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INTRODUCTION

SYMPOSIUM: Incitement at 100— and 50—and Today

FREE SPEECH AND VIOLENCE IN THE MODERN WORLD

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2019 marks the one-hundredth anniversary of the Supreme Court's first consequential encounter with the First Amendment's guarantee of freedom of speech, in a series of cases dealing with opposition to the nation's entry into World War I and its policies opposing the Bolshevik Revolution.¹ Those cases marked the starting point for what could be called "the free speech century": a century in which free speech became elevated to a primary—some would say *the* primary—constitutional commitment.²

Of course, with that elevation came a century of contestation about what free speech meant, who had the right to exercise it, and what government interests could justify its suppression. Nowhere was this contestation sharper than in the realm of speech that is alleged to incite violence. On the one hand, such speech, when part of a call for radical political change, lies at the heart of the First Amendment's concern with allowing free discussion of all matters

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¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Abrams v. United States*, 250 U.S. 616, 617–18 (1919).

² See, e.g., *Jones v. City of Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) (describing the First Amendment as occupying a "preferred position" in the hierarchy of constitutional values), *vacated*, 319 U.S. 103 (1943). The preferred position idea eventually faded away. See, e.g., Elizabeth J. Wallmeyer, *Filled Milk, Footnote Four & the First Amendment: An Analysis of the Preferred Position of Speech After the Carolene Products Decision*, 13 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 1019, 1020–21 (2003) (describing it as having "faded away" after a decade).

relating to self-government.³ But such speech can also pose great risks to peace, public order, and public safety.⁴

The Supreme Court's challenge over the last one hundred years has been to mediate between these conflicting concerns. The challenge remains, and indeed, is more acute than ever. Today, the internet provides extraordinary opportunities for group mobilization. We have seen the positive side of this potential all over the world, when oppressed groups have used social media to organize protests against repressive governments.⁵ But we have also seen the negative side, as forces of violence have used those same tools to exhort others to perform violent acts.⁶ The global anxiety over terrorism, and the ease with which death and destruction can be wrought on a massive scale, only accentuates our fear of those who would incite violence, whether through new technologies or the old-fashioned methods of the printed or spoken word.

On April 12, 2019, scholars gathered at Brooklyn Law School to consider the past, the present, and the future of free speech, and concerns about incitement that militate toward suppression. The speakers provided incisive and timely insight on these important matters—insight that is reflected in the papers published in this symposium issue of the *Brooklyn Law Review*.⁷

Noted First Amendment litigator Floyd Abrams engages these questions directly by considering the key words from Justice Holmes's canonical formulation for the constitutional standard governing regulation of incitement speech⁸—the requirement that any danger justifying such regulation must be “clear and present.”⁹ Mr. Abrams asks what types of “danger” are sufficiently “present” to provide that justification, using as examples the Communist teachings at issue in *Dennis v. United States*¹⁰ and *The Progressive*

³ See, e.g., *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 183 (1999) (describing “core political speech” as the context in which First Amendment protection “is at its zenith” (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988))).

⁴ See, e.g., *Hess v. Indiana*, 414 U.S. 105, 106–07 (1973) (per curiam) (dealing with a protester's exhortation to continue the illegal commandeering of a public street).

⁵ See, e.g., Heather Brown et al., *The Role of Social Media in the Arab Uprisings*, PEW RES. CTR. (Nov. 28, 2012), <https://www.journalism.org/2012/11/28/role-social-media-arab-uprisings/> [<https://perma.cc/VAP8-JA5Y>] (discussing the part played by social media in the Arab Spring protests).

⁶ See, e.g., Julia Carrie Wong, *Schan: The Far-Right Website Linked to the Rise in Hate Crimes*, GUARDIAN (Aug. 4, 2019), <https://www.theguardian.com/technology/2019/aug/04/mass-shootings-el-paso-texas-dayton-ohio-schan-far-right-website> [<https://perma.cc/VK79-73P8>].

⁷ Symposium, *Incitement at 100—and 50—and Today*, 85 BROOK. L. REV. 1 (2019).

⁸ See Floyd Abrams, *The First Amendment and the Imminence of Harm*, 85 BROOK. L. REV. 7 (2019).

⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹⁰ *Dennis v. United States*, 341 U.S. 494, 497–98 (1951).

magazine's publication of plans for constructing a hydrogen bomb.¹¹ While Mr. Abrams reaches no hard and fast conclusion on this exceptionally difficult question, his discussion places both the difficulty and the stakes of that issue in stark relief.

Emerson Sykes, a staff attorney with the American Civil Liberties Union, takes the next logical step after Mr. Abrams' article and considers the history, current status, and possible future of the equally canonical modern formula for incitement, expressed in *Brandenburg v. Ohio*.¹² Mr. Sykes provides a rich history of the *Brandenburg* litigation, explains the requirements it establishes before the First Amendment allows a speaker to be convicted of incitement to violence, and discusses *Brandenburg's* impact on modern speech controversies and its role in the world of social media. While he considers whether other nations have something to teach Americans about the allowable realm for provocative speech, and whether the phenomenon of social media changes the calculus, Mr. Sykes argues that *Brandenburg's* basic preference for allowing such speech retains its fundamental vitality.

Professor Rachel VanLandingham considers in more detail one question raised by Mr. Sykes: the issue of social media.¹³ In particular, Professor VanLandingham assumes that government is, or should be, disabled from restricting social media speech that fails the current *Brandenburg* test for incitement.¹⁴ But she then asks whether the government should have greater power to pressure social media operators—as the intermediaries—to restrict speech on their social media platforms. Professor VanLandingham discusses whether allowing such informal government pressure would cause the same degradation of democratic political dialogue that would flow from more direct government regulation.

In a similar vein, Professor David Han engages the fundamental issue of whether the stringently speech-protective *Brandenburg* formula can survive the threats of violence and terrorism enabled and enhanced by the internet and social media age.¹⁵ His concern is that *Brandenburg*—the product of an era

¹¹ *United States v. Progressive, Inc.*, 467 F.Supp. 990, 991 (W.D. Wis. 1979).

¹² See Emerson J. Sykes, *In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 BROOK. L. REV. 15 (2019); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (limiting the leeway government has to punish speech advocating illegal action to situations in which that speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

¹³ See Rachel E. VanLandingham, *Words We Fear: Burning Tweets & the Politics of Incitement*, 85 BROOK. L. REV. 37 (2019).

¹⁴ *Brandenburg*, 395 U.S. at 447.

¹⁵ See David S. Han, *Brandenburg and Terrorism in the Digital Age*, 85 BROOK. L. REV. 85 (2019).

where militant speech was often confined to leaflets and soap boxes—may be viewed as obsolete in the contemporary digital world of instant global communication. He suggests that an effort to bring its principles “up to date” would result in a balancing readjustment between speech and security that might subordinate speech. Professor Han maintains that it is better to resolve those issues through the prism of the persuasion presumption, the principle at the heart of *Brandenburg*, rather than a kind of instrumental balancing. This approach would lead to a deeper and more honest conversation about the fundamental principles underlying *Brandenburg*'s insistence that, except in the most extraordinary circumstances, speech seeking to persuade, rather than incite, to violence cannot be restrained, and render any incursions on that principle more narrow and tolerable.

Professor Christina Wells is also concerned about terrorism threats being used to justify lowering *Brandenburg*'s protective shield for provocative and challenging speech and dissent.¹⁶ In her view, the insistence on imminence of violence caused by speech is the core of *Brandenburg*'s protection, a safeguard undermined by broad proposals to target “terrorism” speech. The important mission of *Brandenburg* was to repudiate a half-century of watered-down protection under the “clear and present danger” test. The United States government used fears of “Communism” and other “isms” as the pretext for attacks on dissident groups and individuals legitimately pressing for political and social change. Similar threats of repression have emerged today in the effort to equate terrorism with certain groups and advocacy efforts, while ignoring similar threats from the other side of the ideological aisle. Professor Wells' answer to avoid the pitfalls of the past is a rigorous reaffirmation of the *Brandenburg* test, which will not leave us defenseless against true threats of terrorism.

Finally, however, Professor Leslie Gielow Jacobs submits that there are circumstances where the *Brandenburg* rules *overprotect* speech.¹⁷ In her view, the paradigm for withholding protection is where a speaker exhorts her listeners to engage in violence and properly suffers criminal penalty if the incitement tests are met. But courts have given protection in a number of other dissimilar contexts. Professor Jacobs focuses on government management of nonpublic forums. In this circumstance,

¹⁶ See Christina E. Wells, *Assumptions About “Terrorism” and the Brandenburg Incitement Test*, 85 BROOK. L. REV. 111 (2019).

¹⁷ See Leslie Gielow Jacobs, *“Incitement Lite” for the Nonpublic Forum*, 85 BROOK. L. REV. 149 (2019).

application of the traditional *Brandenburg* requirements of imminence and unlawful acts may need to be relaxed to affect a more proper accommodation of speech rights and public or private harms. An adjusted incitement exclusion from protection, which she dubs “incitement lite,” would alter some elements of the *Brandenburg* test, so it would no longer be a blunt, one-size-fits-all incitement category. But “incitement lite” would preserve *Brandenburg*’s spirit by defining different, more nuanced, and tailored scopes of government authority to regulate speech that persuades listeners to engage in harmful conduct.

Together, the papers published in this edition constitute important contributions to the freedom of speech concerns that burst upon the constitutional stage in 1919 and have never left it.

