

INTERPRETING THE FIRST AMENDMENT AND SUPPRESSING  
POLITICAL MINORITIES

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## INTRODUCTION

“The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>1</sup>

The #BlackLivesMatter movement was founded in response to the “extrajudicial killings of Black people by police and vigilantes,” namely Trayvon Martin’s killing by George Zimmerman and Mike Brown’s killing by Ferguson police officer Darren Wilson.<sup>2</sup> According to the movement, “Black poverty and genocide is state violence,” and in order to liberate all affected, the #BlackLivesMatter movement is proactively “working for a world where Black lives are no longer systematically and intentionally targeted for demise . . . [by] creating a political project—taking the hashtag off of social media and into the streets.”<sup>3</sup> Not surprisingly, given the public call to action against the government for its deprivation of basic human dignity, tensions have run high. For example, a prominent leader in the #BlackLivesMatter movement, DeRay Mckesson, was arrested for “obstruction of a highway of commerce” while protesting the killing of Alton Sterling by a Baton Rouge Police Department officer.<sup>4</sup> Mckesson recently settled a lawsuit against the Baton Rouge Police Department for the arrest,<sup>5</sup> but he is also facing a lawsuit for inciting violence against the Baton Rouge Police Department resulting in an officer being hit in the face by a rock-like object.<sup>6</sup>

Although it would appear to many that those within the #BlackLivesMatter movement are merely exercising their freedom of speech by speaking out against an unjust state, modern First Amendment

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1. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (dissenting from the Court’s holding that a “public necessity” may justify restrictions on the civil rights of citizens).

2. See *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Sept. 8, 2017); *A HerStory of the #BlackLivesMatter Movement*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/herstory/> (last visited Sept. 8, 2017).

3. See *About the Black Lives Matter Network*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Sept. 8, 2017).

4. Yamiche Alcindor, *DeRay Mckesson, Arrested While Protesting in Baton Rouge, Is Released*, N.Y. TIMES (Jul. 10, 2016), [http://www.nytimes.com/2016/07/11/us/deray-mckesson-arrested-in-baton-rouge-protest.html?\\_r=0](http://www.nytimes.com/2016/07/11/us/deray-mckesson-arrested-in-baton-rouge-protest.html?_r=0); see also Joshua Berlinger & Nick Valencia, *Alton Sterling Shooting: Homeless Man Made 911 Call, Source Says*, CNN (Jul. 8, 2016, 7:24 AM), <http://www.cnn.com/2016/07/07/us/baton-rouge-alton-sterling-shooting/>.

5. Andrea Gallo, *DeRay Mckesson, Arrested Alton Sterling Protestors to Get Payout from Baton Rouge in Lawsuit Settlement*, THE ADVOCATE (Nov. 22, 2016, 6:16 PM), [http://www.theadvocate.com/baton\\_rouge/news/article\\_0bd9cc7c-b110-11e6-8137-5336510f1f03.html](http://www.theadvocate.com/baton_rouge/news/article_0bd9cc7c-b110-11e6-8137-5336510f1f03.html).

6. Joe Gyan Jr., *BRPD Officer Injured During Black Lives Matter Protest Sues DeRay Mckesson, National Organization*, THE ADVOCATE (Nov. 7, 2016, 12:52 PM), [http://www.theadvocate.com/baton\\_rouge/news/baton\\_rouge\\_officer\\_shooting/article\\_54fcb320-a51b-11e6-9c4a-77b4f26188d2.html?sr\\_source=lift\\_amplify](http://www.theadvocate.com/baton_rouge/news/baton_rouge_officer_shooting/article_54fcb320-a51b-11e6-9c4a-77b4f26188d2.html?sr_source=lift_amplify).

jurisprudence offers no protection to speech that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>7</sup> Accordingly, the lawsuit filed against Mckesson alleging that he incited the assault of a police officer is not necessarily at odds with First Amendment principles. To the contrary, modern First Amendment jurisprudence arguably provides the flexibility necessary for an unjust state to perpetuate its injustice by silencing those that call others to action through civil and criminal sanctions.

Principally, this Note seeks to show how past and modern interpretations of the First Amendment’s protection of speech can be utilized by the government to silence a political minority’s call for justice despite the First Amendment’s promise that “Congress shall make no law . . . abridging the freedom of speech.”<sup>8</sup> This Note also suggests that an absolutist interpretation of the First Amendment’s protection of speech—protecting all speech short of an overt act—is necessary to protect the speech rights of political minorities.

In Part I, I will discuss three interpretations of the First Amendment’s protection of speech—a narrow common law interpretation, a near-absolutist interpretation, and an absolutist interpretation. Then, in Part II, I will discuss how nonabsolutist interpretations of the First Amendment’s protection of speech have been, and may continue to be, used to suppress the speech of political minorities. I will do this by first showing how the narrow common law interpretation of the First Amendment was used to justify the suppression of the speech of political minorities through the Alien and Sedition Acts of 1798 and Supreme Court rulings in the 1920s. Then I will show how the near-absolutist interpretation of the First Amendment’s protection of speech as expressed in *Brandenburg v. Ohio*<sup>9</sup> may also be used to suppress the speech of political minorities by applying it to the #BlackLivesMatter movement. In Part III, I will argue that an absolutist interpretation of the First Amendment’s protection of speech is necessary to protect the speech of political minorities and that it would not necessarily lead to a disorderly society. Finally, I will conclude by emphasizing the idea that nonabsolutist interpretations of the First Amendment’s protection of speech enable the government to suppress the speech of political minorities.

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7. 395 U.S. 444, 447 (1969) (per curiam).

8. U.S. CONST. amend. I.

9. 395 U.S. 444 (1969) (per curiam).

## I. THREE INTERPRETATIONS OF THE FIRST AMENDMENT'S PROTECTION OF SPEECH

In this Part, I will survey different interpretations of the First Amendment's protection of speech. More specifically, I will analyze three distinct interpretations: a narrow common law interpretation, a near-absolutist interpretation, and an absolutist interpretation.

### A. *The Narrow Common Law Interpretation*

In Leonard Levy's book, *Freedom of Speech and Press in Early American History: Legacy of Suppression*, Levy argues that the freedom of speech protected by the First Amendment is to be understood by its common law meaning.<sup>10</sup> According to this view, to understand the scope of protection afforded to speech by the First Amendment, one must look to the protections afforded to speech by the common law, which merely prohibited prior restraints:

[W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated. The *liberty of the press* is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.<sup>11</sup>

To emphasize the implication of this interpretation, one should note that if the phrase *freedom of speech* was meant to incorporate common law principles into the First Amendment, then speech considered to be "immoral" by society would be subject to government regulation.<sup>12</sup>

The idea that the First Amendment embodies a narrow protection of speech is not a creature of modern revisionist theory. In 1833, Justice Joseph Story, in his *Commentaries on the Constitution*, wrote, "[to say that the First Amendment] was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man."<sup>13</sup> For Justice Story, recourse to

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10. LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* 248 (Harper & Row 1963) (1960).

11. *Id.* at 14 (ellipsis in original) (quoting SIR WILLIAM BLACKSTONE, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* 112–13 (New York 1836)).

12. *See id.* at 13–14.

13. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* § 1874, at 731–32 (Da Capo Press 1970) (1833).

Blackstone's commentaries on the common law was unnecessary for the "rational man" to understand that the First Amendment does not protect speech that is without "good motives and for justifiable ends."<sup>14</sup> Justice Story was particularly fearful that "[m]en would . . . be obliged to resort to private vengeance, to make up for the deficiencies of the law" if the government was prohibited from providing a remedy for libel.<sup>15</sup> Given this undesirable consequence, it is not surprising that Justice Story interpreted the First Amendment to only protect speech that was "true" and spoken "with good motives and for justifiable ends."<sup>16</sup> Echoing the common law tradition, Justice Story believed that the First Amendment stood to eliminate the imposition of prior restraints on speech, but did not afford speakers the "freedom from censure for criminal matter."<sup>17</sup> Under this interpretation of the First Amendment, every speaker has the opportunity to speak but is also subject to government regulation if the speech is at odds with "the preservation of peace and good order."<sup>18</sup>

Judge Robert Bork argued for a similarly narrow interpretation of the First Amendment's protection of speech. In his article *Neutral Principles and Some First Amendment Problems*, Judge Bork wrote that "[g]overnment cannot function if anyone can say anything anywhere at any time . . . [a]nyone skilled in reading language should know that the words [of the First Amendment] are not necessarily absolute."<sup>19</sup> For example, the First Amendment does not protect those who incite "mutiny aboard a naval vessel engaged in action against an enemy."<sup>20</sup> In opposition to an absolutist interpretation of the First Amendment, Judge Bork argued that only "explicitly and predominately political speech" is protected.<sup>21</sup> Judge Bork came to this conclusion by reasoning that "[the framers] indicated a value when they said that speech in some sense was special and when they wrote a Constitution providing for representative democracy."<sup>22</sup> Thus, in his view, the unique object of the First Amendment is speech that "deal[s] explicitly, specifically and directly with politics and government" because only then does speech become "different from any other form of human activity," allowing the "principled judge [to] prefer [it] to other claimed freedoms."<sup>23</sup>

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14. *Id.* at 732–33.

15. *Id.* at 732.

16. *Id.* at 733.

17. *Id.* § 1878, at 736.

18. *Id.*

19. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 21 (1971).

20. *Id.*

21. *Id.* at 26.

22. *Id.*

23. *Id.*

Judge Bork also distinguished speech advocating lawless action from political speech that he believed to be the object of the First Amendment's protection of speech. According to Judge Bork, "political speech" is the "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country."<sup>24</sup> "Political speech is not any speech that concerns government and law," for speech "advocating forcible overthrow of the government or violation of law"<sup>25</sup> is an act subject to government regulation triggering the "managerial judgments governments must make" for purposes of national safety.<sup>26</sup> In other words, since speech "advocating forcible overthrow of the government" is indistinguishable from other activity in opposition to national safety subject to government regulation, it cannot contain the unique value embraced by the First Amendment's protection of the freedom of speech. Judge Bork even criticized Justice Brandeis's and Justice Holmes's view that the First Amendment protects speech advocating the overthrow of government<sup>27</sup> insofar as it would protect speech that has "no political value within a republican system of government."<sup>28</sup>

Thus, according to Leonard Levy, Justice Story, and Judge Bork, the First Amendment only protects speech that is generally favorable to a well-ordered society,<sup>29</sup> not that which is "immoral"<sup>30</sup> or without "justifiable ends."<sup>31</sup>

### B. *The Near-Absolutist Interpretation*

In *Free Speech in the United States*, Zechariah Chafee argued that the First Amendment was, in fact, a direct repudiation of the common law. Chafee scoffed at the idea that the First Amendment embodies the Blackstonian interpretation of the freedom of speech: "Not only is the Blackstonian interpretation of our free speech clauses inconsistent with eighteenth-century history . . . but it is contrary to modern decisions, thoroughly artificial, and wholly out of accord with a common-sense view of the relations of state and citizen."<sup>32</sup> Chafee also rejected an absolutist

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24. *Id.* at 29.

25. *Id.* at 29–30.

26. *Id.* at 25.

27. See discussion *infra* Part II.A.2.

28. Bork, *supra* note 19, at 33.

29. See *id.* at 21.

30. See LEVY, *supra* note 10, at 14.

31. STORY, *supra* note 13, at 733.

32. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 9–10 (Atheneum 1969) (1941).

interpretation of the First Amendment—“the belief of many agitators that the First Amendment renders unconstitutional any Act of Congress without exception ‘abridging the freedom of speech, or of the press,’ that all speech is free, and only action can be restrained and punished.”<sup>33</sup> Finding a middle way, Chafee asserted that the First Amendment protects speech “to the point where words will give rise to unlawful acts.”<sup>34</sup> He claimed this point cannot be defined with “precision,” but allows one “with certitude [to] declare that the First Amendment forbids the punishment of words merely for their injurious tendencies.”<sup>35</sup>

Chafee, in contrast to Judge Bork, praised Justice Holmes and Justice Brandeis for their understanding of the First Amendment’s protection of speech. First, Chafee commended Justice Holmes’s dissent in *Gitlow v. New York*<sup>36</sup> for providing those “who really want to preserve the great American traditions of freedom of speech” with a “weapon[.]” through his “clear and present danger” test.<sup>37</sup> In *Gitlow*, Justice Holmes asserted that the government may regulate speech only when “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 [the State] has a right to prevent.”<sup>38</sup> Like Chafee, Justice Holmes believed that, while the freedom of speech is not absolute, there needs to be a “clear and present danger” before speech is regulated.<sup>39</sup>

Similarly, Chafee applauded Justice Brandeis’s concurrence in *Whitney v. California*<sup>40</sup> as a statement of “the reasons for the traditional American policy of freedom of speech guaranteed by the Constitution.”<sup>41</sup> In *Whitney*, Charlotte Whitney was convicted under the California syndicalism act as one who “assisted in organizing the Communist Labor Party of California . . . to advocate, teach, aid or abet criminal syndicalism.”<sup>42</sup> Although he concurred in the decision upholding the conviction because Whitney failed to raise the constitutional issue,<sup>43</sup> Justice Brandeis was

unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the

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33. *Id.* at 8.

34. *Id.* at 35.

35. *Id.*

36. 268 U.S. 652 (1925).

37. CHAFEE, *supra* note 32, at 325.

38. *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting) (alteration in original).

39. *Id.* at 672.

40. 274 U.S. 357 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

41. CHAFEE, *supra* note 32, at 348.

42. *Whitney*, 274 U.S. at 366.

43. *Id.* at 380 (Brandeis, J., concurring).

desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment [i.e., the First Amendment as incorporated against the states via the Fourteenth Amendment].<sup>44</sup>

Chafee, like Justice Brandeis, claimed that “[i]f the words put into the Constitution by our forefathers are to mean anything, the danger arising from speech must not be checked by law unless it is imminent danger . . . [and] the evil apprehended [is] relatively serious.”<sup>45</sup> If the narrow common law interpretation was to prevail, Chafee warned that “criminal syndicalism laws . . . can easily be interpreted by juries in times of excitement to include peaceable advocates of industrial or political change.”<sup>46</sup> However, it is not clear that Chafee’s warning is not just as applicable to his near-absolutist interpretation of the First Amendment’s protection of speech—for example, “juries in times of excitement”<sup>47</sup> may also interpret criminal syndicalism laws to suppress “peaceable advocates of industrial or political change”<sup>48</sup> even if they must find that lawless activity was imminent.<sup>49</sup>

### C. *The Absolutist Interpretation*

Fearful of the possibility that juries may interpret criminal syndicalism laws to suppress peaceful protestors, an absolutist’s interpretation of the First Amendment extends the protection of speech to the line between speech and overt acts.<sup>50</sup> Contrary to the idea that an absolutist interpretation of the First Amendment is only held by “agitators,”<sup>51</sup> James Madison, the drafter of the First Amendment,<sup>52</sup> discussed the federal government’s absolute lack of authority to regulate speech in his *Report on the Virginia Resolutions*.<sup>53</sup> And more recently, William T. Mayton of Emory University’s School of Law restated Madison’s argument that the First Amendment served to affirm the fact that the federal government, as a

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44. *Id.* at 379.

45. CHAFEE, *supra* note 32, at 349.

46. *Id.* at 354.

47. *Id.*

48. *Id.*

49. See discussion *infra* Part II.B.2.

50. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 94–95 (1984).

51. CHAFEE, *supra* note 32, at 8.

52. See *Bill of Rights*, NATIONAL ARCHIVES, <https://www.archives.gov/legislative/features/bor> (last visited Sept. 8, 2017).

53. See James Madison, *Report on the Virginia Resolutions*, in 4 ELLIOT’S DEBATES 546, 569–76 (Jonathan Elliot ed., J.B. Lippincott Company 2d ed.) (rprt. 1941) (1836).

government of enumerated powers, was not specifically delegated the authority to suppress speech.<sup>54</sup>

In an illuminating discussion from James Madison's *Report on the Virginia Resolutions* in response to the Alien and Sedition Acts of 1798, Madison articulated his view that the First Amendment is an expression of the federal government's absolute lack of authority to regulate speech.<sup>55</sup> The section of the Sedition Act of 1798 at issue in the *Report* reads as follows:

And be it further enacted, that if any shall write, print, utter, or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, with an intent to defame the said government, or either house of the said Congress, or the President, or to bring them or either of them into contempt or disrepute, or to excite against them, or either or any of them, the hatred of the good people of the United States . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.<sup>56</sup>

To Madison, it was clear that this section of the Sedition Act necessarily abridged the freedom of the press protected by the First Amendment because criticizing public officials, or bringing them into "disrepute," is simply another way of referring to "the right of freely discussing public characters and measures."<sup>57</sup> Indeed, Madison asserted that

[w]ithout tracing farther the evidence on this subject, it would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution [to the federal government], as it originally stood, and that the amendment was intended as a positive and absolute reservation of it.<sup>58</sup>

Thus, according to Madison, any infringement on speech by the federal government is antithetical to the First Amendment.

Although Madison principally discussed the freedom of the press in the *Report on the Virginia Resolutions*, his argument is equally relevant to the freedom of speech.<sup>59</sup> In general, Madison reflected that since "so much pains were bestowed in enumerating other powers, and so many less

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54. See Mayton, *supra* note 50, at 94–95.

55. See Madison, *supra* note 53, at 569–76.

56. *Id.* at 573–74.

57. *Id.* at 575.

58. *Id.* at 572.

59. See *id.* at 577.

important powers are included in the enumeration,”<sup>60</sup> those powers not specifically given to the federal government were “clearly excluded.”<sup>61</sup> Also, in response to the fear that the government would not have any means to shield “itself against the libellous attacks,”<sup>62</sup> Madison stated that “the question does not turn either on the wisdom of the Constitution or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instrument.”<sup>63</sup> Thus, it is likely that Madison would have admonished Justice Story and Judge Bork for reading their fears into the actual meaning of the First Amendment.<sup>64</sup> Instead, Madison explained that those fears could be addressed by the states’ ability to pass laws prohibiting the libelous activity that was the principal concern of the Sedition Act since the powers not granted to the federal government were reserved “to the states or to the people.”<sup>65</sup>

To be sure, Leonard Levy argued that the *Report on the Virginia Resolutions* should not be used as evidence of the meaning of the First Amendment since it was politically motivated.<sup>66</sup> In arguments over the Alien and Sedition Acts, Levy claimed that commenters, like Madison, “argued from personal and party interests” and “were even less motivated by principle and precedent than usual.”<sup>67</sup> Nevertheless, Madison’s view of the First Amendment’s protection of speech in the *Report on the Virginia Resolutions* is still a unique and authoritative interpretation of the First Amendment from the drafter himself.

Indeed, William T. Mayton, in *Seditious Libel and the Lost Guarantee of Freedom of Expression*, summoned Madison’s argument from the *Report on the Virginia Resolutions* to explain how the modern trend of rationalizing the suppression of speech for its tendency to “bring about illegal acts” is antithetical to the First Amendment.<sup>68</sup> Like Madison, Mayton argued that the structure of the federal government is the true limit on the government’s power to regulate speech, and that the First Amendment is merely an affirmation that the federal government lacks the power to regulate speech.<sup>69</sup> As Mayton recounted the history of the ratification of the Constitution he quoted James Iredell who stated, during a ratification debate in North Carolina, that “[i]f the Congress should

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60. *Id.* at 573.

61. *Id.*

62. *Id.* at 572–73.

63. *Id.* at 573.

64. See discussion *supra* Part I.A.

65. Madison, *supra* note 53, at 561.

66. LEVY, *supra* note 10, at 246–47.

67. *Id.* at 246.

68. Mayton, *supra* note 50, at 91.

69. *Id.* at 94.

exercise any other power over the press than this [i.e., through copyright laws], they will do it without any warrant from this Constitution, and must answer for it as for any other act of tyranny.”<sup>70</sup> In other words, Iredell argued that since Congress was not given any specific power in Article I of the Constitution to regulate the press or speech, it has no authority to assert that power. Of course, Mayton’s structural argument for an absolutist interpretation of the First Amendment’s protection of speech makes the Amendment seem superfluous. Nevertheless, the First Amendment does serve to affirm the idea that the federal government may not regulate speech: “This amendment was meant to seal an understanding about speech already embodied in the text of the original Constitution and acknowledged and explained in the round of debate that accompanied it.”<sup>71</sup> Thus, under this view, the First Amendment reflects an understanding that the federal government may not regulate speech for any reason.

To that end, Mayton focused part of his argument on the Treason Clause as a source of power specifically delegated to the federal government susceptible to use as a means to suppress speech.<sup>72</sup> But, Mayton notes that the Treason Clause, which reads, “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court,”<sup>73</sup> explicitly requires an “overt act” as a necessary element of the offense.<sup>74</sup> Therefore, Mayton explains, “[t]he treason clause, as it acknowledges and defines government’s traditional power to punish conduct injurious to it, specifically limits this power to conduct involving ‘overt acts.’”<sup>75</sup> So, even for treason, speech alone is not sufficient for a conviction.

Mayton’s argument for an absolutist interpretation of the First Amendment’s protection of speech is also responsive to the argument that it would be absurd to totally restrain the government’s ability to regulate speech. Given that the First Amendment is merely an affirmation that the *federal* government does not have the power to regulate speech, it follows that state governments have the “authority to suppress speech harmful to person and property.”<sup>76</sup> Mayton discusses Madison’s *Report on the Virginia Resolutions* on this point:

Madison completed his exposition of the liberty of expression under the Constitution by acknowledging that it was not an

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70. *Id.* at 118.

71. *Id.* at 119.

72. *See id.* at 115–17.

73. U.S. CONST. art. III, § 3, cl. 1.

74. Mayton, *supra* note 50, at 115.

75. *Id.* at 94–95.

76. *Id.* at 94.

absolute one. A moment's consideration of such problems as conspiracy to murder or injury to reputation will convince most people that such liberty ought not to be absolute. But under the allocation of power between the state and federal governments, Madison explained, regulation of such speech was dispersed to the states, as part of their residual police power, and this dispersal, Madison wrote, "account[s] for the policy of binding the hands of the federal government."<sup>77</sup>

Thus, before the First Amendment was incorporated against the states, the saving grace of the absolutist interpretation was that the First Amendment applied only as a prohibition against the federal government, leaving state governments free to remedy the ills of unbridled speech. Though, as I will discuss in Part III, even after incorporation of the First Amendment against the states through the Fourteenth Amendment, a variation of the absolutist interpretation that recognizes that speech itself may be an act separate from its expressive component leaves room for government regulation of problems brought about by some forms of speech.

## II. REJECTING THE ABSOLUTIST INTERPRETATION: SUPPRESSING THE SPEECH OF POLITICAL MINORITIES

As Mayton argued in his article, in recent times, governments have rationalized the suppression of speech when it has a tendency to bring about unlawful activity.<sup>78</sup> Litigation over state legislation that prohibits the advocacy of lawless action frequently splits the Court because there is a real tension between the legitimate fear of lawless action and the reality that the state is necessarily seeking to suppress speech even before the lawless action (i.e., an overt act) has occurred.<sup>79</sup> In an effort to resolve this tension, the Supreme Court has settled on allowing state suppression of speech only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>80</sup>

Interestingly though, throughout the history of the United States, it is political minorities that have had to pay the price, through suppression of their speech, to preserve public order.<sup>81</sup> Thus, instead of trying to preserve public order, it appears that courts and lawmakers who reject the absolutist interpretation of the First Amendment's protection of speech are actually

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77. *Id.* at 128 (alteration in original).

78. *Id.* at 91.

79. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam).

80. *Id.* at 447.

81. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 371 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Gitlow v. New York*, 268 U.S. 652, 669 (1925).

manipulating the First Amendment to silence the speech of dissidents. In this Part, I will show how the Supreme Court and lawmakers favoring nonabsolutist interpretations of the First Amendment's protection of speech in the name of public order have been, and will continue to be, hostile to the speech of political minorities.<sup>82</sup>

A. *The Narrow Common Law Interpretation and Suppressing the Speech of Political Minorities*

Through the following examples, I will show how the narrow common law interpretation of the First Amendment's protection of speech justified the suppression of the speech of political minorities. First, I will discuss the Alien and Sedition Acts of 1798 and their impact on the Democratic-Republicans. Then, I will discuss two Supreme Court decisions from the 1920s that upheld criminal convictions of communist and socialist party members.

1. *The Alien and Sedition Acts of 1798*

Arguably, the Alien and Sedition Acts of 1798<sup>83</sup> were used as tools by the Federalists, led by John Adams, to suppress the political actions of the Democratic-Republicans, led by Thomas Jefferson.<sup>84</sup> To reconcile the Sedition Act with the First Amendment, an appeal was made to "the usual argument that the [First Amendment] was merely declaratory of the common law,"<sup>85</sup> meaning that the freedom of speech afforded to the citizens of the United States was the same as it was at common law as discussed in Part I.A. Thus, the Sedition Act, along with a conveniently narrow interpretation of the First Amendment's protection of speech, was leveraged by the Federalists against the Democratic-Republicans to provide a means of criminal prosecution for political dissent.<sup>86</sup> Although "Jefferson's wholesale pardoning as his party swept into power[] limited the direct injury of the sedition act,"<sup>87</sup> the debates and circumstances surrounding the implementation of the Alien and Sedition Acts demonstrate how political minorities may be suppressed through nonabsolutist

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82. It is beyond the scope of this Note to determine whether the hostility to the speech of political minorities is intentional. Regardless of the intention, I will argue that the prevailing interpretations of the First Amendment's protection of speech are harmful to political minorities.

83. For part of the text of the Sedition Act, see Madison, *supra* note 53, at 573–74.

84. See Mayton, *supra* note 50, at 123.

85. LEVY, *supra* note 10, at 211.

86. Mayton, *supra* note 50, at 124.

87. *Id.*

interpretations of the First Amendment under the guise of protecting the public order.

## 2. *The Red Scare: Gitlow and Whitney*

During the 1920s, the Supreme Court adopted the narrow common law interpretation of the First Amendment when considering the political action of the socialist and communist parties.<sup>88</sup> While it is true that these parties had radical ideas with respect to the means of legitimate political action,<sup>89</sup> it is also true that they were political parties that represented a minority of the population and actively engaged in the political processes of the United States.<sup>90</sup> But instead of affording these political parties open avenues to participate in public debate, states prosecuted members of the parties for advocating their ideas under criminal syndicalism laws because they feared public disorder.<sup>91</sup>

For example, in *Gitlow v. New York*, the Court upheld Benjamin Gitlow's conviction for circulating socialist writings "advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means."<sup>92</sup> Indeed, the trial court found that Gitlow was "a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of 'moderate Socialism,'" and that he was "responsible for [the] circulation" of the papers that formed the basis of the conviction even though "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto."<sup>93</sup> Although the writings that Gitlow circulated did call for "conquering and destroying the parliamentary state and establishing in its place, through a 'revolutionary dictatorship of the proletariat', the system of Communist Socialism,"<sup>94</sup> Gitlow was merely disseminating the ideology of a minority political party. As the Court notes, Gitlow was attempting to persuade the Socialist Party to adopt the principles of the Left Wing through these writings.<sup>95</sup>

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88. See *Whitney v. California*, 274 U.S. 357, 371 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

89. See *Gitlow*, 268 U.S. at 656–59.

90. See, e.g., *1924 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1924&minper=0&f=0&off=0&elect=0> (last visited Sept. 8, 2017); *1928 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1928&minper=0&f=0&off=0&elect=0> (last visited Sept. 8, 2017).

91. See generally *Whitney*, 274 U.S. at 359; *Gitlow*, 268 U.S. at 654–55.

92. *Gitlow*, 268 U.S. at 655, 672.

93. *Id.* at 655–56.

94. *Id.* at 658.

95. *Id.* at 656.

In response to Gitlow's argument that his conviction violated the First Amendment as incorporated against the states by the Fourteenth Amendment, the Court held that, "a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means"<sup>96</sup> because

[i]t is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.<sup>97</sup>

Thus, in congruence with the narrow common law interpretation, the Court found that mere "utterances" by a political minority deemed to be dangerous to the government were subject to regulation.

Likewise, in *Whitney v. California*,<sup>98</sup> the Supreme Court affirmed a conviction under a state criminal syndicalism law based on the narrow common law interpretation of the First Amendment.<sup>99</sup> As a member of the "Communist Labor Party," the trial court found that Charlotte Whitney, the defendant, had "assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism."<sup>100</sup> The basis for this finding was that Whitney had attended a "convention held in Oakland in November, 1919, for the purpose of organizing a California branch of the Communist Labor Party," and "took an active part in its proceedings."<sup>101</sup> The majority stated that a conviction under these circumstances was a legitimate use of state power, notwithstanding the "freedom of speech," because "a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means."<sup>102</sup>

It is important to note that in both of these cases there were no accusations that any actual harm was done by the communist or socialist parties. Instead, both Whitney and Gitlow were prosecuted under ostensibly

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96. *Id.* at 667.

97. *Id.* at 666.

98. 274 U.S. 357, 357 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

99. *Id.* at 371–72.

100. *Id.* at 366.

101. *Id.* at 364.

102. *Id.* at 371.

prophylactic statutes in order to prevent unrest that might have resulted from the dissemination of the ideas of their respective political parties. In effect, the Court twice gave its stamp of approval to the silencing of political minorities through its adoption of the narrow common law interpretation of the First Amendment's protection of speech in order to preserve public order.

Likely noticing how unsettling these results were to the idea of a robust representative democracy, Justice Holmes and Justice Brandeis dissented from the majority's decision in *Gitlow*.<sup>103</sup> While being careful not to extend the First Amendment's protection of speech to the line between speech and overt acts, Justice Holmes suggested that the Court adopt the standard pronounced in *Schenck v. United States*, that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent."<sup>104</sup> According to Justice Holmes, this standard would afford political minorities, in this case the Left Wing Section of the Socialist Party, the appropriate protection from state censorship necessary to persuade others: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>105</sup>

Likewise, in a separate concurring opinion in *Whitney*, Justice Brandeis felt compelled to communicate his displeasure with the rationale of the majority as antithetical to the American way. Justice Brandeis explained:

[Those who won our independence] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to

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103. *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

104. *Id.* at 672–73 (second alteration in original) (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

105. *Id.* at 673.

discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.<sup>106</sup>

Despite this grandiose statement of the liberty embodied by the First Amendment’s protection of speech, Justice Brandeis voted to affirm the conviction because Whitney did not raise the constitutional issue.<sup>107</sup> Though, as opposed to the majority, Justice Brandeis believed that “utterances inimical to the public welfare”<sup>108</sup> are within the protection of the First Amendment because they are a means of “assembling with a political party.”<sup>109</sup> Like it was for Justice Holmes in *Gitlow*, it was clear to Justice Brandeis that the Court’s interpretation of the First Amendment’s protection of speech had the direct effect of suppressing the speech of a political minority.

*B. Brandenburg and the Insufficient Protection Afforded to Speech of Political Minorities by the Near-Absolutist Interpretation*

In *Brandenburg*, the Court reviewed the conviction of Clarence Brandenburg, a leader of the Ku Klux Klan, under Ohio’s criminal syndicalism statute for televising a rally calling for “revengeance” against the government and in which “derogatory” statements were made about different ethnic groups.<sup>110</sup> Part of the rally included a speech that called for a march “on Congress July the Fourth, four hundred thousand strong,” apparently to protest the continued suppression of white people by “our President, our Congress, [and] our Supreme Court.”<sup>111</sup> Thus, like the actions of the socialist and communist parties in the 1920s, the KKK, in this specific case, was merely expressing its discontent with the status quo through violent rhetoric—there were no accusations of actual violence.

In deciding that the conviction of the KKK leader should not be affirmed, the Court adopted the near-absolutist interpretation of the First Amendment’s protection of speech. The majority stated that

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106. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

107. *Id.* at 379–80.

108. *Id.* at 371 (majority opinion).

109. *See id.* at 379 (Brandeis, J., concurring).

110. *Brandenburg v. Ohio*, 395 U.S. 444, 444–47 (1969) (per curiam).

111. *Id.* at 446.

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe 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.<sup>112</sup>

Although it rejected the idea that mere “utterances inimical to the public welfare”<sup>113</sup> are without the protection of the First Amendment, the majority did not hold that an overt act is required before government regulation is legitimate.

Thus, the Supreme Court has not yet adopted an absolutist interpretation of the First Amendment’s protection of speech. Justice Douglas noted in his concurrence that if the majority had been faithful to the “philosophy” of Justice Holmes’s dissent in *Gitlow*—the idea that “[e]very idea is an incitement” and that “[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result” and that “the only meaning of free speech is that [advocates] should be given their chance”<sup>114</sup>—then “the line between what is permissible and not subject to control and what may be made impermissible and subject to regulation [should be] the line between ideas and overt acts.”<sup>115</sup> But the majority did not adopt Justice Douglas’s absolutist interpretation of the First Amendment’s protection of speech. Instead, the majority struck down the conviction on the basis that Ohio’s criminal syndicalism statute was overbroad insofar as it prohibited the mere advocacy of lawless action, as “[n]either the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.”<sup>116</sup> Consequently, there is still room for the speech of a political minority to be suppressed through nonabsolutist interpretations of the First Amendment. Indeed, under the *Brandenburg* doctrine, speakers that are found to have incited “imminent lawless action” are subject to government regulation.<sup>117</sup>

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112. *Id.* at 447.

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

114. *Brandenburg*, 395 U.S. at 452 (Douglas, J., concurring (citing *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting))).

115. *Id.* at 456 (Douglas, J., concurring).

116. *Id.* at 448–49 (per curiam opinion).

117. *Id.* at 447.

1. *Brandenburg: An Opportunity for Government Suppression of Speech*

By failing to fully embrace an absolutist interpretation of the First Amendment's protection of speech, the *Brandenburg* doctrine leaves room for the government to suppress the speech of political minorities through criminal syndicalism laws. Despite the *Brandenburg* doctrine's purported broadening of the First Amendment's protection of speech, it is not obvious why those speaking out against the government are afforded greater protection than they were under *Gitlow* and *Whitney*. In fact, in Madison's *Report on the Virginia Resolutions*, Madison argued that there is no principled difference between a regulation of speech that excites and a regulation of normal discussion:

To prohibit the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct.<sup>118</sup>

If one applies Madison's argument to the advocacy of lawless action, the shortcomings of the *Brandenburg* doctrine become apparent—if the incitement of imminent lawless action may be regulated, then the discussion of lawless action may be regulated as well. This slippery slope argument seems to be well-rebutted by the fact that the *Brandenburg* doctrine makes a distinction between the legitimate regulation of incitement to imminent lawless action and the illegitimate regulation of mere advocacy of lawless action.<sup>119</sup> But the artificiality of this distinction is easily exposed.

By not extending the limit of the First Amendment's protection of speech to the point of overt acts, "the state . . . gains the power to make relatively subjective and unconfined assessments about mental events."<sup>120</sup> In theory, a prosecutor may still successfully prosecute speakers that merely advocate lawless action by arguing that the speech was directed towards inciting imminent lawless action—that is, under the *Brandenburg* doctrine, instead of arguing that the speaker was advocating for lawless

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118. Madison, *supra* note 53, at 575.

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

120. Mayton, *supra* note 50, at 112.

action, the prosecutor simply has to argue that the speaker intended to incite imminent lawless action. As a result, the *Brandenburg* doctrine could be used to suppress the speech that it was intended to protect. Indeed, a reversion back to the narrow common law interpretation of the First Amendment's protection of speech under *Gitlow* and *Whitney* does not even have to be explicitly stated in future Supreme Court decisions—in effect, the reversion may be accomplished by more precise legislation and jury instructions that prohibit speech that is intended to incite imminent lawless action. To demonstrate this, I will first argue that simple semantic alterations to Ohio's criminal syndicalism law and the jury instructions could have changed the result in *Brandenburg*. Then, I will show how the #BlackLivesMatter movement could be prosecuted under the *Brandenburg* doctrine.

## 2. *Brandenburg's Illusory Protection of Speech*

Even though the *Brandenburg* Court purported to expand the protection of speech under the First Amendment beyond the holdings of *Gitlow* and *Whitney*, the expansion is arguably a rhetorical embellishment. The conviction in *Brandenburg* was overturned because Ohio's Criminal Syndicalism statute was overbroad—its fault was that it prohibited “mere advocacy.”<sup>121</sup> Instead of finding that the speech of the KKK leader was protected by the First Amendment, the Court sidestepped that more fact-specific question and, implicitly, left open the question as to whether the speaker's conviction might have been upheld if the statute or jury instructions were in congruence with the Court's incitement to imminent lawless action rule.<sup>122</sup> The Court noted that “[n]either the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.”<sup>123</sup> Instead of reprimanding Ohio for its suppression of speech, it is as if the Court provided Ohio with instructions for suppressing the speech of political minorities—all Ohio must do is refine its statute to more specifically regulate the incitement of imminent lawless action and instruct its juries to find that such incitement was present. Presumably, if these formalities are met, then a conviction under its criminal syndicalism law will be upheld. Accordingly, there is no reason to believe that the *Brandenburg* doctrine could not be used to suppress the speech of political minorities.

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121. *Brandenburg*, 395 U.S. at 448–49.

122. *Id.*

123. *Id.* at 448–49.

### 3. *Brandenburg Applied to #BlackLivesMatter*

The illusory protection provided to the speech of political minorities by the *Brandenburg* doctrine is apparent when applied to the #BlackLivesMatter movement. Controversial killings of black people by the police over the past few years have given rise to the #BlackLivesMatter movement in the United States.<sup>124</sup> The movement is most visible in the aftermath of these killings, especially when tensions within communities break into riotous settings that attract media attention.<sup>125</sup> Many times #BlackLivesMatter protestors and sympathizers are portrayed by the media as instigators of violence through the linking of provocative slogans, hashtags, and chants to illegal activity that occurs during some protests.<sup>126</sup>

In response to systemic racism, #BlackLivesMatter protestors have used rhetoric that is arguably “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>127</sup> Be it a street chant, a hashtag, or a sideline heckle at a protest, a case can be made that #BlackLivesMatter rhetoric contributes to the atmosphere in which lawless activity is threatened and carried out. For example, just seven days after protestors in New York City chanted “[w]hat do we want? Dead cops. When do we want them? Now,”<sup>128</sup> New York City Police Department officers Rafael Ramos and Wenjian Liu were killed.<sup>129</sup> Of course, it may be difficult for a prosecutor to prove a causal link between these events, but should a constitutional right like the freedom of speech be subject to the creativity and persuasiveness of a prosecutor?

Likewise, proving causation is less difficult when similar rhetoric is directed at an ongoing riot. For example, in Charlotte, protestors chanted

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124. See *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Sept. 8, 2017); *A HerStory of the #BlackLivesMatter Movement*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/herstory/> (last visited Sept. 8, 2017).

125. See, e.g., Katherine Peralta, Anna Douglas, & Steve Harrison, *Protestors, Chants and Riot Police: Not a Typical Panthers Game Day*, CHARLOTTE OBSERVER (Sept. 25, 2016, 10:01 AM), <http://www.charlotteobserver.com/news/local/article104074816.html>.

126. See, e.g., Rich Lowry, *Anti-Police Protestors Cheer a Cop Getting Hurt. Are We Surprised?*, NAT'L REV.: THE CORNER (July 11, 2016, 1:54 PM), <http://www.nationalreview.com/corner/437671/anti-police-protesters-st-paul-cheer-hurting-cops>.

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

128. *#Blacklivesmatter Chants for Dead Cops*, YOUTUBE (July 8, 2016), [https://www.youtube.com/watch?v=hqQXmnMr\\_w8](https://www.youtube.com/watch?v=hqQXmnMr_w8); Warner Todd Huston, *Al Sharpton Leads March in DC as NYC Protestors Chant: 'What Do We Want? Dead Cops!'*, BREITBART (Dec. 13, 2014), <http://www.breitbart.com/big-government/2014/12/13/al-sharpton-leads-thousands-in-saturday-march-on-washington-dc/>.

129. Benjamin Mueller & Al Baker, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide*, N.Y. TIMES (Dec. 20, 2014), [http://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html?\\_r=0](http://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html?_r=0).

“[r]esist the police” during a time of great unrest.<sup>130</sup> To convict these protestors under the *Brandenburg* doctrine, the prosecutor must simply collect evidence to show that the chants incited a rioter to resist the police since resisting the police is a crime (i.e., a lawless action) in North Carolina.<sup>131</sup> Additionally, other protestors have even encouraged the physical assault of a police officer.<sup>132</sup> While it is likely that #BlackLivesMatter protestors and sympathizers operate under the assumption that their conduct is protected by the First Amendment, in reality, their protections are probably less stable given that a conviction may be upheld if a prosecutor can convince a jury that the protestors’ speech was intended to incite imminent lawless action.

### III. A VARIATION OF THE ABSOLUTIST INTERPRETATION AND THE PROTECTION OF POLITICAL MINORITIES

A more robust and liberty-maximizing interpretation of the First Amendment’s protection of speech would be to protect all speech—including both advocacy and incitement—short of an overt act (the absolutist interpretation). As Justice Douglas noted in his concurrence in *Brandenburg*, “[t]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.”<sup>133</sup> The absolutist interpretation also need not lead to societal ills such as libel and mutiny.<sup>134</sup> An absolutist interpretation that accounts for the effects of speech independent of its expressive component allows for the regulation of problems such as libel and mutiny without suppressing the speech of political minorities through the regulation of incitement.

The fear that particular societal ills would become irremediable under an absolutist interpretation is unfounded.<sup>135</sup> Even though Mayton and

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130. Robert MacMillan & Mike Blake, *Charlotte Marchers Demand Police Release Shooting Tapes*, REUTERS (Sept. 21, 2016), <http://www.reuters.com/article/us-usa-police-idUSKCN11R1GS>; see also Tonya Maxwell & Melanie Eversley, *N.C. Gov. Declares State of Emergency Following Violent Charlotte Protests*, USA TODAY (Sept. 22, 2016), <http://www.usatoday.com/story/news/nation/2016/09/21/charlotte-police-man-killed-officers-holding-gun-not-book/90774106/>.

131. See N.C. GEN. STAT. ANN. § 14-223 (LexisNexis 2015) (North Carolina criminal law prohibiting the obstruction of a police officer).

132. Lowry, *supra* note 126.

133. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring); see also *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776–77 (1942) (Douglas, J., concurring) (separating the expressive aspect of labor picketing as protected speech from the patrolling aspect of labor picketing that is an act subject to regulation).

134. See Bork, *supra* note 19, at 21; LEVY, *supra* note 10, at 14 (quoting SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 112–13 (New York 1836)).

135. See LEVY, *supra* note 10, at 14 (quoting SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 112–13 (New York 1836)).

Madison's absolutist interpretation of the First Amendment does not consider regulation of societal ills such as libel to be legitimate,<sup>136</sup> a variation of the absolutist interpretation recognizes that words themselves may be acts subject to criminal or civil penalties. The idea that words themselves may be acts is not novel. Indeed, an exception to the definition of hearsay under the Federal Rules of Evidence is "verbal acts."<sup>137</sup> For example, speech forming a contract would not be excluded as hearsay at trial because the speech's significance "lies solely in the fact that it was made" not whether the speech is true.<sup>138</sup> Put differently, the words spoken are collateral to their independent legal effect—e.g., the formation of a contract. Likewise, words themselves may constitute a mutinous act or be damaging to a person's reputation; therefore, if those speakers are then subject to criminal or civil penalties, it would be due to the direct effect of the verbal act, not the expression of an idea or viewpoint.

Statements that incite others to action are not verbal acts like statements that are mutinous or libelous. Consider libel: the libelous statement itself damages a person's reputation. Also consider a mutinous statement: the mutinous statement itself undermines the authority of a captain. In both situations, the harm being remedied—the damaging of one's reputation or the undermining of the captain's authority—occurs as a direct result of and simultaneously with the making of the statement. In contrast, regulations that prohibit statements that incite others to action are prophylactic. The harm targeted by the regulation—that is, the harm which results from the action that the speaker is inciting—has not yet occurred; one may follow the speaker's call to action or not. Thus, when the incitement of imminent lawless action is prohibited, it is merely the expression of an idea that is regulated rather than the perpetration of a particular harm. Accordingly, insofar as incitement is not a "verbal act," the absolutist interpretation allows for the regulation of libel and mutiny, but not incitement.

The absolutist interpretation would also not prevent prosecutions for unlawful actions committed by those incited to action. For example, the protestors in Charlotte merely chanting "resist the police"<sup>139</sup> would not be subject to criminal penalties, while the protestors that actually resisted the police would be subject to criminal penalties.<sup>140</sup>

Thus, the absolutist interpretation not only maximizes the ability of political minorities to express their viewpoints without the fear of

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136. See *supra* Part I.C.

137. FED. R. EVID. 801 advisory committee's note to the 1972 proposed rules.

138. *Id.*

139. See MacMillan, *supra* note 130.

140. See N.C. GEN. STAT. ANN. § 14-223 (LexisNexis 2015).

prosecution, but it also need not lead to societal problems such as libel, mutiny, and unlawful activity during protests. Ironically, an absolutist interpretation that recognizes the legitimacy of regulating the effects of verbal acts is similar to the narrow common law interpretation insofar as it is hostile to prior restraints.<sup>141</sup> Both approaches to the First Amendment's protection of speech allow for all speech and only regulate the speech if it causes particular harms. The significant difference between the approaches with respect to political minorities is that the narrow common law approach allows for the regulation of speech that is merely immoral whereas the absolutist interpretation only allows for regulation of speech if it is a verbal act as discussed above.<sup>142</sup> But this difference is key to maximizing the ability of political minorities to freely express their ideas while minimizing societal disorder. Under the absolutist interpretation, the prosecution of political minorities' speech would not turn on the illusory distinction between advocacy and incitement, but rather on whether the speech itself is an overt act that directly harms another.<sup>143</sup> As a result, political minorities would no longer be subject to prosecution for speech categorized as "incitement" by those in power.

### CONCLUSION

This Note has attempted to make clear that nonabsolutist interpretations of the First Amendment's protection of speech have served to suppress the speech of political minorities and that the *Brandenburg* doctrine could be used to do the same. Whether the First Amendment is interpreted to protect speech until there is a "clear and present danger"<sup>144</sup> or until it "[incites] imminent lawless action,"<sup>145</sup> the truth is that either approach allows the government to suppress the speech of political minorities. This Note has also suggested that an interpretation of the First Amendment that protects all speech short of an overt act is the best way to maximize the freedom of speech for political minorities.

While the *Brandenburg* doctrine does make a distinction between the legitimate regulation of incitement to imminent lawless action and the illegitimate regulation of mere advocacy of lawless action, this Note has argued that such a distinction is illusory insofar as the government need only convince a jury that the speech in any particular case was incitement

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141. See LEVY, *supra* note 10, at 14 (quoting SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 112–13 (New York 1836)).

142. See *id.*

143. But see CHAFEE, *supra* note 32, at 35 (still allowing for regulation of speech that "will give rise to unlawful acts" and not just speech that is itself an unlawful act such as libel or mutiny).

144. *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

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

rather than mere advocacy. Certainly, such convictions may be reversed on appeal if a judge believes that the speech was advocacy and not incitement, but the inquiry remains just as subjective as it was at trial. Accordingly, under the *Brandenburg* doctrine, all that is necessary to suppress the speech of a political minority is a common belief amongst jurors and judges that the speech is incitement. Even if convictions this Note warns about have yet to occur, it should be unsettling to a proponent of individual liberty that one's freedom of speech may be defined by the prevailing beliefs of the day.

Therefore, groups protesting the government, like #BlackLivesMatter, should be wary of modern First Amendment jurisprudence until all speech short of an overt act is protected. The value of requiring an overt act to be committed by the speaker before his or her speech may be regulated is that it guards against the unwarranted suppression of speech by the government through a definition of incitement to lawless action that is inclusive of all dissident speech. Indeed, the *Brandenburg* doctrine, falling just short of an absolutist interpretation, subjects the First Amendment's protection of speech to the whims of popular opinion, leaving a vulnerable principle ready to be distorted by judges with an inclination to suppress the speech of political minorities by characterizing it as incitement.

As Justice Black eloquently stated, "If we are to pass on that great heritage of freedom, we must return to the original language of the Bill of Rights. We must not be afraid to be free."<sup>146</sup> Disturbingly, it seems that the fear of a full embrace of the "original language of the Bill of Rights" referred to by Justice Black<sup>147</sup> is the fear of influential political minority groups. Indeed, nonabsolutist interpretations of the First Amendment's protection of speech allow for the suppression of the viewpoints of political minorities. Thus, it is time to embrace an absolutist interpretation of the First Amendment's protection of speech in order to prevent the fear of the majority from becoming the censorship of the minority.

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146. *In re Anastaplo*, 366 U.S. 82, 116 (1961) (Black, J., dissenting).

147. *Id.*

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