

## CHAPTER 1

### Free Speech, But ...

**T**HE DEFENSE IN FORMER PRESIDENT Donald Trump's second impeachment relied in part on the assertion that his speech at a rally on January 6, 2021, was protected by the First Amendment.<sup>1</sup> Trump spoke for more than an hour to a crowd of thousands outside the White House, at a rally that he himself had been promoting for months, one that he had promised would be "wild." Trump repeated the lie that the 2020 presidential election had been stolen from him. He used the word "fight" twenty separate times. And he promised his supporters that he would march with them down Pennsylvania Avenue to the Capitol to "stop the steal."

When he finished speaking, Trump did not join the 10,000 who marched to the Capitol. And while the world watched in horror, hundreds of them broke into the Capitol building, where they attacked police, ransacked offices, and roamed the hallways looking for lawmakers to punish. They erected a makeshift gallows on the Capitol grounds. Some rioters shouted "Hang Mike Pence" as they marched through the building, a response to Trump's insistence that the vice president had been too weak to stop Congress from counting the Electoral College ballots that would confirm Joe Biden as president.

The events of January 6 have been called a riot, an insurrection, an act of domestic terrorism, or, by some of Trump's more ardent supporters keen to erase the memory, a peaceful demonstration that got a little out of hand. In the weeks and months that followed, more than 725 were charged with offenses ranging from trespass and resisting arrest to assault with a deadly weapon to seditious conspiracy, a crime which

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carries a maximum penalty of twenty years in prison.<sup>†</sup> The Capitol invasion left 7 dead, including 3 police officers, 140 officers injured, some seriously, and \$1.5 million in property damage.<sup>2</sup> And it left this question: Did Donald Trump incite the riot that day, or were his words protected by the Constitution?

It has become common in the past few years for the American conservatives to reject any criticism of their words by invoking their freedom of speech. And they're quick to label any criticism of their positions "cancel culture," an attempt to deprive them of their First Amendment speech protections. The far right similarly rejects firearms regulations as violations of their Second Amendment right to keep and bear arms, as long as the guns in question belong to conservatives and not progressives. They defended Trump's words as peaceful and they rejected the notion that the rioters were armed, or even rioting. Although police confiscated a significant number of guns and other weapons from the invaders of the Capitol, and millions watched the riot unfold on TV, Senator Ron Johnson, of Wisconsin, told a Milwaukee radio interviewer, "This didn't seem like an armed insurrection to me."<sup>3</sup> Representative Andrew S. Clyde, of Georgia, went further, calling the Capitol riot a "normal tourist visit."<sup>4</sup> Normalizing the events still further by referring to them as constitutionally protected free speech, in February, 2022, the Republican National Committee declared the January 6 insurrectionists "ordinary citizens engaged in legitimate political discourse."<sup>5</sup>

District of Columbia law makes clear that the rioters' weapons did not have Second Amendment protection. But were Trump's words constitutionally protected speech? The relevant part of the First Amendment states, "Congress shall make no law ... abridging the freedom of speech." It turns out that "no" in the Constitution doesn't always mean "no." As we'll see in the chapters that follow, fighting words and threats have never been

<sup>†</sup> The rarely used but serious charge of seditious conspiracy is detailed in 18 US Code § 2384: "If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both."

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protected speech. And for much of American history, political speech wasn't guaranteed protection either. Criminal or seditious conspiracy are not protected. Neither is incitement to riot. The unanswered question hanging over the events of January 6 is this: Did Trump's words incite the violent acts that followed? And if they did, can he be held accountable?

Freedom of speech is never absolute. Justice Oliver Wendell Holmes said in *Schenck v. United States* (1919), the Supreme Court's first free-speech decision, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." We'll look at *Schenck* in detail in Chapter 3, but in affirming the convictions of two First World War draft protestors, the *Schenck* court ruled that speech posing "a clear and present danger" to the nation can't hide behind the First Amendment.

In Trump's second impeachment, the former president's lawyers invoked two different First Amendment decisions: *Watts v. United States* (1969) and *Brandenburg v. Ohio* (1969). We'll examine both of these cases in detail later on as well, but neither case furnishes a good defense for the former president. Robert Watts, referring to then-President Lyndon Johnson, said, "If they ever make me carry a rifle the first man I want to get in my sights is LBJ." Watts wasn't about to shoot anyone – people laughed as he aimed an imaginary rifle at an imaginary Johnson. The US Supreme Court found that Watts' words, though hyperbolic and perhaps ill-chosen, posed no danger to the president. They did not cause a riot. They did not encourage anyone to harm the president, or anyone else. Instead, the Court declared that what Watts said was protected political speech, a peaceful protest against what he considered an unjust war.

*Brandenburg* also fails to protect Trump's words. Ku Klux Klan member Clarence Brandenburg invited a local TV reporter to film a "rally" of a dozen men wearing sheets in a remote Ohio field, where they burned a cross and made threats against Jews and Blacks. But the Supreme Court reversed Brandenburg's conviction because his words, though hateful, were spoken to a small group in a remote location, where they could have no broader impact. They were not likely to produce what the Court termed "imminent lawless action."

The words of Watts and Brandenburg were protected because their tiny audiences did not and could not act on what the speakers said. In

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contrast, Trump spoke to a crowd of thousands primed for action. Many of the listeners, by their own testimony, were waiting for his command to attack an unprotected Capitol. Trump urged them to fight and told them to march. Although his lawyers insisted that Trump meant “fight” in a figurative sense, many in the crowd literally marched and they literally fought. It was textbook imminent lawless action. Trump’s lawyers insisted that his speech was hyperbolic. He didn’t mean for anyone to break the law. But Senate minority leader Mitch McConnell, a long-time Trump supporter, disagreed. McConnell, who had been trapped inside the Capitol by the mob, acknowledged that Trump’s words were practically and morally responsible for the Capitol riot.<sup>6</sup>

We’ll consider a speaker’s intent in more detail when we look at threatening speech in Chapter 5, but for now there is lots of evidence suggesting Trump’s state of mind. There is his long record of violent rhetoric in his private conversations, his public speeches, and his Twitter posts (after January 6, the social media platform blocked him). He never seemed to care when his words caused chaos or damage to individuals, to financial markets, to America’s trading partners, or the nation’s allies around the world, even to Americans trying to cope with the Covid-19 pandemic. At various times he told his audiences to rough up protesters and lock up his opponents. He suggested drinking bleach or trying unproven drugs to fight the coronavirus. Some people followed those instructions. And for months he had promulgated the “big lie,” urging his followers to reclaim an election he insisted had been stolen from him.

All of this led up to Trump’s rally in Washington on January 6 to “stop the steal,” and to the riot that followed. In light of the Supreme Court’s rejection, in *Terminiello v. Chicago* (1948), of the heckler’s veto – banning speech because of fears that the audience might respond violently – it would appear that Trump’s speech that day could not have been prevented by authorities who feared that the crowd would overreact.<sup>7</sup> But even if the president’s words, and those of his then-attorney Rudy Giuliani and other speakers that day, were constitutionally protected, the police should have been prepared for the lawlessness that followed.

Trump himself did not engage in violence, even if he egged others on. After promising rally-goers that he would accompany them to the Capitol, he returned to the White House. There his reported actions

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further revealed his state of mind.<sup>8</sup> He was said to be delighted watching the Capitol riot on TV. He did nothing to rein in his followers, despite pleas from advisors that he intervene. He ignored warnings of danger and urgent requests for help from political allies like Senator Tommy Tuberville and House minority leader Kevin McCarthy, who, like Mitch McConnell and Vice President Pence, were trapped in the Capitol. He even encouraged the mob to go after Pence. Hours later, as police began to get things under control, Trump posted a video asking rioters to go home. But even then he repeated his charges of a stolen election and told the rioters that he loved them. In the days that followed, rioters defended their actions by saying that they were only following Trump's orders. All this suggests his intent.

As the Supreme Court acknowledged in *Watts*, political speech can be raw, rowdy, belligerent, in your face. As long as it remains speech, it enjoys First Amendment protection. But once speech is accompanied by lawless action, it is no longer protected. And in any case, freedom to speak doesn't protect speakers from the consequences of their speech. When Trump's words were directly followed by rampage, unlawful entry, property damage, injury, and death, there seems no way to give those words First Amendment cover. And the question remains for those who still insist Trump was simply exercising his right to free speech like any other American, shouldn't a president know better?

The First Amendment guarantees the right to speak. It also guarantees the right of the people *peaceably* to assemble to petition the government to redress their grievances. But the right to speak and protest doesn't mean you can stop the members of Congress from carrying out their constitutionally mandated duty to count the Electoral College ballots on January 6. Similarly, the right to keep and bear arms doesn't mean you can violate local gun laws and it certainly doesn't mean you can use weapons to assault or threaten other people.

It is a free country, to be sure, but experience and the law show that we can't always say what we want. That doesn't make free speech a myth, but it shows that the freedom to speak is never absolute. As the events of January 6 reveal, wrapping yourself in the First Amendment doesn't make what you said protected speech. And wrapping yourself in the Second Amendment doesn't mean you can strap on your guns to storm the

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Capitol. Nor does it mean that you can use your right to speak and bear arms in order to silence someone else.

Two forces threaten free speech in America: people who assert their free speech rights in order to suppress the speech of others; and people who exercise their right to bear arms to silence whoever they do not like. Both forces invoke the Constitution to drown out the voices of the poor and the powerless, the very minorities whose rights the Constitution would normally guarantee. One claims that the First Amendment guarantees them a speech platform which they can use to silence their critics. The other insists that the Second Amendment guarantees their right to bring a gun to the state legislature or to a political demonstration, or even to a voting booth to silence anyone with whom they disagree. There is a third force eroding free speech as well, one I will look at briefly in my concluding chapter: the increasing erosion of our privacy that accompanies recent advances in digital technologies. These threats do not make free speech an illusion. But they do remind us that the right to speak – a right embedded in the fabric of democracy – must always be defended. And they reveal a gap between popular definitions of free speech and the legal understanding of the right to speak.

#### FREEDOM OF SPEECH IS NEVER ABSOLUTE

The First Amendment reads, in part, “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>‡</sup> The meaning of *no law* seems plain enough: you do not need a dictionary to tell you that *no* means “no.” But in practice the First Amendment means, “Congress may make *some* laws abridging the freedom of speech.” In other words, even though it is a free country, you can’t always say what you want.

There are laws against all sorts of speech. Massachusetts, Michigan, Oklahoma, and Rhode Island are just some of the states with “no public

<sup>‡</sup> The amendment also protects the free exercise of religion, a guarantee that merits its own study, but since my concern in this book is with language, I will address religion only when it relates to protected and unprotected *speech*.

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swearing” laws currently on the books. They are not quaint holdovers from a more prudish time: the week before I drafted this paragraph a Georgia woman was jailed for cursing in an elementary school within earshot of the children.<sup>9</sup> Federal law makes it illegal to threaten someone on social media. And it used to be against the law in the United States to criticize the president, to protest a war, even to sing a song in a language other than English.

The First Amendment also protects Americans from compelled speech. You can't be forced to say something against your will, like the Pledge of Allegiance. But just as the government may prohibit some speech, it may also compel certain kinds of speech. If you want a government job, you can be forced to sign a loyalty oath. The Constitution requires the president to take the oath of office before assuming their duties. And police must read an arrested person their rights. The government may compel product labels and warnings. And here's an irony: the Fifth Amendment protects the right to remain silent, but in 2013 the Supreme Court ruled that a prisoner must speak in order to invoke that right to silence.<sup>10</sup>

In fact all sorts of laws, rules, and regulations tell us what we can and cannot say or write, and violating them may be costly:

- Criticizing the president in 1798, or writing anything false, scandalous, or malicious about the government, could mean jail time and a \$2,000 fine (that's about \$40,000 or £30,000 today).
- Protesting the war in 1918, or saying anything disloyal, profane, scurrilous, or abusive about the US government or its policies, could get you twenty years and \$10,000 (about \$160,000 or £117,500 now).
- Teach a German song in 1920 in a Nebraska private school? You'd be fined up to \$100 (\$1,200 or £880 today), with up to thirty days in the county lockup.
- Don't even think about traveling to New York from the Italian Riviera in 1929 with a copy of *Lady Chatterley's Lover* stashed in your luggage. You would be relieved of the racy novel at the pier, not by a pickpocket looking for a thrill but by a Customs Agent.
- Broadcast a comedy routine in 1973 about seven dirty words you can't say on the air, and the FCC might fine the offending radio station or, worse yet, revoke its license.

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- Wear a jacket with an obscenity about the draft written on it inside the Los Angeles County courthouse in 1968, as Paul Robert Cohen did, and you will get sixty days for disturbing the peace.
- The US Supreme Court later reversed Cohen's conviction because his anti-war message was protected political speech, but don't even think of wearing clothing with anything political on it when you visit the Supreme Court today or you'll be fined, imprisoned for up to sixty days, or both.<sup>11</sup>

Although this list of don'ts is hardly exhaustive, the First Amendment does guarantee free speech, and when it comes to political speech, that guarantee is particularly robust. Today you can freely criticize a president or a war, or voice your opinion on any matter of public concern. It is legal to sing a song in Spanish, or Farsi, or Navajo. It is legal to swear on cable TV, or on the Internet. And *Lady Chatterley's Lover* is not only legal, it's got 100,000 ratings, averaging 3.5 stars, on Goodreads.

What the First Amendment does not protect is your right to speak on social media. The First Amendment only limits government attempts to regulate speech. The Constitution doesn't typically concern itself with private speech controls – the kind imposed online, as well as by employers, schools, or social and religious groups. So Donald Trump was wrong to complain in 2020 that social media was violating his free-speech rights and trying to “cancel” him by flagging some of his more misleading tweets, or when those platforms banned him for the lies he posted on January 6. Facebook and Twitter are free to regulate what users upload to their platforms. When Trump's supporters proclaimed on Fox News that they were being silenced, it was clear they still had a platform on America's most popular news network. These speakers crying “cancel culture,” who've already amassed large audiences, are essentially trying to cancel their critics, who typically command much smaller audiences.

The second threat to our free-speech rights is another constitutional amendment. In 2008, the US Supreme Court ruled that the Second Amendment protects an individual's right to own a gun.<sup>12</sup> That led the state of Virginia to allow people to carry guns openly. And that set up a conflict between the First and Second amendments when armed



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protestors tried to silence counter-demonstrators at a 2017 rally in Charlottesville, Virginia.

The First Amendment says free speech may not be abridged. The Second Amendment says the right to keep and bear arms shall not be infringed. Both amendments are framed as absolutes, but in practice both are contingent: it is constitutional to abridge some speech, and some gun ownership can be regulated. Still, it is possible to invoke your right to speak in order to suppress speech with which you disagree, and as armed demonstrators in Charlottesville, Virginia, Portland, Oregon, Kenosha, Wisconsin, Lansing, Michigan, and the District of Columbia have shown, it is increasingly likely that someone with a gun can prevent you from speaking.

Self-defense and free-expression are surely essential rights. So is the right not to be shot or shouted down. No matter how rude, insulting, extreme, or unpopular it may be, speech with any degree of social value is still protected in the United States by the First Amendment. And though assault with a deadly weapon remains a crime, the Supreme Court has also determined that the Second Amendment guarantees everyone the right to tote a gun, perhaps the most common deadly weapon there is. Other countries do not follow America's lead in protecting either words or guns. The United Kingdom and the European Union value free speech, but they also criminalize racist, sexist, and hateful language. And every other modern democracy is appalled at America's determination to hang on to personal weapons, particularly those designed to inflict massive harm with minimal effort.

Although the constitutional amendments guaranteeing freedom of speech and the right to bear arms were ratified along with the rest of the Bill of Rights in 1791, the early United States was far less permissive about words or weapons than it is now. In the few nineteenth-century challenges to gun control laws, courts had no problem upholding laws that banned the possession of the kind of knives, handguns, and concealable swords frequently used, not for military ends, but for brawling, murder, and mayhem. As for the First Amendment, courts also saw no paradox between the Constitution's broad protection of speech and laws banning all sorts of speech, from profanity and obscenity to perjury and political protests. Even criticizing the president, always a popular pastime, could lead to an arrest.

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The words of these amendments haven't changed, but our understanding of them has. During the twentieth century, the courts broadened what counts as speech protected by the First Amendment. In 1917, you could be fined or thrown in jail for calling Woodrow Wilson a bad name or opposing America's entry into the First World War, speech that wouldn't raise an eyebrow today. Although obscenity is still illegal, what counts as obscene has narrowed to the point where, today, you can import *Lady Chatterley* or any other book you want, as long as you do not try to sneak more than 100 ml of shampoo past airport security. And in 2008, the Supreme Court found that the Second Amendment means the opposite of what the courts had understood it to mean since 1791. Instead of supporting state militias, that amendment now guarantees the right of individual Americans to own pretty much any weapon for any lawful purpose. We looked at the January 6 riot in DC, where carrying guns is illegal. Now let's look at Charlottesville, where guns are legal. There the guarantees of the First and Second amendments clashed dramatically, and people died.

## THE AMENDMENTS MEET IN CHARLOTTESVILLE

The First Amendment guarantees the right to speak and the Second, the right to keep and bear arms. As part of the Constitution, these rights of speech and gun ownership are equal in value: one does not trump the other. But in August, 2017, when white supremacists with assault rifles marched into Charlottesville, Virginia, to hold a "free speech rally," the constitutional balance between speech and self-defense shifted, and the guns won.

Here's what happened. Under the banner "Unite the Right," Jason Kessler, a newcomer to the white supremacy movement, called on American Nazis, Klansmen, and other right-wing extremists to come to Charlottesville to protest the removal of a statue of Confederate General Robert E. Lee from Lee Park, recently renamed Emancipation Park.

Kessler applied to the Charlottesville Department of Parks and Recreation for permission to hold a "free speech rally" for about 400 people, "in support of the Lee monument."<sup>13</sup> But once Parks and Recreation approved the permit, Unite the Right took to social media to invite