CHAPTER 1

Free Speech, But …

THE 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.[1] 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

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

carries a maximum penalty of twenty years in prison.[†] The Capitol invasion left 7 dead, including 3 police officers, 140 officers injured, some seriously, and $1.5 million in property damage.[2] 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."[3] Representative Andrew S. Clyde, of Georgia, went further, calling the Capitol riot a "normal tourist visit."[4] 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."[5]

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

[†] 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."

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

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.[6]

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.[7] 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

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

further revealed his state of mind.[8] 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

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

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."[‡] 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

[‡] 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*.

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

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.[9] 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.[10]

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.

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

- 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.[11]

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.[12] 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

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

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."[13] But once Parks and Recreation approved the permit, Unite the Right took to social media to invite

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

thousands of protestors to join their white supremacy crusade: "This is an event which seeks to unify the right-wing against a totalitarian Communist crackdown, to speak out against displacement level immigration policies in the United States and Europe and to affirm the right of Southerners and white people to organize for their interests just like any other group is able to do, free of persecution."[14]

Media reports suggested that more than 2,000 protestors might show up in Charlottesville for what the Southern Poverty Law Center was calling the "largest hate-gathering of its kind in decades." Many right-wing extremists announced that they would come armed (Virginia permits carrying firearms openly), and rally organizers enlisted nativist militias and motorcycle gangs to protect them from the Charlottesville "Communists" they opposed. Fearing violence and seeking to better manage the crowds of protestors and counter-protestors, the city moved the event away from centrally-located Emancipation Park, to McIntire Park, both larger and further from downtown, to facilitate crowd control. In response, Kessler, backed by the Virginia chapter of the American Civil Liberties Union (ACLU), sued Charlottesville, invoking the demonstrators' First Amendment rights to speak, assemble, and petition the government, and asking to return the rally to Emancipation Park. Demonstrators sought protection for their words, but for insurance they brought their guns to town.

On April 11, the day before the scheduled rally, the District Court granted Kessler's request. That night, neo-Nazis exercised their free speech rights by marching triumphantly through the University of Virginia campus in Charlottesville, armed with tiki torches from the local garden center, shouting antisemitic and racist slogans, and threatening anyone who got in their way. And on April 12, thousands of Unite the Right supporters, many of them waving guns and dressed in battle fatigues, rallied at Emancipation Park.

In Charlottesville, the speech of counter-protestors exercising their own right to speak and assemble proved useless against this display of right-wing firepower, and violence erupted. Normally police separate protestors from counter-protestors at rallies to minimize clashes. But Charlottesville police seemed unwilling or unable to do this. When authorities eventually declared the demonstration a threat to public

safety, it took two hours to clear the park, and it took longer still for police to wrest control of downtown Charlottesville from the protestors. One marcher fired his gun into a crowd as he left the park. Another drove his car into a crowd of counter-demonstrators, killing one and injuring nineteen. And two police officers died when their surveillance helicopter crashed.

Much of the nation recoiled at the violence in Charlottesville. The day after the rally, a crowd chased Jason Kessler as he tried to hold a press conference; questions were raised about police inaction; and many public figures expressed dismay at then-President Trump for blaming the Charlottesville violence on both sides, when all accounts showed that it was Kessler's followers who carried lethal weapons and instigated the most serious incidents. For a time, the nation seemed to have had enough of racists hiding behind the Constitution. A second white supremacist "free speech" rally on Boston Common a week later drew, not the promised hordes of demonstrators, but only about fifty, enough to fit inside the Common's bandstand, while 20,000–30,000 peacefully assembled in the nation's oldest park to register their disapproval of the alt-right's racist message.

No one owns the First Amendment. Its protections extend to every side of every controversy, and free speech is a traditional rallying cry in American politics regardless of your point of view. Partisans on the right and left from Berkeley to Boston to the halls of Congress loudly assert their right to speak while blaming their opponents for trying to silence them. And many in the broad political center wonder if extreme speech of any kind really does merit constitutional protection, whether it is the speech of rabid white supremacists like Richard Spencer, who coined the term "alt-right" to sanitize the particular brand of hate speech on display in Charlottesville, or the generally anonymous "black bloc" anarchists who deny government authority. Free speech is stretched to its limits when the "speakers" carry torches or guns or chemical sprays and engage in threatening behavior.

In its lawsuit against Charlottesville, the ACLU contended that by moving the demonstration from a park directly connected to Unite the Right's message, city authorities had succumbed to the heckler's veto. In the end, there was no heckler's veto in Charlottesville, where the

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

authorities let the white supremacists say and do pretty much whatever they wanted. But speech was chilled by the "Second Amendment veto" used by the followers of Kessler and Spencer: when there is a showdown between the First and Second amendments, the people with guns tend to silence those who are unarmed.

At another "free speech" rally forty years earlier, there was no legal way to exercise a Second Amendment veto. In 1978, American Nazis marched to support what they called "White Free Speech" in Skokie, Illinois, a city with a majority Jewish population that included a significant number of Holocaust survivors. The marchers wore Nazi uniforms, carried Nazi flags, and displayed swastikas. As in Charlottesville, they had a permit for their protest. As in Charlottesville, the courts – prompted by the ACLU – let the march go ahead. And as in Charlottesville, the courts ruled that a heckler's veto could not stop the Nazis from exercising their First Amendment rights, because even hateful and unpopular speech is protected by the Constitution. The courts reasoned that anyone offended by the marchers' message could turn away, although some of the judges apologized to the residents of Skokie for having to endure the pain and insult of a Nazi presence.[15] And so the Nazis marched legally, as they did in Charlottesville. But Illinois did not permit carrying weapons openly, and in Skokie, the Nazis did not have guns.

In Charlottesville, however, the Nazis, the Ku Klux Klan, and other white supremacists could bring their weapons to the park or carry them openly downtown, threatening anyone who might oppose their "message" of white supremacy. Emboldened by the relaxation of gun control after the 2008 *Heller* decision, right-wing protestors have exercised their Second Amendment vetoes not just in Charlottesville, but at a number of "stop the steal" demonstrations after the 2020 presidential election.[16] But even though openly carrying a gun is permitted in Virginia, brandishing one is not. State law forbids holding or waving a weapon "in such a manner as to reasonably induce fear in the mind of another of being shot or injured."[17] But it is not necessary to wave a gun in someone's face to silence them. Simply having one in your hand, on your hip, or bulging in your pocket or purse, is enough to convince most people that they are in a space where the First Amendment does not apply.

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The ACLU has always opposed violence, but it has also consistently warned against allowing hecklers to silence speech. In a 1934 pamphlet urging that American Nazis be allowed to speak at New York City's Madison Square Garden despite the fear of violence at their rallies, the organization outlined the position it would later take in *Kessler* v. *City of Charlottesville*:

> To those who urge suppression of meetings that may incite riot or violence, the complete answer is that nobody can tell in advance what meetings may do so. Where there is reasonable ground for apprehension, the police can ordinarily prevent disorder … If and when Nazi meetings result in breaches of the peace, their organizers can be prosecuted under the criminal law … Short of that, their freedom to carry on their agitation should be unrestricted.[18]

That was an unpopular position to take at a time when violence had become a regular feature of Nazi rallies in Germany, violence that would result in the murder of millions of Jews and others on the streets and in death camps, not to mention the slaughter on the battlefields of the Second World War.

Two days after Charlottesville, the Virginia ACLU similarly insisted, "Our lawsuit challenging the city to act constitutionally did not cause violence." Later, the organization argued that they could not have foreseen that violence because, before they agreed to take his case, they made Jason Kessler swear "in court papers that he intended the rally to be 'peaceful' and 'avoid violence,'"[19] a statement that suggests the defenders of free speech were well aware that Kessler and his crowd were spoiling for a fight. In that 1934 pamphlet, the ACLU defended its controversial position: "We do not choose our clients. Lawless authorities denying their rights choose them for us." Similarly, the Virginia ACLU insisted that they defended Unite the Right only because the government illegally interfered with the protestors' right to speak. But the ACLU has never felt bound to accept every free-speech case that comes its way. Just five days after Charlottesville, ACLU Executive Director Anthony Romero announced that the organization would no longer back the speech rights of "hate groups seeking to march with firearms" and that in the future, it would screen its clients more carefully "for the potential of violence at their rallies."[20]

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The events of Charlottesville raise two important questions:

1. When does the right to bear arms conflict with the right to speak one's mind?
2. When do words cross a line from protected to unprotected speech?

To answer these questions requires us to understand how courts go about interpreting our laws. We will start by looking at how the Second Amendment right to bear arms has been interpreted from its first draft, in 1789, until the Supreme Court determined in 2008 the meaning that paved the way for First and Second amendment showdowns. The Second Amendment consists of a single, twenty-seven word sentence. Seeing how judges have moved from one understanding of that sentence to its opposite offers a lesson in legal meaning-making. And that, in turn, will lead us to the main focus of *You Can't Always Say What You Want*: the many attempts to define and limit the right to speak and write.

We will see that there is an ever-shifting line between protected and unprotected speech for political speech, obscene speech, and threatening speech which can leave speakers at a loss to know when they've crossed that line. Each attempt to separate protected from unprotected speech solves some problems but raises new ones. That is true of many legal landmarks. *District of Columbia* v. *Heller* affirmed an individual right to own weapons, but it did not address whether states can ban guns at protests and rallies. Instead, the *Heller* court suggested that there are many "sensitive" places where guns may be prohibited, like courtrooms, schools, or government buildings – even after *Heller*, you still can't bring weapons into the Supreme Court. But *Heller* did not say anything about keeping guns out of bars or sports arenas, where spirits often run high. As a result, states vary on what they will or will not permit: Maryland and Alabama ban guns at rallies and demonstrations, but Virginia does not.[21] It remains to be seen how American courts will treat attempts to restore a balance between the right to speak and the right to bear arms, but it is clear that Charlottesville has raised an issue that *Heller* did not foresee, an issue that is not going to go away anytime soon. In 1919, the Supreme Court observed that the First Amendment would never protect someone falsely shouting "fire!" in a theater and causing a panic. After Charlottesville,

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

it is time to recognize that bearing arms at a political protest is a similar recipe for disaster that should not be permitted under any interpretation of the Second Amendment.

A MATTER OF INTERPRETATION

To recap, both the First and Second amendments are framed as absolutes: "Congress *shall make no law* … abridging the freedom of speech"; and "the right of the people to keep and bear arms, *shall not be infringed*." Even so, the courts always interpret these rights as relative: there are some words and weapons that remain outside the law. Obscene speech, threats, and fighting words are not included in the First Amendment's broad protections. Nineteenth-century courts found that the Second Amendment did not guarantee the right to own a Bowie knife (sometimes called an Arkansas toothpick) or a sword in a cane, and no modern court would protect your right keep and bear a rocket-propelled grenade or an improvised explosive device. Figuring out which words and weapons are OK and which are unprotected requires reading between the lines, reading what Akhil Reed Amar calls "America's unwritten Constitution."[22]

Interpreting the law – finding what it allows or prohibits – is not always easy, but it is always necessary, and it is a never-ending process. The Supreme Court has repeatedly modified its understanding of the First Amendment to shift the line between protected and unprotected speech, and it has even modified its 2008 spin on the Second Amendment, striking down some gun regulations but permitting others to stand.[23] Current events suggest that the Court may eventually be asked to consider what happens when the two amendments clash, as they did in Charlottesville in 2017, or when armed protestors marched on the Michigan State House to protest the public-health lockdown in 2020. Not to mention January 6. That will require revisiting many previous interpretations of speech and arms protections.

Understanding laws, like understanding anything spoken or written, is both subjective and subject to revision. Even so, the law remains a coherent system that is both stable enough to function well at any given point in time, while flexible enough to meet new demands and circumstances.

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

Any system dependent on interpretation presents the possibility of multiple meanings, some of them inconsistent with others. This may lead to misunderstanding and disagreement. In some contexts we tolerate this ambiguity. For example, it is easy for us to accept competing interpretations of literature because there is no easy way to know what Hamlet means when he asks, "To be or not to be?" Competing interpretations of sacred texts are common, too, though disagreement over the tenets of a faith can result in new sects, new religions, even holy wars.

In contrast, we expect consistency from the law: its meaning should be clear and constant and it should apply equally to all. And yet conflict over legal meaning is also normal. Lawyers contest everything from the broad application of a statute, to the significance of a word in a contract, to the second comma in the Second Amendment. And they routinely argue over the definition of a word in a law. In 1893, for example, the Supreme Court was asked to decide whether tomatoes should be defined as fruits or vegetables so an importer could pay the appropriate tariff. The court ruled that tomatoes were vegetables because, even though scientists classified them as fruits, ordinary people thought tomatoes were vegetables.[24] But ordinary meaning is not always obvious. In *Heller*, the Supreme Court ruled that the phrase *bear arms* in the Second Amendment ordinarily means, "carry a gun" and has nothing to do with soldiering, even though pretty much everyone since the 1790s considered the phrase to be military. Even today, soldiers bear arms; hunters carry guns; criminals pack heat.

It turns out that law, like every other form of language, is never absolute, never wholly unambiguous, never completely transparent or explicit. Like all forms of language, laws require interpretation, and interpretations are subject to challenge and reinterpretation. When Judge Learned Hand wrote, "It will be necessary, first, to interpret the law," he was explaining a section of the 1917 Espionage Act that criminalized antiwar protest. But he was also saying that a law doesn't have meaning until a court interprets it. Complicating this is the fact that there are many ways to read a law – strictly, loosely, pragmatically, ideologically. They do not all produce the same results, and no single approach, or combination of approaches, is required. Judge Hand found that the Espionage Act protected antiwar protests, but his interpretation, which

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

we will look at in more detail in Chapter 3, was immediately rejected by an appeals court that saw nothing wrong with suppressing speech in wartime. But attitudes change, and courts today would be more likely to agree with Hand that the First Amendment permits nonviolent opposition to a war.

The ongoing cycle of interpretation and reinterpretation and the conflicting methods of legal interpretation do not make the law hopelessly relative or perilously unstable. Rather, they are a normal part of how law functions. The stability of law depends not on its words, not even on choosing the one right method of legal interpretation, but on the willingness of society to be bound by law, to accept legal interpretation, to acknowledge the need to challenge an interpretation from time to time, and to accept the idea that when things change, interpretations may have to be modified or even rethought completely to accommodate new circumstances. If we didn't reinterpret the law, or replace old laws with new ones, we would still be living under slavery, women could not vote, and no one would have the right to remain silent.

Even the framers recognized that we must live with laws whose meaning is not always easy to uncover. James Madison responded to complaints that the proposed Constitution for the new United States was not clear enough by comparing law to scripture. Madison argued that the deity's ideas are perfectly straightforward, but we poor mortals, prone to error and misreading, come along and muddy the text. If religion seems hard, he concluded, then interpreting law is even harder: people write the law, not gods, and language itself is not always up to the job of conveying complex ideas.[25]

There will always be laws that were not written as precisely or with as much foresight as they should have been, if only because writers are human, and they – we – all make mistakes. There will always be instances where the application of a law will be contested, where the meaning of its words will be disputed. Some 6 percent of early Supreme Court decisions were not unanimous, a sign that founding-era judges disagreed about statutory meaning from the outset. The framers themselves argued over the Constitution's meaning, not only while they were drafting it, but immediately after it was ratified as well. Jefferson and Hamilton disagreed about whether or not the Constitution authorized a federal bank.

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

Madison and Jefferson disagreed with John Adams about the constitutionality of the 1798 Sedition Act.[26] If these learned patriots had different understandings of the founding document that they had debated, drafted, and edited till they got the text just right, then as Madison might put it, mere mortals like us shouldn't be surprised that we, too, contest its meanings.

"WHEN *I* USE A WORD, IT MEANS JUST WHAT I CHOOSE IT TO MEAN – NEITHER MORE NOR LESS"

That is how Humpty Dumpty defines interpretation in Lewis Carroll's *Through the Looking Glass*. We all have opinions about what a law means, but it is the courts that get to prescribe meaning. Why laws need interpretation, and why judges should be the ones to do this, was articulated as long ago as the sixteenth century. Edward Saunders, a sergeant-at-law (the equivalent of a Queen's Counsel in England today), observed in the case of *Partridge* v. *Straunge and Croker* (1553) what Madison later echoed in *Federalist* 46, that laws may indeed be unclear. According to Saunders, the words of a statute are but sounds – he called them "the verberation of the air." The words, mere images of the law, have no meaning until they are interpreted, and according to Saunders this must be done in a way that brings the greatest benefit to society:

> If the words of [a statute] are obscure, they shall … be expounded most strongly for the public good. For words, which are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law, whose talents are exercised in the study of such matters.[27]

Interpretation is necessary to recover the law's true meaning, its spirit. And that spirit, says Saunders, will ensure the public good. For Saunders, here's how to interpret a law whose meaning isn't clear. First, ask the legislators who wrote the laws exactly what they meant. When that is not possible – they may be dead or otherwise unavailable – then get judges

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to "construe the words," because that is what these sages of the law are trained to do.

As we will see in more detail in the next chapter, American constitutional interpretation falls into two broad schools: originalists seek to determine the document's original public meaning: what a reasonable person would have understood the Constitution to mean at the time that it was enacted. On the other side are those who see the Constitution, not as a "suicide pact" forcing us to do something harmful and destructive, but as a living document flexible enough to adapt to changing circumstances, and they seek a practical interpretation that benefits the public good today. In any case, most modern commentators agree with the general position of Sergeant Saunders, that when it comes to legal meaning, the letter of the law is just the beginning. As legal scholars William Baude and Stephen Sachs put it, "In legal interpretation we start with written words and somehow end up with law. The question is what happens in between."[28]

Understanding the spirit of the law, what its words are actually saying, comes only from "what happens in between," an act of interpretation. Few of us get to draft the laws which govern us, and few of us get to serve as judges. But in some way, we are all interpreters of the law. The relationship between words and the law is debated regularly in the press, on social media, and at the dinner table. These discussions cover topics of broad interest: Should a book like that be in a library? What does "marriage" mean? Could a Facebook post get you arrested? Can't we make everyone speak English?

Even when such questions are "settled" by the courts, they continue to resonate. Because who may marry, carry a gun, read a book, or get locked up for tweeting, remains a matter of public interest and may affect us personally, it is vital that we understand how judges read the language of the law. Their interpretations create the legal authority that, in turn, governs the language that we use, specifying who may speak and who may be punished for speech; what may be published and what censored. Laws may even tell us what to say, and whether we have to say it in English.

The goal of *You Can't Always Say What You Want* is to help readers understand these two important, frequently interconnected acts – how

https://doi.org/10.1017/9781009198882.002 Published online by Cambridge University Press

judges parse the words of a statute and how statutes regulate language by sorting protected from unprotected speech. Grounded in linguistics, history, and legal analysis, the book places contemporary issues of free speech and banned speech in their historical perspective, illuminating how judges figure out what the law says, then explaining how the law shapes and limits what we can say. We will look at subversive language, strong language, angry language, foreign language, and required language, to illustrate two ways that we interpret the language of the law. We do so ideologically, to force the law to conform to our sense of what it should mean, whether that sense is liberal, conservative, or something in between; and we do so through linguistic analysis, determining how the words, phrases, clauses, and sentences of the law work together to generate meaning. Whether we are talking about strict construction, the conservative philosophy that laws mean only what they meant when they were enacted, or a pragmatic, results-oriented philosophy, the liberal view that laws must be adapted sensibly to accommodate unforeseen conditions and changing circumstances, we are interpreting laws to make the words – the verberation of the air – fit the case at hand.

This doesn't make the law unreliable, and it should not cause anyone to lose faith in the legal system or in our freedom to think as we will and to say what we think. Instead, it should broaden our insight and deepen our understanding of just how the law really works: practical interpretation within a larger framework of tradition leavened by changing circumstance. That is what I hope to show as we look at the shifts over time in our understanding of how laws mediate what we can and cannot say and write.

The conflicts over legal interpretation that I will discuss in the following pages reveal a fundamental paradox: we demand stability from the law in ways that set it apart from other forms of language use, but legal authority depends on interpretation, an act that is always subjective, contingent, continually evolving. The meaning of any text or utterance is constructed not just from its words, but also through exchanges between speakers and hearers, writers and readers. In addition, although the decisions of judges may seem final, court rulings frequently require further interpretation, sometimes revision, occasionally, reversal. This should not be surprising, for it is how all language works: understanding text is always a matter of interpretation, and no interpretation is ever final.

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