fellow Klansmen. The climate in the late 1960s could have easily produced such violence, and the vitriol and disdain the Klansmen carried would not be quelled by geography. The imminence standard should not protect dangerous speech just because the Court does not think the danger will happen *soon enough*. Therefore, Brandenburg's speech should not have been protected.

The *Brandenburg* test has been flawed since its inception. The Court placed too much reliance on the notion of imminence. Instead of focusing on whether the harm will be timely, the Court should have placed greater emphasis on if the harm is *likely* and place additional consideration on if the harm *did* occur.

B. Brandenburg's Progenies

Following the Supreme Court's decision in *Brandenburg*, many cases followed closely on its heels. These cases questioned what would qualify as imminent and the true breadth of our right to free speech.

One such case was *Hess v. Indiana*.⁴⁰ The Court had to determine whether Indiana's disorderly conduct statute was constitutional.⁴¹ Hess alleged that the statute "abridged his constitutionally protected freedom of speech."⁴² In an anti-war demonstration on the University of Indiana's campus, Hess said, "[w]e'll take the fucking street again."⁴³

The U.S. Supreme Court felt that Hess's speech "amounted to nothing more than advocacy of illegal action at some indefinite future time."⁴⁴ Thus, the U.S. Supreme Court reversed the decision of the Indiana Supreme Court finding that "there was no evidence, or rational inference from the import of the language, that [Hess's] words were intended to

39. *Id.* at 446 (emphasis added).

40. 414 U.S. 105 (1973).

41. *Id.* at 105–06.

42. *Id.* at 106.

43. *Id.* at 106–07. The case notes that the appellant's exact word choice is unclear, and he may have said "[w]e'll take the fucking street later." *Id.* at 107.

44. *Id.* at 108.

produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had ‘a “tendency to lead to violence.”’⁴⁵

However, the dissent criticized the majority’s emphasis on Hess’s use of the word “later.”⁴⁶ The majority thought the word later to mean, at best, some future threat.⁴⁷ “But whatever . . . interpretation[] may be placed upon the remark, there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police.”⁴⁸

I agree with the dissent. The majority placed too great an emphasis on the word “later” or “again.” Hess’s words were a promise of harmful action in response to the war. The majority seems untroubled by the aggression and danger laden within his words because the threat was not imminent enough. Ideally, the majority would have adopted the dissent’s understanding of Hess’s words. While there are multiple ways for his statement to be understood, the dissent’s interpretation promotes public safety, without placing too great a restriction on free speech.

Another progeny of *Brandenburg* is the 1982 case *NAACP v. Claiborne Hardware Company*.⁴⁹ In this case, Charles Evers threatened individuals who failed to boycott white businesses.⁵⁰ Examples of Evers’s speech include him stating on April 19, “boycott violators would be ‘disciplined’ by their own people and warned that the Sheriff could not sleep with boycott violators at night.”⁵¹ Then, on April 21, Evers stated “[i]f we catch any of you going in any of them racist stores, we’re gonna break your damn necks.”⁵²

Regardless of Evers’s “emotionally charged rhetoric,” his “speeches did not transcend the bounds of protected speech set forth in *Brandenburg*.”⁵³ The Court reached its decision for a few reasons.⁵⁴ First, the Court noted that impassioned, extemporaneous speeches cannot be delivered in dulcet phrases.⁵⁵ Second, “[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity

45. *Id.* at 109 (quoting *Hess v. Indiana*, 297 N.E.2d 413, 415 (Ind.), *rev’d*, 414 U.S. 105 (1973)).

46. *Id.* at 111 (Rehnquist, J., dissenting).

47. *Id.*

48. *Id.*

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

50. *Brandenburg Test*, *supra* note 32.

51. *Claiborne Hardware Co.*, 458 U.S. at 902.

52. *Id.*

53. *Id.* at 928.

54. *Id.* at 929.

55. *Id.* at 928.

and action in a common cause.”⁵⁶ And where such charged rhetoric does “not incite lawless action, [it] must be regarded as protected speech.”⁵⁷

However, the Court’s decision does not negate the fact that the First Amendment generally does not shelter violence.⁵⁸ The Court has consistently said “violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of ‘advocacy.’”⁵⁹ Nor are “‘fighting words’—those that provoke immediate violence— . . . protected by the First Amendment.”⁶⁰ But conversely “mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.”⁶¹

Interestingly, *Claiborne Hardware Co.* was effectively decided by a unanimous bench: Justice Stevens authored the majority, six other Justices joined, Justice Rehnquist concurred, and Justice Marshall took no part in the decision.⁶² In spite of the Justices’ decision, this case is another instance where the bench was probably wrong. The threat of violence was evident. But again, the bench seemed satisfied to protect the advocacy of the threat of violence, because it was not imminent enough.

However, *Brandenburg* isn’t entirely boundless. In *Rice v. Paladin*,⁶³ the court weighed whether First Amendment speech protected Paladin Enterprises, which published a how-to guide for hit men, entitled *Hit Man: A Technical Manual for Independent Contractors*.⁶⁴ Because the court took note that “long-established caselaw provides that speech . . . that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment,” the Fourth Circuit ultimately concluded that “the First Amendment d[id] not pose a bar to a finding that Paladin [wa]s civilly liable as an aider and abetter of Perry’s triple contract murder.”⁶⁵

The United States Court of Appeals for the Fourth Circuit recently took up *United States v. Miselis*.⁶⁶ This case gained notoriety due to

56. *Id.*

57. *Id.*

58. *Id.* at 916.

59. *Id.* (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring)).

60. *Id.* at 927 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

61. *Id.*

62. *Id.* at 888, 934.

63. *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

64. *Advocacy of Unlawful Action and the “Incitement Test,” supra* note 33.

65. *Rice*, 128 F.3d at 242–43.

66. *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2756 (2021) (noting the case generally discussed the Anti-Riot Act).

deaths, injuries, and the topic of the rallies that sparked civil discord.⁶⁷ Michael Miselis and Benjamin Daley were charged with conspiracy to commit an offense against the United States, in violation of the Anti-Riot Act.⁶⁸ Both men entered conditional guilty pleas.⁶⁹ The charges followed Miselis's and Daley's "violent participation in three white supremacist rallies," including the infamous "Unite the Right" rally in Charlottesville, Virginia.⁷⁰

Miselis and Daley challenged their convictions on the premise that the Anti-Riot Act is "facially overbroad under the Free Speech Clause of the First Amendment."⁷¹ The Fourth Circuit concluded that "the Anti-Riot Act is overbroad vis-à-vis *Brandenburg* insofar as it proscribes speech tending to 'encourage' or 'promote' a riot, as well as speech 'urging' others to riot or 'involving' mere advocacy of violence."⁷² In other words, "[t]hese days, then, advocacy of lawlessness retains the guarantees of free speech unless it's directed and likely to produce imminent lawlessness."⁷³

While analyzing First Amendment jurisprudence is certainly of great interest, we nevertheless find the law riddled with questions. There appears to be no clear answer as to what speech the *Brandenburg* test will protect. On one hand, the *Rice* court goes on to mention that, in *Brandenburg v. Ohio*,⁷⁴ "the Supreme Court held that *abstract* advocacy of lawlessness is protected speech under the First Amendment."⁷⁵ And by the same token, more than twenty years later, the Fourth Circuit in *Miselis*—referring back to *Rice*—noted that it has "understood *Brandenburg*'s protection to be limited to *mere* or 'abstract' advocacy."⁷⁶

In light of its holdings in *Rice* and *Miselis*, the Fourth Circuit inadvertently highlighted a pressing issue with the *Brandenburg* test. Abstract as a threshold is inconsequential. With this in mind, we turn to

67. See Sonam Sheth and Michelle Mark, *3 Dead Following White Nationalist Rally in Charlottesville, Virginia—FBI Announces Investigation*, INSIDER (Aug. 12, 2017, 6:49 PM), <https://www.businessinsider.com/car-hits-counter-protesters-charlottesville-white-nationalist-rally-2017-8> [<https://perma.cc/LVM3-6JLV>]; *Three Members of California-Based White Supremacist Group Sentenced on Riots Charges Related to August 2017 "Unite the Right" Rally in Charlottesville*, U.S. DEPT. JUST. (July 19, 2019), <https://www.justice.gov/usao-wdva/pr/three-members-california-based-white-supremacist-group-sentenced-riots-charges-related> [<https://perma.cc/M49F-HW4Q>].

68. *Miselis*, 972 F.3d at 525. See generally Anti-Riot Act, 18 U.S.C. §§ 2101–2102.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 540.

73. *Id.* at 533.

74. 395 U.S. 444 (1969).

75. *Rice v. Paladin Enters.*, 128 F.3d 233, 243 (4th Cir. 1977) (emphasis added).

76. *Miselis*, 972 F.3d at 533.

what occurred at the Capitol.

III. THE CAPITOL INSURRECTION

Throughout the past few years, this Country could best be described as “a powder keg about to explode.”⁷⁷ And on January 6th the detonation occurred. Following Donald Trump’s “Save America Rally,” insurrection ensued.⁷⁸ Devout Trump supporters scaled the Capitol walls and stormed the People’s home.⁷⁹ I theorize that the reason Trump chose to have his rally on January 6th was extremely intentional. On that day, lawmakers gathered in a joint session to count the Electoral College’s vote.⁸⁰ Dating all the way back to 1796, the votes of the Electoral College have been counted and read.⁸¹ Rallying to “save America” and storming the Capitol on a monumental day were deliberate, symbolic choices.

The initial altercations began at 1:10 PM on the Capitol steps.⁸² One short hour later, the rioters breached police lines, and we saw the now infamous images of people scaling the walls of the Capitol.⁸³ On January 6th, 2021, at 2:44 PM, shots were reported fired in the House Chamber—where the joint session to certify the election was being held.⁸⁴

On April 19th, 1775, at Lexington and Concord, the American Minutemen and the British Redcoats exchanged gunfire for what would later be regarded as the “shot heard round the world.”⁸⁵ Now, fast forward more than 200 years to gunfire within our Capitol walls—in a word, those were the shots *seen* round the world. In modern history, the Capitol had never been breached.⁸⁶ The rioters storming the Capitol, taking it over,

77. CHRISTOPHER JACKSON ET AL., *Right Hand Man*, in HAMILTON (Atlantic Records 2015).

78. George Petras et al., *Timeline: How the Storming of the U.S. Capitol Unfolded on Jan. 6*, USA TODAY (Feb. 9, 2021, 8:33 AM), <https://www.usatoday.com/in-depth/news/2021/01/06/dc-protests-capitol-riot-trump-supporters-electoral-college-stolen-election/6568305002/> [<https://perma.cc/B8WE-WKZK>].

79. *Id.*

80. *Id.*

81. Ron Elving, *Objecting to Electoral Votes in Congress Recalls Bitter Moments in History*, NPR (Jan. 5, 2021, 5:00 AM), <https://www.npr.org/2021/01/05/952883116/objecting-to-electoral-votes-in-congress-recalls-bitter-moments-in-history> [<https://perma.cc/XU6N-4YL8>].

82. Petras et al., *supra* note 78.

83. *Id.*

84. *Id.*

85. Elizabeth Nix, *What Was the “Shot Heard Round the World”?*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/what-was-the-shot-heard-round-the-world> [<https://perma.cc/6DAQ-XEM8>].

86. Amy Sherman, *A History of Breaches and Violence at the US Capitol*, POLTIFACT (Jan. 6, 2021), <https://www.politifact.com/article/2021/jan/07/history-breaches-and-violence-us-capitol/> [<https://perma.cc/CA3R-X56R>].

and shooting within chambers, sent a clear message: our country was undoubtedly fractured. The rioters stood on the Senate floor, broke into offices, and defaced the Capitol—including tearing down an American flag and replacing it with a Trump flag.⁸⁷ The insurrection that unfolded left five dead and more than a hundred capitol police officers injured.⁸⁸ Officers were beaten and tased repeatedly.⁸⁹ Additionally, I would like to take a moment to honor the four additional officers who have since died by suicide that responded to the insurrection.⁹⁰

Notwithstanding the insurrection, “Vice President Mike Pence, presiding over the joint session to count the electoral votes, announced the results at 3:41 a.m. ET, formalizing Biden’s win over President Donald Trump by a margin of 306 to 232.”⁹¹

We use *Brandenburg* to measure speech in incitement prosecutions.⁹² “Whether *Brandenburg* would protect Trump from federal criminal prosecution is a subtle question.”⁹³ “Trump’s statements immediately before the January 6 putsch were so egregious that they may overcome [*Brandenburg*’s] bar.”⁹⁴ If we read Trump’s speech literally, he’d be

87. Petras et al., *supra* note 78; Morgan Smith & Virginia Chamlee, *Pro-Trump Rioters Tear Down American Flag, Replace it with Trump Flag at U.S. Capitol Building*, PEOPLE (Jan. 6, 2021, 5:35 PM),

<https://people.com/politics/pro-trump-rioters-tear-down-american-flag-replace-with-trump-flag-at-u-s-capitol-building/> [<https://perma.cc/DMT5-MJXR>].

88. 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-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html [<https://perma.cc/S68N-6Z54>].

89. Elly Belle, *Here’s What We Know About the People Who Died During the Capitol Riot*, REFINERY29 (Jan. 8, 2021, 4:39 PM), <https://www.refinery29.com/en-us/2021/01/10255518/capitol-riot-deaths-injuries-details> [<https://perma.cc/QB7B-9WBN>].

90. Chelsey Cox & Matthew Brown, *Two Additional DC Officers Who Responded to U.S. Capitol Insurrection Die by Suicide*, USA TODAY (Aug. 3, 2021, 2:39 PM), <https://www.usatoday.com/story/news/politics/2021/08/02/third-officer-who-responded-jan-6-capitol-riot-dies-suicide/5460242001/> [<https://perma.cc/LQ6F-EC79>].

91. Joey Garrison & Deirdre Shesgreen, *A Rattled Congress Affirms Joe Biden’s Electoral College Victory After Pro-Trump Riot at Capitol*, USA TODAY (Jan. 7, 2021, 11:52 AM), <https://www.usatoday.com/story/news/politics/elections/2021/01/06/electoral-college-vote-stopped-unclear-when-resume-after-riot/6572441002/> [<https://perma.cc/9V84-53DG>].

92. Ian Millhiser, *Trump’s False Claim that Impeachment Violates the First Amendment, Explained*, VOX (Feb. 12, 2021, 1:13 PM), <https://www.vox.com/22272734/trump-impeachment-first-amendment-lies-incitement-brandenburg-new-york-times-sullivan-bond> [<https://perma.cc/A2KA-E887>].

93. Noah Feldman, *Trump Will Try to Make His Impeachment About Free Speech*, BLOOMBERG (Jan. 14, 2021, 8:30 AM), <https://www.bloomberg.com/opinion/articles/2021-01-14/is-trump-s-jan-6-rally-speech-protected-by-the-first-amendment> [<https://perma.cc/6YUC-LDAW>].

94. Millhiser, *supra* note 92.

protected under *Brandenburg*.⁹⁵ With that in mind, the scholars who call for a literal reading believe “that Trump’s words need[ed] to have explicitly called for violence,” which was not the case.⁹⁶

It comes as no surprise that there is a scholarly debate as to whether Trump’s words would have been protected under the seminal *Brandenburg* case. But at the same time, certain questions shouldn’t warrant a debate. This is one of those times. Trump’s abhorrent rhetoric led to incitement and insurrection. The fact that any question exists is precisely the reason a new test to replace *Brandenburg* is needed.

Given these points, we turn to my proposed replacement for *Brandenburg*. The replacement narrows the bounds of free speech and provides more guidance on how to determine what speech will be unprotected. The new test is one that should be applied to not only civil and criminal proceedings, but to impeachment proceedings as well if another President in the future tries to undermine the democratic process.

IV. IMPACTS AND SOLUTIONS

Simply put, the *Brandenburg* test is too elementary to be our primary measuring stick in evaluating incitement. Far too many times has incitement occurred and the courts have protected the speech.⁹⁷ Again, this isn’t to say *Brandenburg* is meritless. There have been some instances where speech wasn’t protected.⁹⁸

Even so, free speech isn’t always so free. In addition to the lives the insurrection cost, it also spurred the House to pass a Capitol security bill in the staggering amount of \$1.9 billion.⁹⁹ Moreover, the costs associated with the insurrection amounted to more than \$730 million.¹⁰⁰

Brandenburg has been problematic since the bench fashioned the test. The test is more than 50 years old, but unlike a fine wine, the test has not become better with age. Time has consigned *Brandenburg* to being

95. Feldman, *supra* note 93.

96. *Id.*

97. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Hess v. Indiana*, 414 U.S. 105 (1973); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

98. See generally *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2756 (2021).

99. Billy House, *House Democrats Narrowly Pass \$1.9 Billion Capitol Security Bill*, BOS. GLOBE (May 20, 2021, 1:10 PM), <https://www.bostonglobe.com/2021/05/20/nation/house-democrats-narrowly-pass-19-billion-capitol-security-bill/> [https://perma.cc/5LXF-4WFS].

100. Claudia Grisales, *From Trauma Counselors to Fencing, What’s in the House-Passed Capitol Security Bill*, NPR (May 20, 2021, 1:56 PM), <https://www.npr.org/2021/05/20/998535467/from-trauma-counselors-to-fencing-whats-in-the-house-passed-capitol-security-bil> [https://perma.cc/3CVF-X4P9].

fruitless. The test is nothing more than an archaic misapplication of how we should measure free speech.

To be fair, some of the issues with *Brandenburg* are not issues that the Supreme Court could have reasonably foreseen. A generous amount of the issues can be attributed to globalization. That globalization can be broken into two relevant parts here: digitalization and mobilization. In fact, “much scholarly ink already has been spilled on the multiple problems with applying *Brandenburg* to . . . emails, texts, and posts on social media.”¹⁰¹

Digitalization has created an unprecedented ability to foster communications.¹⁰² Words have become more dangerous because the digital world makes no corner untouchable. A simple tweet can reach millions of people.¹⁰³ Audience sizes now have the potential to be exponentially larger than they did when *Brandenburg* was decided due to the advent of social media.¹⁰⁴ Technology has weaponized our words more than the Supreme Court—and certainly our Founding Fathers—could have ever fathomed.

Mobilization is equally as threatening. People (theoretically) can cross borders and traverse the globe at the drop of a hat. Access to transportation has increased significantly since *Brandenburg*.¹⁰⁵ People are more mobile than ever.

To summarize, globalization demands a stricter test to replace *Brandenburg*. Because words can spread like wildfire and people can mobilize like they never have before, speech is more dangerous. Individuals traveled from all over the country to attend Trump’s rally.¹⁰⁶

101. Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 CONN. L. REV. 117, 124 (2019).

102. Sol Rogers, *The Role of Technology in the Evolution of Communication*, FORBES (Oct. 15, 2019, 8:57 AM), <https://www.forbes.com/sites/solrogers/2019/10/15/the-role-of-technology-in-the-evolution-of-communication/?sh=3a82b371493b> [<https://perma.cc/8CLC-YG54>].

103. See Salman Aslam, *Twitter by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Jan. 7, 2023), <https://www.omnicoreagency.com/twitter-statistics/> [<https://perma.cc/F22P-53NZ>] (noting that in 2021, Twitter had approximately 217 million users).

104. See Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2021?*, BACKLINKO (Oct. 10, 2021), <https://backlinko.com/social-media-users> [<https://perma.cc/APL2-LZZ7>] (explaining that 3.96 billion people use social media worldwide).

105. See Colin Pooley, *How Have Our Travel Habits Changed over the Past 50 Years?*, THE CONVERSATION (Oct. 21, 2015, 9:58 AM), <https://theconversation.com/how-have-our-travel-habits-changed-over-the-past-50-years-49029> [<https://perma.cc/CTH4-FX39>].

106. See *Thousands Cheer Trump at Rally Protesting Election Results as Congress Holds Vote to Affirm Biden’s Win*, WFLA (Jan. 6, 2021, 1:45 PM), <https://www.wfla.com/news/national/protesters-rally-in-dc-for-2nd-day-trump-set-to-speak/>

His tweets were read by millions.¹⁰⁷ The impact of speech is no longer limited to whoever is within earshot or just word of mouth.

Criticisms of *Brandenburg*'s fallibility are nothing new. In fact, there are more law review articles exploring the merits and faults of this landmark case than any of us would care to count. The question is: if *Brandenburg* presents such issues, and legal scholars seem to criticize the test of falling short, why haven't we replaced it? The interest behind the insurrection is that it provides the opportunity to redefine the *Brandenburg* test. Without commenting on the merit of criminal sanctions, a lawsuit against Trump in front of the Supreme Court would be a pivotal test case to change a test so many feel falls short.

Given these points, we are brought to *Brandenburg*'s replacement. The new test will be the namesake of the insurrection: The Capitol Test. The Capitol Test should be used as the measuring stick to determine when speech has morphed into incitement and is no longer protected. Professor Jed Rubenfeld contends "[*Brandenburg*] is better considered 'as a test to determine whether an individual has intentionally used speech so closely and directly engaged with a particularized course of prohibited conduct that the individual may be treated as having participated in that conduct.'"¹⁰⁸ The Capitol Test will borrow concepts from Rubenfeld's position.

The two elements of the original *Brandenburg* test will remain but serve only as a foundation, not as the entire structure. The true goal of the new test will be to really weigh imminence against probability. The Capitol Test will dilute the significance the Supreme Court placed on imminence and redistribute that weight to considering the probability and the effect on the reasonable listener. The new test will be as follows:

The government may limit inflammatory speech and/or hate speech that advocates for crime and violence where:

- (1) The speech is directed to inciting or producing imminent lawless action, *and* the speech is likely to incite or produce such action.
- (2) To determine whether the two parts in (1) are met, the court may consider these five factors:

[<https://perma.cc/W858-G9QJ>]; see also Joseph Tanfani et al., *How Trump's Pied Pipers Rallied a Faithful Mob to the Capitol*, REUTERS (Jan. 11, 2021, 6:55 PM), <https://www.reuters.com/article/us-usa-trump-protest-organizers-insight/how-trumps-pied-pipers-rallied-a-faithful-mob-to-the-capitol-idUSKBN29G2UP> [<https://perma.cc/LD3N-MW63>].

107. See *Donald Trump and Twitter – 2009 / 2022 Analysis*, TB, <https://www.tweetbinder.com/blog/trump-twitter/> [<https://perma.cc/G5TU-CZLG>] (sharing that as of the day his account was permanently deactivated—January 8, 2021—Trump had amassed an impressive 88,936,841 followers).

108. Calvert, *supra* note 101, at 129–30 (quoting Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 828 (2001)).

- (a) Whether the speech led to producing such actions.
- (b) What the totality of the circumstances was and what the firmness of the language was.
- (c) What the mens rea of the inciter was.
- (d) What a reasonable person under the circumstance would believe.
- (e) Would we know it when we see it?

The Capitol Test will be a mix of factors and elements. This test embraces *Brandenburg's* original two elements but adds five factors to further help a court answer the question of whether the speech should be protected.

In the new test, 2(a) addresses a primary issue with *Brandenburg*. The original test does not care whether the lawless action occurs or not. But it should. That is not to say that if the lawless action is only likely that the speech should be protected. The focus of this factor is whether the lawless action occurred. If the speech *actually* led to the lawless action, then there should be a strong presumption for finding unprotected speech.

Section 2(b) of the Capitol Test relies on well-established contract law principles of looking to the totality of the circumstances and the firmness of the language.¹⁰⁹ Here, we would want to look at the literal words chosen to possibly incite such lawless action. Was the speech given at a rally? Did a hateful tweet get shared minutes before violence? What language was used? Did the speaker specifically make a call for violence or a certain action? The essence of 2(b) is to provide the court with a more complete picture and to put the potentially harmful rhetoric into context.

The next factor, 2(c) looks at the mens rea of the inciter. Mens rea is Latin for “guilty mind.”¹¹⁰ Mens rea can be broken down into different categories: purpose, knowledge, reckless, and negligence.¹¹¹ Specifically, we will look to a revised version of purpose and knowledge. This factor of the Capitol Test looks at whether the speaker acted with a purpose and knowledge that their words would more than likely lead to the lawless action that the original *Brandenburg* test sought to prevent. With this factor, the court could inquire into whether the inciter intended for incitement to occur. The court could analyze whether the inciter had any

109. See generally *Babcock & Wilcox Co. v. Hitachi Am., Ltd.*, 406 F. Supp. 2d 819 (N.D. Ohio 2005); *Fletcher-Harlee Corp. v. Pote Concrete Contractors*, 421 F. Supp. 2d 831 (D.N.J. 2006), *aff'd*, 482 F.3d 247 (3d Cir. 2007).

110. *Mens Rea*, LEGAL INFO. INSTIT., https://www.law.cornell.edu/wex/mens_rea [https://perma.cc/C4EP-PPDH].

111. *Model Penal Code's Mens Rea*, L. SHELF, <https://lawshelf.com/coursewarecontentview/model-penal-codes-mens-rea/> [https://perma.cc/XGX9-VE76].

reason to know that incitement would occur.

Factor 2(d) draws on a fundamental tort principle—the reasonably prudent person under the circumstances (RPP-UTC).¹¹² Here, the court may look at what the RPP-UTC would believe the intention of the speaker to be and what they would feel called to do. This factor permits a court to appreciate how an objective person may view the rhetoric of the speaker. This factor is intertwined with 2(b). Once the court can look at the totality of the circumstance and the firmness of the language the inciter used, the court can analyze what the reasonable person would have believed the inciter to mean. Contextually, would it be reasonable for the individual to believe the speaker desired violent actions to ensue?

And finally, factor 2(e) pays homage to some famous words penned by Justice Potter Stewart. In a case about pornography and indecency, Justice Stewart’s response was, “I know it when I see it.”¹¹³ While Stewart’s notion would provide little guidance, his assurance cannot be ignored. However, because the standard of “I know it when I see it”¹¹⁴ is so subjective, we relegate it to being a minor factor to consider. And, conversely, in a landmark First Amendment Speech case, Justice Harlan opined that “it is nevertheless often true that one man’s vulgarity is another’s lyric.”¹¹⁵ There is no doubt that some speech is more offensive than others, but its inherent offensiveness doesn’t automatically make the speech unprotected. With this factor, courts can consider whether the speech is simply distasteful or has breached the line in the sand and far exceeds lyricism.

To demonstrate, we will look at the insurrection under the context of the Capitol Test as compared with the *Brandenburg* test.

A. *Insurrection Under Brandenburg*

Under the *Brandenburg* test, whether Trump’s speech would be protected is not clear. While there are numerous tweets and speeches that can illustrate how Trump spurred an insurrection, two statements particularly come to mind.

Under the first prong—the speech is directed to inciting or producing imminent lawless action—Trump said, “we fight, we fight like hell,”¹¹⁶

112. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010).

113. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

114. *Id.*

115. *Cohen v. California*, 403 U.S. 15, 25 (1971).

116. Ryan Goodman et al., *Incitement Timeline: Year of Trump’s Actions Leading to the Attack on the Capitol*, JUST SECURITY (Jan. 11, 2021), <https://www.justsecurity.org/74138/incitement-timeline-year-of-trumps-actions-leading-to-the-attack-on-the-capitol/> [<https://perma.cc/NA4Z-V8R3>].

and “we are going to walk down Pennsylvania Avenue . . . and we are going to the Capitol.”¹¹⁷ Regarding the second prong—whether the speech is likely to incite or produce such action—there may be some question here.

Trump’s speech at the “Save America” rally seems sufficiently imminent and likely to cause violence. He called for his rally-goers to march down to the Capitol and provided them the directions there. However, a court may not be moved. First, a court may not be persuaded that there was imminence. Trump didn’t explicitly say we are going to walk to the Capitol *right this very minute*. Second, a court may be even less convinced that Trump’s speech was problematic because he did, albeit later in the day, call for his supporters to “[s]tay peaceful!”¹¹⁸ Therefore, there is the potential that a court would find his call for peacefulness enough to assuage him of his guilt.

As I have previously asserted, whether Trump’s speech would be protected should not be a close call. Hence, the need for a new test.

B. *Insurrection under the Capitol Test*

Under the Capitol Test, the question of whether Trump engaged in protected speech would be all but eviscerated. Element two of the Capitol Test is comprised of five factors that guides the two parts of element one. So, was the speech directed to incite or produce imminent lawless action? And was the speech likely to incite or produce such action?

First, 2(a) asks directly whether the speech led to producing such lawless actions. Here, the answer is unequivocally yes. Trump’s speech resulted in an insurrection at our Capitol. There can be no sugarcoating of a bitter truth. Again, as explained above, he called for his supporters to go to the Capitol and fight like hell. And they did.

Next, 2(b) explores the totality of the circumstances and the firmness of the language. The totality of the circumstances can best be explained as an evaluation of the context. Here, the totality of the circumstances would point toward breathing life into Trump’s words. One website detailed a year of Trump’s actions that preceded and foreshadowed the insurrection.¹¹⁹

Trump spent an incalculable amount of time during his presidency, discrediting every news outlet and person who disagreed or criticized him.¹²⁰ In 2020, Trump refused to promise there would be a peaceful

117. *Id.*

118. *Id.*

119. *See id.*

120. *See* Dan Mangan, *President Trump Told Lesley Stahl He Bashes Press ‘to Demean You and Discredit You so . . . No One Will Believe’ Negative Stories About Him*, CNBC (Oct. 29, 2018, 3:35 PM), <https://www.cnbc.com/2018/05/22/trump-told-lesley-stahl-he-bashes->

transition of power if he were to lose the election.¹²¹ Trump employed the language of “liberal mob” and “Trump Army” in his campaign materials.¹²² He went as far as retweeting a video that disturbingly claimed the only good Democrat is a dead Democrat.¹²³ Going as far back as July of 2020, Trump started to lay the foundation for undermining the election, should the results not be in his favor.¹²⁴ All this to say, the totality of the circumstances points to a clear answer: the militarization of the former President’s supporters backs a finding of incitement.

When we look to mens rea under 2(c), the facts would point to Trump acting with knowledge and purpose. First, during the First Presidential debate, Trump told the Proud Boys (a white supremacist militia organization) to stand back and stand by.¹²⁵ The Proud Boys were so excited that Trump called upon them that they made “stand back and stand by” their new slogan.¹²⁶ Going a step further, members of the supremacist group responded with tweets such as “standing down and standing by sir.”¹²⁷ Additionally, on January 1, 2021, Trump tweeted, “The BIG Protest Rally in Washington, D.C. will take place at 11:00 a.m. on January 6th. Location details to follow. StopTheSteal!”¹²⁸ The Proud Boys attended his rally and were present participants in the siege of the Capitol.¹²⁹

Leading up to the rally, Trump knew the support he had garnered, and he knew what individuals who believed in him would do.¹³⁰ He had this

press-to-discredit-negative-stories.html [https://perma.cc/3WDN-LQYT]; Lisa Intrabartola, *How Trump Shaped the Media*, RUTGERS (Jan. 19, 2021), https://www.rutgers.edu/news/how-trump-shaped-media [https://perma.cc/RSZ6-NCHJ]; Paul Farhi, *News Study Says Trump has ‘Dangerously Undermined Truth’ with Attacks on News Media*, WASH. POST (Apr. 16, 2020, 9:00 AM), https://www.washingtonpost.com/lifestyle/media/new-study-says-trump-has-dangerously-undermined-truth-with-attacks-on-news-media/2020/04/15/4152f81c-7f2d-11ea-9040-68981f488eed_story.html [https://perma.cc/8959-6RGC].

121. Goodman et al., *supra* note 115.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Natalie Reneau, et al., *Proud Boys Led Major Breaches of Capitol on Jan. 6, Video Investigation Finds*, NY TIMES (July 11, 2022), https://www.nytimes.com/2022/07/12/us/politics/proud-boys-jan-6.html [https://perma.cc/5FHX-HWQL].

130. See Mike DeBonis & Jacqueline Alemany, *Trump Sought to Lead Armed Mob to Capitol on Jan. 6, Aide Says*, WASH. POST (June 28, 2022, 9:29 PM), https://www.washingtonpost.com/national-security/2022/06/28/trump-sought-lead-armed-mob-capitol-jan-6-aide-says/ [https://perma.cc/SG4N-QAJ3].

knowledge based on past events.¹³¹ His supporters engaged in violent actions during the Charlottesville riot, attempted to kidnap Governor Gretchen Whitmer, and contributed to the large rise in hate crimes.¹³² Significantly, “Trump has continually refused to recognize what’s at the core of this violence: hate nurtured under a tense national climate that he has helped cultivate.”¹³³ All the facts illustrate that Trump’s mens rea was purposeful and knowledgeable. He intended for his speech to lead to incitement. Hence, under the Capitol Test he would be culpable for the harm that occurred.

Factor 2(d) permits the court to engage in an objective inquiry. What would a reasonably prudent person under the circumstances foresee the speech to indicate? Would a reasonable person believe that Trump’s words would carry weight with the ears the words fell on? Factor 2(d) ties back in with 2(b) where we looked at the totality of the circumstances. A reasonable person under the circumstances, judging against the political backdrop and Trump’s previous actions, may likely believe that Trump’s words would meet the standard for incitement.

Here, the reasonable person could either be a rally-goer or anyone else. The reasonable rally-goer under the circumstances would likely believe that Trump genuinely wanted them to go take back the Capitol based on his tweets and speeches. Additionally, as Trump has in the past failed to condemn violence, a reasonable person would have no reason to believe Trump would condemn them storming the Capitol.

Individuals not at the rally, looking at the context of how the previous four years have unfolded, would also believe under the circumstances that Trump wanted his supporters to storm the Capitol. Again, as Trump has told supremacist groups to stand back and stand by,¹³⁴ and failed to confirm that he would engage in a peaceful transition of power,¹³⁵ no one had any reason to believe that Trump’s speech was not intended to incite the insurrection. Under 2(d), any reasonable person under the circumstances would believe that Trump’s speech initiated incitement and that he wanted the insurrection to ensue.

Lastly, with 2(e), would we know it when we see it? Are there instances where the speech is just so plainly problematic that we know it cannot be protected? Based on the circumstances and history surrounding and preceding the insurrection, it’s possible that the answer is simply yes.

131. See Fabiola Cineas, *Donald Trump Is the Accelerant*, VOX (Jan. 9, 2021, 11:04 AM), <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech> [<https://perma.cc/8E4Z-U237>].

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

If the “most powerful man” on the planet calls on his supporters to take back the vote and to fight like hell, then the problem may have a clear answer. While 2(e) does not provide the firmest standard, there are certain times when we may just know. Granted, 2(e) would not be a heavily weighed factor. However, this factor does provide the judiciary with discretion to find incitement and not protect speech when the speech has clearly gone too far.

Ultimately, when Trump called on his supporters and allies to push back on the election since the day President Biden was announced the winner, and when he told rallygoers to walk down Pennsylvania Avenue and to fight like hell or there would not be a country left to fight for, the evidence of incitement is outstanding. Trump’s speech was directed at inciting or producing imminent lawless action, and based on previous experiences with Trump supporters, we can infer that the speech was likely to incite or produce such action. And going one step further, the speech did incite and produce lawless action.

Under the Capitol Test, Trump’s speech would unequivocally be unprotected by First Amendment Speech. The entire goal of the Capitol Test is to remove the uncertainty that clouds decisions under *Brandenburg*.

CONCLUSION

The “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹³⁶ However, the government does not have to protect all speech. Incitement is one example of unprotected speech. The current test for determining incitement no longer works. In part, the test is not good enough because it does not account for the mobilization and digitalization of our world.

A better test is needed because the cost of free speech is too high. The insurrection cost many lives, countless injuries, and millions of dollars. We watched domestic terrorism unfold on national TV.¹³⁷ January 6, 2020 was a wake-up call that speech has gone too far. The Capitol Test should replace the *Brandenburg* test as the test for incitement. The new test incorporates all of *Brandenburg*, but it builds on the tenets the Court laid out in 1969. The Capitol Test is designed with the current times in mind.

Speech should not be censored. However, it should have reasonable limits. For example, speech that incites violence should not be protected, but speech that has societal benefits should be protected under the First

136. *Police Dept. of Chi. v. Mosely*, 408 U.S. 92, 95 (1972).

137. Del Quentin Wilber, *FBI Director Says Capitol Riot Was ‘Domestic Terrorism,’* L.A. TIMES (Mar. 2, 2021, 2:49 PM), <https://www.latimes.com/politics/story/2021-03-02/fbi-wray-testify-congress-capitol-siege> [<https://perma.cc/DCW3-2NSN>].

Amendment. The insurrection was an egregious attack on our democracy that boasted no justifiable societal benefit.¹³⁸

We can zealously fight and advocate for the things we care about without it escalating into insurrection. Free speech is an expansive and incredible right so fundamental to the American identity. In the late 1700s we used speech to liberate this nation from an oppressive government. Now, speech has been weaponized to overthrow our current government. The attempted coup is evidence enough that free speech has an astronomical price that we cannot be willing to pay.

I conceive the ideal power of speech aligned with the words of the late Justice Ruth Bader Ginsburg. In a speech she gave, she said to “[f]ight for the things that you care about, but do it in a way that will lead others to join you.”¹³⁹ As opposed to encouraging others to join your cause by inciting fear and hate, I’d like to imagine she was encouraging her listeners to inspire change. The freedom of speech is a powerful weapon. But that power need not be militarized. Speech must take its rightful place once more as a weapon for positive change.

138. The insurrection did make a really fascinating guest appearance in the realm of pop culture. See Althea Legaspi, *Machine Gun Kelly Drops New Song ‘Daywalker!’ Featuring Corpse*, ROLLING STONE (Mar. 12, 2021, 12:12 AM), <https://www.rollingstone.com/music/music-news/machine-gun-kelly-corpse-husband-daywalker-song-1140531/> [<https://perma.cc/6GQX-5EEF>]. In his first single of 2021, award winning alternative artist, Machine Gun Kelly, along with Corpse, released the song DAYWALKER!. *Id.* In relevant part, the lyrics at the end of the song are, “if I get angry, I’m goin’ to start up a riot like people on Capitol Hill.” MACHINE GUN KELLY & CORPSE, DAYWALKER! (Interscope Records, 2021).

139. Alanna Vagianos, *Ruth Bader Ginsburg Tells Young Women: ‘Fight for the Things You Care About,’* HARV. RADCLIFFE. INSTIT. (June 2, 2015), <https://www.radcliffe.harvard.edu/news-and-ideas/ruth-bader-ginsburg-tells-young-women-fight-for-the-things-you-care-about>.