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FREE SPEECH AND THE CONFLUENCE OF NATIONAL SECURITY AND INTERNET EXCEPTIONALISM

Alan K. Chen*

INTRODUCTION

When one person exhorts another to violate the law, it is typically done through traditional modes of speech—the spoken or written word. The appropriate treatment of what is commonly referred to as “advocacy of law violation”¹ or “unlawful advocacy”² under First Amendment doctrine has perplexed both courts and legal scholars for generations. Conceptual complexities in drawing boundaries between potentially inciting speech and dangerous conduct make this an inherently difficult problem.³ But perhaps another reason for the confusion is that many of the important U.S. Supreme Court decisions in this area have come during times of real or perceived national crises.

After years of wrangling with the issue, the Court in *Brandenburg v. Ohio*⁴ established a strongly speech-protective orientation that prohibits the government from regulating “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.”⁵ In recent years, commentators have questioned whether, in light of contemporary events, the Court should reconsider *Brandenburg* in favor of a more lenient standard that would permit the government to regulate more speech.⁶ As it happens, the

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1. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1038 (5th ed. 2015).

2. Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1159 (1982).

3. For a thoughtful and comprehensive treatment of these issues, see KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

4. 395 U.S. 444 (1969) (per curiam).

5. *Id.* at 447.

6. By now, there is already a rich post-9/11 literature on this important topic. For an argument that *Brandenburg* should be modified to some degree, see Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015), <http://www.slate.com/>

two primary justifications for a proposed modification arose at roughly the same time, around the beginning of the twenty-first century. First, there have been calls to relax the *Brandenburg* standard to accommodate the rise of global and domestic terrorism, particularly since the terrorist attacks of September 11, 2001.⁷ Here, the idea is that the increasing (and, it is argued, increasingly successful) efforts of terrorist organizations to recruit and incite people to commit unlawful acts suggest the need for greater leeway for government intervention to prevent death, injuries, and property destruction.⁸ Second, scholars have called for a relaxed *Brandenburg* standard in light of the rapid expansion of digital communication technologies made possible through social media platforms.⁹ This claim suggests that there has been substantial growth in opportunities for terrorist incitement because of the wide availability of internet communication.

In this Article, I argue that, notwithstanding these contemporary developments, the Court got it mostly right in *Brandenburg*. Or, I want to at least suggest that it is premature to reconstruct the *Brandenburg* test to address perceived changes in our global environment. For the most part, *Brandenburg* has succeeded in mediating the balance between protecting political or ideological advocacy and enabling the government to regulate actual incitement, even in the contemporary era. Moreover, I argue that society should be especially wary of calls to narrow *Brandenburg*'s speech-protective standard because such changes might be significantly influenced by the confluence of two forms of exceptionalism—national security exceptionalism and internet exceptionalism—both of which are continuing to evolve in real time.

In development of this argument, this Article contains three parts. Part I discusses how the law of incitement is situated in the evolution of modern free speech doctrine. Next, Part II identifies and explains how national security exceptionalism and internet exceptionalism may work together to influence the relaxation of the *Brandenburg* test. Finally, Part III argues that there is insufficient evidence at this point to suggest a strong need to recalibrate the *Brandenburg* test.

articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html [https://perma.cc/YPC4-3AW3]. For arguments in support of retaining the *Brandenburg* test notwithstanding contemporary developments, see generally GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004); Judge Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL'Y REV. 361 (2010); Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655 (2009).

7. See *infra* notes 52–80 and accompanying text.

8. Anthony Faiola and Souad Mekhennet, *From Hip-Hop to Jihad, How the Islamic State Became a Magnet for Converts*, WASH. POST (May 6, 2015), https://www.washingtonpost.com/world/europe/from-hip-hop-to-jihad-how-the-islamic-state-became-a-magnet-for-converts/2015/05/06/b1358758-d23f-11e4-8b1e-274d670aa9c9_story.html [https://perma.cc/5JBW-MQDU].

9. See *infra* notes 82–108 and accompanying text.

I. BACKGROUND

The modern understanding of the free speech doctrine is only about 100 years old.¹⁰ During the past century, several understandings about the limits of government power to ban or regulate speech have become canonical. The Supreme Court has typically followed the so-called two-level theory of speech.¹¹ Under this model, speech that has high value in terms of advancing the goals of the Free Speech Clause (i.e., advancing democratic self-governance, facilitating the search for “truth,” and promoting individual autonomy)¹² is considered to have the highest level of constitutional protection from government regulation. It is presumed that in adopting and enforcing legal regulations of high-value speech, the government may not discriminate against speakers based on their viewpoints or against speech because of its content.¹³ Such regulations are subject to the strictest form of judicial scrutiny.¹⁴

But, in *Chaplinsky v. New Hampshire*,¹⁵ the Court began carving out a distinct category of no- or low-value speech. There, the Court defined categories of expression that are not “covered” by the First Amendment—that is, their regulation is not even subject to scrutiny under the Free Speech Clause.¹⁶ This means that the government may not only regulate but may potentially even prohibit speech, such as obscenity¹⁷ and fighting words,¹⁸ because it is outside the scope and concerns of the First Amendment. The rationale typically provided for the Court’s exclusion of these forms of communication from the First Amendment’s coverage is that they have little or no social value. But just as important is that these types of speech are also presumptively considered to be harmful.¹⁹ Recently, and somewhat controversially, the Court has suggested that this list of no- or low-value speech is based on historical recognition rather than categorical balancing.²⁰

10. See *Dennis v. United States*, 341 U.S. 494, 503 (1951) (plurality opinion) (“No important case involving free speech was decided by this Court prior to *Schenck v. United States* [in 1919].”). But see David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 520 (1981) (surveying judicial decisions and legal scholarship concerning free speech prior to World War I).

11. See Geoffrey R. Stone, *Kenneth Karst’s Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37, 43 (2008) (discussing the application of the “two-level” theory).

12. These are the most commonly invoked reasons for protecting speech. For a more extensive discussion and critique of these theories, see Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1016.

13. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994).

14. *Id.*

15. 315 U.S. 568 (1942).

16. For a comprehensive discussion of the coverage-protection distinction, see generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

17. *Miller v. California*, 413 U.S. 15, 35–37 (1973).

18. *Chaplinsky*, 315 U.S. at 572.

19. *Id.*

20. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). But see Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2177–79 (2015) (disputing the Court’s historical account of low-value speech).

Under this two-level theory, First Amendment doctrine has never quite known what to do about government regulation of speech that advocates for others to violate the law. The evolution of the relevant doctrine has been recounted numerous times, so a brief summary should suffice here. Unlawful advocacy falls presumptively into neither the high- nor no-value categories. In part, this is because pure advocacy, even of such extreme ideas as the violent overthrow of government, can be a form of core political expression. But it also underscores the very real concern that when advocacy is strongly connected to unlawful conduct, its regulation might be necessary to avoid the Constitution becoming, as Justice Robert Jackson once wrote, “a suicide pact.”²¹

In light of this tension, the Supreme Court first struggled with defining the boundary between protected advocacy and dangerous incitement in a series of early twentieth-century cases concerning critics of U.S. involvement in World War I and sympathizers with the Soviet revolution. These cases— involving prosecutions under the Espionage Act of 1917 and the Sedition Act of 1918—ultimately led the Court to adopt a First Amendment test that permitted government regulation of advocacy of unlawful conduct when “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 Congress has a right to prevent.”²² Although the “clear and present danger” test sounds like a fairly robust standard, the Court upheld numerous prosecutions under this analysis. Notably, in *Schenck v. United States*,²³ the Court found it irrelevant that the defendant’s advocacy for others to avoid the military draft was unlikely to influence any audience member because his *intent* for such an effect was sufficient to justify his conviction.²⁴

During the period of peace between World War I and World War II, the Court employed an even more deferential test that permitted government regulation of advocacy of law violation where the regulations were “reasonable.”²⁵ Some form of the clear and present danger test reemerged during the McCarthy era, as federal prosecutors pursued convictions under the Smith Act, which criminalized advocacy or even teaching about the “duty, necessity, desirability, or propriety of overthrowing or destroying any

21. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Interestingly, unlawful advocacy cases have never drawn an express distinction among different types of law violations. Thus, at least in theory, the *Brandenburg* test would be applied both in a case prosecuting an individual for advocating that another person commit a minor infraction, such as littering, and a case when a person advocated that another pursue the violent overthrow of the government. See Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 44 (2013) (describing this as *Brandenburg*’s “most significant ambiguity”); see also *Goedert v. City of Ferndale*, 596 F. Supp. 2d 1027, 1032 (E.D. Mich. 2008) (noting that it is unclear whether *Brandenburg* includes incitement to nonviolent lawbreaking and holding that the city could not invoke the incitement doctrine to justify an ordinance banning signs encouraging motorists to honk their car horns in support of political demonstrations).

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

23. 249 U.S. 47 (1919).

24. *Id.* at 52.

25. *Gitlow v. New York*, 268 U.S. 652, 668–69 (1925).

government in the United States by force or violence.”²⁶ In *Dennis v. United States*,²⁷ the Court rejected facial and as-applied challenges to the Smith Act because such speech created a clear and present danger.²⁸ In response to the claim that the danger of violent revolution resulting from the defendants’ speech was remote, the Court noted that because the seriousness of the harm sought to be prevented was so high, the low probability of success did not render the speech protected.²⁹ *Dennis* substantially diluted First Amendment protection for unlawful advocacy.³⁰ As Erwin Chemerinsky has observed, “the approach taken by the plurality in *Dennis* makes probability and imminence—two seeming requirements of a clear and present danger test—irrelevant.”³¹

Both the World War I-era and McCarthy-era cases were decided during wartime or during a time when many public officials engaged in alarmist posturing about substantial dangers to national security. It is therefore not surprising that the Court’s next foray into the incitement doctrine did not come until 1969. Since, at the time, the United States was heavily involved in military action in Southeast Asia, and the country’s deep divisions over that policy were starting to emerge, the perceived concern about undermining national security on American soil was not as clear.³² *Brandenburg* concerned a prosecution under a criminal syndicalism statute dating back to the post-World War I era, but the relevant expression involved racial epithets rather than workers’ rights or antiwar rhetoric. The case came to the attention of prosecutors when a local television station broadcast a report from a rally by a local Ku Klux Klan faction.³³ Clarence Brandenburg, a leader of that group, was shown on film giving a speech calling for “revengeance [sic]” against the government for suppressing the white race and making derogatory remarks about African Americans and Jews.³⁴ Although the film also captured images of some weapons, Brandenburg’s speech did not overtly call for any type of violence, and he was never shown carrying a weapon.³⁵ Importantly, there were only about twelve Klan members present, along with the television reporter and camera operator for the story, who were the only nonmembers.³⁶

The Court overturned Brandenburg’s conviction, overruled *Whitney v. California*,³⁷ and held that the First Amendment prohibits the government from punishing “advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action

26. 18 U.S.C. § 2385 (2012).

27. 341 U.S. 494 (1951).

28. *Id.* at 516–17 (plurality opinion).

29. *Id.* at 510.

30. CHEMERINSKY, *supra* note 1, at 1046.

31. *Id.*

32. STONE, *supra* note 6, at 543.

33. *Brandenburg v. United States*, 395 U.S. 444, 445 (1969) (per curiam).

34. *Id.* at 445–47.

35. *Id.*

36. *Id.*

37. 274 U.S. 357 (1927).

and is likely to incite or produce such action.”³⁸ This *Brandenburg* test is most commonly understood to impose three prerequisites on the state.³⁹ First, it must show that the speaker *intended* to (“directed to”) incite imminent lawless action.⁴⁰ Second, the speech must be *likely to be successful* in its provocation of unlawful behavior in the specific context.⁴¹ Finally, the law violation must be likely, under the circumstances, to be *imminent*.⁴² Subsequent cases have wholeheartedly embraced the *Brandenburg* formulation.⁴³

Unlike the categories of no-value speech, such as obscenity and fighting words, at no point has the Court ever categorically excluded unlawful advocacy from the First Amendment’s coverage. Nor, for what I think most would agree are obvious reasons, has the Court treated such advocacy as pure speech, both covered and fully protected by the First Amendment’s guarantees. Rather, the *Brandenburg* test reflects a preference for a regime of ad hoc, case-by-case (rather than categorical) balancing regarding laws targeting terrorist expression.

As in all areas of law, in an ideal world, the relevant First Amendment doctrine would strike a perfect balance to achieve optimal deterrence. That is, the Constitution would permit laws to regulate speech that is truly dangerous (that either has caused, or is very likely to cause, tangible harm), but would forbid any law prohibiting or even deterring pure political expression that has utility in promoting democracy, the search for truth, or individual autonomy. A First Amendment standard that is too capacious could permit speech that causes devastating harm. A free speech doctrine that is too narrow will prohibit or chill much expression, and the marketplace of ideas will be less robust.

As numerous scholars have observed, *Brandenburg* adopted a highly speech-protective test. Or at least, *maybe* it did. Uncertainty over the definition of “imminence” and questions about how to measure likelihood raise concerns for some.⁴⁴ Others question whether the *Brandenburg* test implicitly incorporates any sort of Learned Hand-like balance, whereby speech might be restricted even if there is little likelihood of actual incitement because the potential product of such incitement presents a substantial danger to human lives.⁴⁵

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

39. See Kaminski, *supra* note 21, at 42.

40. *Id.*

41. *Id.*

42. *Id.*

43. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam). But see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010) (rejecting a facial challenge to the constitutionality of a federal law prohibiting the provision of material support to organizations identified as “foreign terrorist organizations”). As discussed below, the *Holder* Court did not even cite to or invoke *Brandenburg* in its analysis. See *infra* note 111.

44. See, e.g., Kaminski, *supra* note 21, at 43–46.

45. See, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 122 (2006) (“A huge harm unlikely to materialize for several more

The Supreme Court's treatment of such unlawful advocacy reveals important things. It is not inevitable that the law should treat advocacy of unlawful conduct as speech. From a categorical-balancing perspective, one could make a normative claim that such advocacy is much more likely to cause broad, tangible social harm than, say, defamation of a private person. What this suggests is that even the early twentieth-century Supreme Court recognized that advocacy of unlawfulness has social value, even if its decisions did not always reflect that. Without some type of meaningful constitutional scrutiny, government regulation of such expression could realistically suppress or chill what we might recognize as pure expressions of ideology.

II. EXCEPTIONALISM (SQUARED)

Legal commentary often invokes the idea of exceptionalism across several areas. Exceptionalism conveys the notion that, in specified areas of law where the courts consistently apply a particular legal doctrine or analytical framework, there exist certain subcategories of cases in which the courts depart from that framework because they view those subcategories as exceptional, or requiring a different set of rules.⁴⁶ Often, this occurs without explicit recognition about what the courts are doing. This suggests that the courts themselves do not recognize that they are departing from legal norms or that, if they do recognize it, they do not wish to publicly acknowledge it.

Not surprisingly, there are debates about how to identify exceptionalism when the courts do not expressly articulate what they are doing and disputes over whether it is actually occurring in any given area. In addition, even assuming that there is a form of exceptionalism occurring in an area of the law, there are frequently serious normative questions about whether it is a good thing.

This Part argues that two distinct forms of exceptionalism may skew the development of First Amendment doctrine in an era of concerns about terrorist incitement on the internet. First, there is the danger of national security exceptionalism, a concept that has frequently been invoked by First Amendment scholars to suggest that courts may relax free speech protection in cases (or in specific eras) involving acute concerns about national security.⁴⁷ Second, there is the real possibility of internet exceptionalism, the idea that courts may create new First Amendment rules to reflect the “newness” of digital communication platforms because of concerns that the

years is not a lesser threat to the nation than a much smaller harm likely to materialize tomorrow.”).

46. See, e.g., Erik Luna, *The Bin Laden Exception*, 106 NW. U.L. REV. 1489, 1491 (2012) (defining exceptionalism as “a comparative concept involving a contrast among sufficiently analogous sets of values and practices, where an apparent anomaly or special case is subject to descriptive and normative assessments”).

47. See generally STONE, *supra* note 6.

internet has fundamentally transformed human communication in ways that previous generations of doctrine do not adequately accommodate.⁴⁸

The contemporary “war” on terror roughly coincides with the proliferation of easy and fast electronic means of communication. This implies that the modern era is one in which free speech doctrine may be particularly vulnerable to the dual pressures of these different forms of exceptionalism. Email communication became widely available in the mid-1990s, shortly before the 2001 terrorist attacks.⁴⁹ Facebook and Twitter, two of the most popular social media platforms, went online in 2004 and 2006, respectively.⁵⁰ Thus, it is unsurprising that *Brandenburg*, itself a doctrinal correction to exaggerated national security concerns from a previous generation, is under great scrutiny as domestic terrorist incidents appear to be on the rise and organized terrorist groups seem to use social media and other internet communication platforms to expand their networks.⁵¹

First Amendment doctrine should be sensitive to the possibility that calls to adjust the *Brandenburg* test and narrow the scope of speech protected by its admittedly capacious standard may be skewed by the way these two forms of exceptionalism come together (or as I say, get “squared”). Their confluence may have the substantial capacity to distort free speech law in ways that each form of exceptionalism alone might not (or might not to the same degree). Courts should therefore tread cautiously before departing from a legal regime that has, in retrospect, been largely successful in distinguishing between actual incitement and other forms of speech that should remain protected.

A. National Security Exceptionalism

The national security exceptionalism narrative runs strongly through a broad band of legal scholarship. The general theory of this type of exceptionalism is that courts show more deference to the state, and are correspondingly less protective of civil liberties, during times of war or other national security crises.⁵² From a descriptive standpoint, many legal scholars and historians have argued that such exceptionalism has occurred during various times in our nation’s history, most obviously during World War I,

48. See, e.g., Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1639 (2015).

49. *World Wide Web Timeline*, PEW RES. CTR. (March 11, 2014), <http://www.pewinternet.org/2014/03/11/world-wide-web-timeline/> [<https://perma.cc/W9BT-LRPQ>].

50. *Company*, TWITTER, https://about.twitter.com/en_us/company.html [<http://perma.cc/Q6EG-CGPL>] (last visited Oct. 16, 2017) (scroll down to “Our leadership” and select the “Bio” link under “Jack Dorsey”); *Our History*, FACEBOOK, <https://newsroom.fb.com/company-info/> [<https://perma.cc/RQN3-XB5G>] (last visited Oct. 16, 2017).

51. See Rukmini Callimachi, *Not “Lone Wolves” After All: How ISIS Guides World’s Terror Plots from Afar*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/world/asia/isis-messaging-app-terror-plot.html> [<https://perma.cc/GC77-RNCD>].

52. Of course, exceptionalism is not limited to courts and can influence decision-making by other government institutions as well. See Sudha Setty, *Obama’s National Security Exceptionalism*, 91 CHI.-KENT L. REV. 91, 91–92 (2016).

World War II, and the Cold War.⁵³ Although this Article focuses on speech, others argue that it also extends to constitutional guarantees of equality and privacy. Perhaps the case most often associated with this phenomenon is *Korematsu v. United States*,⁵⁴ in which the Court upheld the mass internment of persons of Japanese ancestry living in the western United States during World War II.

When it comes to judicial review of laws restricting expression during wartime, the pattern, and historical evidence, is pretty clear. Although some scholars have questioned the descriptive accuracy of this phenomenon,⁵⁵ it is not uncommon to see the Supreme Court openly embrace exceptionalism in its First Amendment decisions. As Justice Oliver Wendell Holmes wrote in *Schenck*, “[w]hen a nation is at war[,] many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”⁵⁶ The Espionage Act of 1917 itself, moreover, applied by its own terms only “in time of war.”⁵⁷ The subversive advocacy cases that emerged during the Cold War were unequivocally influenced by national security concerns, often expressly stated in the Court’s decisions.⁵⁸

Some scholars have argued that national security exceptionalism is normatively desirable. One common argument is that during emergencies courts may be uncomfortable shaping long-standing constitutional rules because they may not have full access to the intelligence information on which government decisions are based.⁵⁹ Additionally, some commentators argue that there are credible concerns about institutional competence and that courts are justifiably deferential when national security is at stake.⁶⁰

53. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 3 (2007); STONE, *supra* note 6, at 12–14; David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L.L. REV. 1, 1 (2003).

54. 323 U.S. 214 (1944). National security exceptionalism can also occur with regard to government efforts to compel nationalistic feelings and loyalty in its citizens. See generally Alan K. Chen, *Forced Patriot Acts*, 81 DENV. L. REV. 703 (2004).

55. Aziz Huq has observed that most of the theoretical work assumes that national security exceptionalism exists and debates only its normative desirability. See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 229. He argues that, at least in the area of legal challenges to emergency detention policies, there is no empirical support to suggest that this descriptive account is accurate. *Id.* at 226.

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

57. Act of June 15, 1917, ch. 30, tit. 1, 40 Stat. 217, 217 (codified as amended at 18 U.S.C. §§ 791–799).

58. See *Dennis v. United States*, 341 U.S. 494, 509 (1951) (plurality opinion) (“[T]he words [clear and present danger] cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited.”).

59. POSNER & VERMEULE, *supra* note 53, at 5–6.

60. *Id.* at 17. A somewhat middle-ground position is that national security exceptionalism occurs, but that over time the nation learns from the previous generation’s overexaggeration of such concerns, thus pushing government toward more modest responses. See Mark V. Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 307.

Some of these same theorists have suggested that *Brandenburg* in particular needs to be modified in response to the most recent era of threats from terrorist actions, roughly post-9/11. Eric Posner, for example, notes that “[t]he pattern in American history—and, in the other democracies as well, even today—is that during times of national emergency, certain limits on speech will be tolerated.”⁶¹ Posner views this not only as tolerable but strongly desirable.⁶² He suggests that never before have individuals and organizations from outside of the country been so easily able to use social media to recruit and “radicalize” supporters and encourage them to engage in violent or other criminal acts against the United States and its people.⁶³ And, glossing over *Brandenburg*, Posner notes that prior to the 1960s, people could be punished for engaging in “dangerous” speech.⁶⁴

Posner has proposed an unprecedented law that would make it a “crime to access websites that glorify, express support for, or provide encouragement for ISIS or support recruitment by ISIS; to distribute links to those websites or videos, images, or text taken from those websites; or to encourage people to access such websites by supplying them with links or instructions.”⁶⁵ To stave off concerns about legitimate uses of such sites, he would allow an exemption for those who could show that they have research, journalistic, or professional security justifications for accessing them.⁶⁶

Critics of Posner’s approach have already identified several serious concerns with his proposal. First, the difficulty in administering such a law without censoring legitimate political advocacy is a significant danger.⁶⁷ Second, it has been argued that Posner may substantially overestimate the level of influence that ISIS propaganda has had in the United States and the extent to which it might have instigated tangible harms.⁶⁸ As Paul Gowder points out, Posner’s column extrapolated his projection of harm from only a single anecdote.⁶⁹ Reliable estimates suggest that there have been seventy-one deaths from domestic terrorism events over a ten year period (2005 through 2015), which amounts to about seven per year.⁷⁰ Moreover, that figure includes deaths caused by terrorist attacks that are not related to ISIS-inspired “jihad.”⁷¹

61. Posner, *supra* note 6.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* There is some disagreement about the various terms used to describe the so-called Islamic State, such as ISIS, ISIL, and Daesh. See Callimachi, *supra* note 51; Max Fisher, *When a Phrase Takes on New Meaning: Radical Islam, Explained*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/world/when-a-phrase-takes-on-new-meaning-radical-islam-explained.html> [<https://perma.cc/Z6TK-C2TU>]. For purposes of this Article, I refer to this coalition of groups as ISIS because that currently seems to be the most common usage.

66. *Id.*

67. Paul Gowder, *Let’s Just Censor Eric Posner*, MEDIUM (Dec. 15, 2015), <https://medium.com/@PaulGowder/let-s-just-censor-eric-posner-instead-9975537eb548> [<https://perma.cc/AWC8-XFZ4>].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

There are certainly other reasons to quarrel with Posner's reasoning. First, the speech doctrine relating to unlawful advocacy is, for obvious reasons, focused on the *speaker*, rather than the persons incited to act. The dilemma turns on the concern about punishing someone for pure speech; it was never in doubt that the incited person could be punished for his or her actual unlawful conduct.

Second, in the case of social-media-inspired violence, most speakers conveying ISIS propaganda are likely to be located outside of the United States and therefore beyond the territorial jurisdiction of American criminal laws.⁷² To be sure, this is why Posner's proposal targets not the speakers but those who domestically access, consume, and redistribute their speech on social media or through more traditional means.⁷³ But, as he points out, such a law clashes with existing First Amendment precedent protecting the right to receive information.⁷⁴ Insofar as I can determine, the concept of punishing the audience for a speaker's expression is completely foreign to American law.

Third, there is an interesting and potentially troubling assumption about human agency related to both Posner's proposal and the *Brandenburg* test itself. Part of the justification for punishing the inciting speaker is that speakers in some circumstances will engage in such powerful rhetoric that it will virtually overcome the will of the listener, compelling him to engage in criminal conduct he would not otherwise have carried out. The central idea here is not that the speaker was successful by virtue of her rhetorical persuasiveness but that she has somehow been so mesmerizing or provocative that the listener cannot help but act. To some degree, this liberates the listener of any agency or moral responsibility. It suggests that he cannot engage in autonomous cognitive function and could not possibly have listened to the speaker and made his own decision to act based on rational deliberation about the speech. Posner's proposed law assumes that cutting the audience off from such speech will protect them from what is essentially mind control through internet postings. It is never questioned whether this understanding of communication is consistent with what we know about social psychology.

Posner is by no means the only legal scholar to call for at least some modification to the *Brandenburg* test. Alexander Tsesis, one of the most thoughtful of these critics, has criticized *Brandenburg*'s conclusion that only laws that prohibit imminently dangerous speech are constitutional. According to Tsesis, the Court's decision "ignored a plethora of empirical evidence about the long-term effects of racist and ethnocentric propaganda" and showings that "[of]ten, ideologues prepare their followers for broad-based, organized destruction through systematic, long-term indoctrination."⁷⁵ This observation is important because it pinpoints part of

72. See Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 1, 4 (2002) (suggesting that domestic law alone cannot handle problems of internet incitement).

73. Posner, *supra* note 6.

74. *Id.*; see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

75. Tsesis, *supra* note 72, at 13.

the danger to national security posed by the particular ideologies of the radical groups associated with contemporary terrorism. But it is unclear how the law could, consistent with generations of First Amendment doctrine, address long-term invocation of rhetoric to influence even racially or religiously hateful opinions, teachings, and beliefs.

In contrast, many theorists such as Geoffrey Stone have been critical of national security exceptionalism, arguing that

[t]hroughout our history, judges have erred on the side of deference in times of crisis. Like other citizens, judges do not want the nation to lose a war, and they certainly do not want to be responsible for a mass tragedy. . . . Moreover, . . . judges, like other citizens, are not immune to the fears and anxieties of the moment. This makes them even more prone—indeed, perhaps too prone—to err on the side of deference.⁷⁶

Similarly, David Cole has explained that

there is reason to think that as a general matter in times of crisis, we will overestimate our security needs and discount the value of liberty. Liberty is almost by definition abstract; it is measured by the *absence* of control or restraint. Fear, by contrast, is immediate and palpable; it takes physical form as stress, anxiety, depression, a pit in the stomach, a bad taste in the mouth. It is easy to take liberty for granted, and to presume that government powers to intrude on liberty are not likely to be directed at one's *own* liberty. Fear affects us all, especially after an attack like that of September 11.⁷⁷

In my view, the current threats to national security are, like those in our nation's past, serious but also likely to be overestimated. That is not to minimize the devastating loss of American lives that has already occurred in the first quarter of the twenty-first century. But historical lessons should nonetheless breed skepticism, at least for now. It is easy for the government to assert abstract national security concerns, and for the public to believe those assertions because citizens generally have limited access to information about the degree and likelihood of current threats. It is, and always will be, difficult to objectively assess such threats in real time.⁷⁸ This is why understanding our past record of addressing such threats is so crucial.

Moreover, those who view national security exceptionalism as a good thing maintain that the dangers are not as great as we might think, since courts typically return to more robust protection of civil liberties during peacetime.⁷⁹ But that argument assumes finite periods of national security concerns, such as traditionally declared wars against foreign nations. To the extent that current terrorism threats justify an “emergency” exception to First Amendment speech protection, what do we do about the fact that the War on

76. STONE, *supra* note 6, at 544.

77. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955–56 (2002).

78. A stark reminder of this is the granting of a writ of *coram nobis* invalidating Fred Korematsu's original conviction after the information on which the detention order was premised became declassified. *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

79. POSNER & VERMEULE, *supra* note 53, at 42.

Terror is not really a war, but an ongoing global problem with no apparent end? As Stone observes, “if the [Bush] administration is correct that the war on terrorism will grind on indefinitely, that is all the more reason to be scrupulous in scrutinizing proposed restrictions of civil liberties.”⁸⁰

Yet another reason for skepticism about relaxing *Brandenburg* in the current era is that, in the current global climate, the targets of restrictions on civil liberties are more likely to be Muslims, a religious minority group (even if those who are engaged in violent acts are at the outer fringes of Islamic thought). As *Korematsu* should remind us, it is certainly not unknown to our history for Americans to be particularly fearful of perceived national security threats from those belonging to minority religious, cultural, and ethnic groups.⁸¹

Finally, skepticism brought on by exaggerated fears of national security threats must, in this case, be multiplied by the corresponding fears of new communication technologies. This claim is elaborated below.

B. Internet Exceptionalism

In considering whether to modify the *Brandenburg* test, we must also account for concerns about internet exceptionalism. Mark Tushnet has defined internet exceptionalism as “whether the technological characteristics of the Internet (and, more generally, twenty-first century information technologies) justify treating regulation of information dissemination through the Internet differently from regulation of such dissemination through nineteenth- and twentieth-century media, such as print, radio, and television.”⁸² Translated to the current topic, the question is whether these characteristics should push us toward different types of regulations of terrorist incitement.

Commentators have generally identified three distinctive features of the internet and social media that might justify different treatment under First Amendment doctrine. First, speech on the internet can be communicated broadly and instantaneously (amplification).⁸³ Second, communication on the internet is much less expensive than other modes of communication (cost).⁸⁴ Finally, speakers using the internet can often mask their identities to listeners, at least in the absence of technological tools unavailable to the general public (anonymity).⁸⁵ There is little dispute that these features make communication on the internet distinctive from traditional media. The

80. STONE, *supra* note 6, at 554.

81. See, e.g., Aziz Z. Huq, *The Political Psychology of Counterterrorism*, 9 ANN. REV. L. & SOC. SCI. 71, 83 (2013) (“[S]tudies . . . furnish support for the proposition that perceptions of terrorism threat will tend to correlate with more stereotypical thinking, greater disapproval of minorities, and increasingly authoritarian attitudes, although they disagree about the precise mechanism at work.” (citation omitted)).

82. Tushnet, *supra* note 48, at 1638.

83. *Id.* at 1651–54.

84. *Id.* at 1654–58.

85. *Id.* at 1658–62.

question is whether those distinctions are sufficiently meaningful to require a new or modified legal regime for the regulation of internet speech.

There has, of course, been much thoughtful scholarship addressing how and to what degree the technological transformation that has occurred over the past twenty years might require substantial alteration in the way existing legal regimes operate.⁸⁶ Moreover, calls for modifying First Amendment doctrine in reaction to digital communication technology have ranged from concerns about the ease with which the internet can act as a shield for people engaging in hate speech and other forms of harassment,⁸⁷ to the proliferation of “fake news,”⁸⁸ to the infringement on intellectual property rights.⁸⁹

Here, the question is whether, in a manner similar to that reflected by national security exceptionalism, courts may feel the need to defer to government regulation of terrorist incitement made more possible because of rapid advances in digital technologies. Such reactions may stem from fear generated by legal decision-makers’ lack of familiarity with such technologies just as they may stem from fear of threats to national security.

Much of the literature on internet exceptionalism is normative and argues for or against idiosyncratic legal models for regulation of speech through digital technologies.⁹⁰ There are, however, doubts about the degree to which the amplification, cost, and anonymity features change the qualitative nature of speech, whether that relates to the speech’s value or the harms it might cause.⁹¹ The amplification and cost factors no doubt make it possible for speakers to reach a wider audience than traditional communication modes, but do not necessarily change the content of the speech. For example, so-called “hate speech” can be conveyed through old-school techniques, such as direct verbal epithets, racist graffiti, or cross burning, but may potentially be directed at a wider range of targets through the internet. Commentators argue whether that ability creates substantially more harm to a larger group of listeners than traditional communication.⁹² Claims regarding the anonymity feature generally relate to the fact that speakers may be emboldened to make more extreme statements when hiding behind artificial identities and may also evade detection for internet speech that otherwise might be subject to prosecution or other legal sanction.⁹³

86. See, e.g., Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297–99 (2014); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 210–14.

87. See Tsesis, *supra* note 72.

88. See Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 66 (2017).

89. See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 54–82 (2008).

90. Compare Easterbrook, *supra* note 86, at 208, with Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999).

91. For an excellent discussion disputing whether those features make incitement of mobs over the internet substantially more problematic, see Kaminski, *supra* note 21, at 78–82.

92. Tsesis, *supra* note 72, at 30.

93. See *Reno v. ACLU*, 521 U.S. 844, 889–90, 894 (1996) (O’Connor, J., concurring in part and dissenting in part) (discussing challenges in identifying and holding responsible

The argument for relaxing *Brandenburg*'s standard is that, to the extent terrorist incitement is dangerous, that danger is substantially exacerbated because of the availability of the internet. Of course, terrorist incitement can take place through many different conventional communication methods, including in-person conversation, written letters, leaflets, memos, telephonic communication, and broadcasting over traditional television and radio networks. But when conducted over the internet, that incitement is amplified at low or no cost and more anonymous than any of the other potential means of communication.

Arguments for internet exceptionalism applied to incitement stem from these features but also rely on other claims. First, some have argued that it is easier for terrorists to radicalize their audience through social media and other digital communication platforms.⁹⁴ Eric Posner, again, writes:

Today, the Internet makes possible the constant circulation of captivating videos, vivid images, and extremist text, creating a "radicalization echo chamber." It is the change in technology, more than the change in the nature of foreign threats, that has given rise to a historic and unprecedented danger from foreign radicalization and recruitment.⁹⁵

If there is a meaningful causal link between internet communication and the development of extremist views, and more importantly, actions based on those views, then there might be a strong claim to allow greater regulation of terrorist expression.

It has also been argued that the amplification feature of internet speech provides another reason to permit greater regulation of inciting speech.⁹⁶ Not only can terrorists form networks around the globe, but they can also incite violent actions by others located in distant lands with great speed. This calls into question whether *Brandenburg*'s requirement that the speech in question be likely to cause imminent harm is too narrow to permit regulation of terrorist incitement.

These claims in favor of internet exceptionalism for terrorist incitement have materialized through various proposals for reform. As already discussed, Posner calls for a law criminalizing the act of accessing terrorist web sites or social media platforms.⁹⁷ Lyrisa Lidsky argues for a more

anonymous internet users); Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 658 (2017) ("[T]he internet emboldens terrorists by providing them with the tools to post anonymously and inexpensively"). *But see* Julie Seaman & David Sloan Wilson, *#freespeech*, 48 ARIZ. ST. L.J. 1013, 1038 n.147 (2016) (citing a study finding little empirical evidence of a causal relationship between internet anonymity and aggressive, antisocial behavior).

94. CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 69 (2007).

95. Posner, *supra* note 6. Underscoring that his main claim relates to technological developments, Posner responds to some of his critics by pointing out that "[t]he question, which no one seems to want to address, is whether social media and other forms of Internet-based communication create opportunities for radicalization that pose a threat to public safety." Eric Posner, *More on Anti-Propaganda Laws*, ERIC POSNER (Dec. 19, 2015) <http://ericposner.com/more-on-anti-propaganda-laws/> [<https://perma.cc/58DQ-EVJM>].

96. *See, e.g.*, Tsesis, *supra* note 93, at 657–59.

97. *See supra* notes 61–66 and accompanying text.

limited adjustment to *Brandenburg*'s imminence requirement to address some types of terrorist incitement. As she argues,

The imminence requirement serves to prevent suppression of speech based on the government's exaggerated fears of the danger posed by radical speech. A satisfactory replacement for cyber incitement would focus on ensuring a direct causal linkage between the speech and the harm, focusing on factors such as the likely make-up of the target audience, whether there was a prior history of violence by members of that audience, whether the speaker supplied detailed instructions on carrying out the violent acts advocated, and whether the violence took place with little delay upon receiving the inciting speech.⁹⁸

Thus, her claim is not so much for *Brandenburg*'s imminence requirement to be relaxed but for a more nuanced consideration of the context in which the speech takes place.

Tsesis does not overtly call for *Brandenburg* to be modified, but he argues that its imminence requirement substantially limits the government's authority to regulate terrorist incitement on the internet. His argument is more geared toward the idea that other legal doctrines might have to be invoked to address such incitement. As he observes,

The incitement doctrine applies only to imminently dangerous statements and is hence of limited value to combat internet terrorist incitement. A statute containing such a component could be effective against immediate calls for violence through applications such as Instagram or Snapchat. But the bulk of internet terrorist speech seeks long-term indoctrination, mentoring, recruitment, and so on; hence, policymakers need additional doctrinal guidelines.⁹⁹

Several things should give us pause before transforming or modifying existing First Amendment doctrine in reaction to these changes. The same things that make speech potentially more problematic also make it possible to more effectively address those problems. Hateful speech is cheap and easy, but so is counterspeech. Perhaps terrorist speech can be used to incite a wider range of potential sympathizers, but so can propaganda that responds to such provocation. One response to this argument, however, is that terrorist social media networks may incite violence or other criminal conduct over relatively secured networks so that counterspeech may not be a realistic possibility in this scenario. But counterspeech need not necessarily take the form of persuading a particular individual not to carry out a specific, unlawful act. Widely broadcast propaganda refuting radical rhetoric might operate to

98. Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 164 (2011).

99. Tsesis, *supra* note 93, at 667. Unlike others, I do not address the so-called "true threats" doctrine as applied to terrorist incitement on the internet. My hesitancy to do so stems from the fact that this Article focuses on speech directed at a listener with the goal of inciting that listener to harm a third person, not on speech that is directly threatening the listener. Others suggest that the true-threats doctrine may be a better fit for terrorist speech on the internet. See Martin H. Redish & Matthew Fisher, *Terrorizing Advocacy and the First Amendment: Free Expression and the Fallacy of Mutual Exclusivity*, 86 FORDHAM L. REV. 565, 583–90 (2017).

dissuade potential terrorists. Admittedly, however, there are serious limitations to the effectiveness of counterspeech if those who are predisposed to accept radical terrorist views are less likely to consult or believe alternate sources.¹⁰⁰

This brings us to the related issue of imminence. The expression of radical terrorist groups through social media and other internet-communication methods is often not the type of speech that fits neatly under the incitement doctrine. For instance, the type of long-term radicalization or indoctrination that these groups sometimes view as their goal relates to advocacy and teaching about their ideology—albeit sometimes an ideology infused with violence as a tactic—rather than immediate calls for a specific violent act. Unlike speech spurring on an angry mob, there may be a substantial lag between when speech is posted on a web page or Facebook and when an audience member reads and acts on that speech. The ultimate goal of the speaker might be to inspire the listener to engage in a violent act at some indefinite time in the future, but that type of more abstract advocacy is what *Brandenburg* was designed to protect. As Margot Kaminski observes,

If groups can form so quickly that police cannot react, there might be an argument for ignoring the imminence requirement and allowing regulation before the call to arms happens. This, however, is exactly why *Brandenburg* has an imminence standard: the further back from actual harm regulation gets, the more it impinges on free expression.¹⁰¹

Moreover, during the lag time, there could be other factors that cause a reader to become radicalized as well as substantial opportunities for counterspeech to dispute the call for violent action. Thus, *Brandenburg* takes into account that there may be many reasons why the length of time between the speech and the act may diminish the danger—counterspeech, doubt, and regret developed internally by the listener, or concern about capture and punishment, to name a few. These things are not likely to be true when an angry mob is incited.

In addition, it is not clear just how much the breadth and speed with which radical messages can be conveyed on the internet necessarily justifies internet exceptionalism given our past experiences with other types of communication. Other technologies prior to the internet also had the advantages of relatively low cost and wide dissemination. The radical right-wing “radio priest” Father Charles Coughlin, for example, is reported to have reached an audience of as many as 30 million listeners through his weekly radio broadcasts.¹⁰² The Egyptian Sheikh Omar Abdel Rahman—who was later convicted of conspiring to bomb several New York City landmarks—

100. SUNSTEIN, *supra* note 94, at 69.

101. Kaminski, *supra* note 21, at 80.

102. Rick Perlstein, *I Thought I Understood the American Right. Trump Proved Me Wrong.*, N.Y. TIMES MAG. (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/magazine/i-thought-i-understood-the-american-right-trump-proved-me-wrong.html> [https://perma.cc/W3J3-DKQF].

communicated and inspired his followers through conference calls and the wide circulation of cassette tapes containing recordings of his messages.¹⁰³

With regard to the anonymity that is enhanced by communicating over the internet, there are two general responses. First, while anonymity could certainly be a valid concern for law enforcement agencies trying to capture and deter terrorists, as stated earlier, most inciters in this realm are likely to be outside the United States and therefore beyond its criminal jurisdiction—a much larger impediment to law enforcement than anonymity.¹⁰⁴ Second, as others have pointed out, the First Amendment was enacted against the backdrop of a culture in which anonymous political speech was recognized as a valuable feature of free expression.¹⁰⁵

In general, I am sympathetic to concerns that the technological changes wrought by the internet might not be as qualitatively substantial as initial concerns might indicate. Or that, at the very least, we still do not know enough about how digital communication might transform things such as terrorist incitement to justify a major doctrinal change. Jamie Boyle's book, *The Public Domain*, describes a phenomenon that has useful parallels to the arguments presented in this Article.¹⁰⁶ Boyle argues that in the regime of intellectual property, the content industry (i.e., movie studios and music production companies) typically has adopted what he calls a "20/20 downside" vision of changes produced by digital communication and the internet.¹⁰⁷ This influences them to see only the downside of piracy threats from the internet and to ignore or undervalue the corresponding potential upsides.¹⁰⁸ There is a degree to which that same danger might occur in the context of terrorist incitement in the digital age. Some policy-makers, judges, and scholars may have a 20/20 downside vision of what will happen if the current First Amendment doctrine is not adjusted to deal with the dangers of terrorism.

One might object that in the contemporary era, the national security and internet issues are one and the same and that I am bootstrapping my arguments by contending that their confluence is more reason for caution than either factor alone. Moreover, one could argue that the multiplier effect of both concerns—national security and internet communication—is precisely the *danger* to society that justifies at least a temporary exceptional approach to free speech doctrine.

In terms of the first claim, it is clear from our long history of contracting civil liberties during crises that national security exceptionalism is by no means limited to the advent of the internet. It is equally clear that internet exceptionalism concerns are not confined to issues concerning national

103. Jim Dwyer, *The Voice That Called to Terrorists, Unstilled by Time or Even Death*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/nyregion/omar-abdel-rahman.html> [<https://perma.cc/XU7Q-RKJX>].

104. See Tsesis, *supra* note 72, at 4.

105. See generally Andrew Koppelman, *Entertaining Satan: Why We Tolerate Terrorist Incitement*, 86 FORDHAM L. REV. 535 (2017).

106. BOYLE, *supra* note 89, at 63.

107. *Id.*

108. *Id.*

security. This is exhibited by the discourse on how digital communication technologies suggest a need to modify other areas of law, such as intellectual property¹⁰⁹ and privacy.¹¹⁰ With regard to the second argument, I maintain that we should, at the very least, be skeptical about the potential to propose exaggerated responses to multiple justifications for exceptionalism. Moreover, as I will explain in Part III, if there are grave concerns about national security and the internet leading to tangible social harms that cannot be addressed in any way other than relaxing the *Brandenburg* standard, the evidence of such a problem has yet to emerge in any concrete way.

III. *BRANDENBURG* TODAY

Although *Brandenburg* has been the subject of much academic debate, particularly in recent years, it appears in practice to strike an appropriate balance. In my view, even with some level of ambiguity, the test has largely produced results that comport with the Court's objectives. It seems in most cases to protect speech that is merely teaching or advocating for ideas that might be dangerous if implemented and to guard against the chilling effect on such speech. But it also allows the government some latitude to prosecute those who clearly intend to cause real harm to the United States and are targeting an audience of people likely to cause that harm.

While there have been few calls to broaden the *Brandenburg* test to protect more speech,¹¹¹ there have been, as discussed, several suggestions about narrowing its holding to permit broader regulation of terrorist incitement.¹¹² Notwithstanding arguments for skepticism, one could argue that such reforms would be justified if many individuals who engaged in dangerous speech are successfully mounting *Brandenburg* defenses to their prosecutions. But an examination of all reported federal cases since 9/11 that have cited to *Brandenburg* does not really provide any such evidence.¹¹³ Most of those cases have nothing to do with terrorism (again, perhaps because much terrorist speech that might be considered as inciting may come from outside

109. Lessig, *supra* note 90, at 502.

110. See generally NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (2015).

111. Unlike during earlier periods of unrest over national security concerns, there do not appear to have been a plethora of abuses of criminal laws or enforcement of subversive-advocacy laws against academics or those who teach about different ideologies that might be associated with contemporary terrorist movements. One might argue that the Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), is an example of the unfortunate relaxation of the *Brandenburg* test. *Holder* rejected a facial challenge—brought by lawyers, journalists, and activists—to federal laws prohibiting the provision of material support to groups identified as a “foreign terrorist organization.” The majority in *Holder*, however, did not even cite *Brandenburg*, although Justice Breyer's dissent did. *Id.* at 43–45 (Breyer, J., dissenting) (arguing that the *Brandenburg* standard would protect much of the plaintiffs' speech). If Justices on the Court completely ignore *Brandenburg*'s applicability to a particular type of criminal statute, it is hard to fault the rule of *Brandenburg* itself. Rather, the problem isn't *Brandenburg* per se, but the refusal to invoke it when it is quite arguably controlling.

112. See *supra* Part II.A.

113. The author examined these cases in September 2017 by searching for “*Brandenburg v. Ohio*” in the Westlaw Federal Cases database with the date restriction “All Dates After 09/11/2001.”

of the country and is therefore beyond the territorial jurisdiction of American criminal law).¹¹⁴ A handful of cases dismissed charges because the government failed to prove one of the three prongs of *Brandenburg* (intent, imminence, or likelihood of unlawful action).¹¹⁵

Decisions adjudicating the claims of accused terrorists show that *Brandenburg* does not protect speech by those who advocate and provoke serious and imminent harm to national security interests. In a handful of these cases, the courts have entertained, but ultimately rejected, *Brandenburg* defenses.¹¹⁶ In each of these cases, the courts have rejected the First Amendment claim and concluded that the United States has easily satisfied the intent, likelihood, and imminence elements of the test.¹¹⁷

Also, in reviewing the available information about both successful and failed terrorist plots inspired by internet communications, it appears that many of the most serious threats do not come from generalized calls for action or radicalization. Rather, these threats come from what can only be viewed as direct, step-by-step incitement and hand-holding that, were the speakers subject to criminal jurisdiction in the United States, would surely meet the *Brandenburg* standard and permit their prosecution.¹¹⁸ As one terrorism analyst has reported, “‘If you look at the communications between the attackers and the virtual plotters, you will see that there is a direct line of communication to the point where they are egging them on minutes, even seconds, before the individual carries out an attack.’”¹¹⁹ Thus, the actions of these groups far exceed the general type of advocacy that *Brandenburg* protects.

Finally, again, there may be a degree to which the concerns about national security and the distinctiveness of the internet are at least somewhat inflated. With regard to national security, as cited above, the number of deaths related to terrorism incidents on U.S. soil are relatively few, particularly when

114. See Tsesis, *supra* note 72, at 4.

115. See, e.g., *Bible Believers v. Wayne County*, 805 F.3d 228, 244 (6th Cir. 2015) (en banc) (holding that members of a Christian group who attended an Arab festival and displayed anti-Islamic messages did not “advocate for, encourage, condone, or even embrace imminent violence or lawlessness”), *cert. denied*, 136 S. Ct. 2013 (2016); *United States v. McCrudden*, No. CR-11-061 DRH, 2015 WL 1198544, at *26 (E.D.N.Y. Mar. 16, 2015) (holding that an email calling for revolution was unlikely to incite such conduct), *aff’d*, 655 F. App’x 23 (2d Cir. 2016).

116. See, e.g., *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1245–50 (Ct. of Mil. Comm’n Rev. 2011) (considering but rejecting a *Brandenburg* defense), *aff’d sub nom.* *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-1307 (Mar. 28, 2017); *United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999) (“[W]hile the state may not criminalize the expression of views, even including the view that violent overthrow of the government is desirable, it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action”); *United States v. Sattar*, 272 F. Supp. 2d 348, 374 (S.D.N.Y. 2003) (stating that “such acts and statements that ‘instruct, solicit, or persuade others to commit crimes of violence’ are not protected by the First Amendment and may be prosecuted” without explicitly invoking *Brandenburg* (quoting *Rahman*, 189 F.3d at 117)).

117. See *supra* note 116.

118. Callimachi, *supra* note 51 (quoting one terrorism expert as stating that foreign terrorist groups frequently engage in very explicit direction and control of individuals carrying out attacks in the United States).

119. *Id.*

compared to other causes of death.¹²⁰ Furthermore, from the available data, the role of the internet in such incidents is not even clear. According to an extensive report by the Cato Institute, the internet and social media played either little or no role in the bulk of domestic terrorism prosecutions brought since 9/11.¹²¹

CONCLUSION

This Article has argued that the legal system ought to be skeptical about calls to relax the free speech protections surrounding unlawful advocacy because we live in a time when such calls may be unduly influenced by inflated concerns about both national security and rapid technological change. In claiming that the *Brandenburg* standard is sufficiently protective of general advocacy while still allowing room for prosecution of truly inciting and dangerous expression, I do not mean to minimize the human damage that terrorist-inspired violence has so tragically caused in our recent history. At the same time, as Geoffrey Stone has thoroughly catalogued,¹²² our longer history shows a tendency to overreact to what are perceived as new types of national security threats. That history should give us pause when reconsidering First Amendment doctrine that has served the mutual values of liberty and security quite well for over a generation. Societal reactions to the newness of the internet and social media platforms can similarly skew our thinking about the need for government regulation. The confluence of these two types of exceptionalism should cause us to be exponentially wary of tinkering with the law of unlawful advocacy in the absence of strong evidence that the law has impeded the ability of the government to protect us from imminent danger.

120. Gowder, *supra* note 67.

121. See TERRORISM SINCE 9/11: THE AMERICAN CASES (John Mueller ed., 2017 ed.), <https://politicalscience.osu.edu/faculty/jmueller/SINCE.pdf> [<https://perma.cc/EMF4-3YVK>].

122. See STONE, *supra* note 6.