

Jan. 6 insurrection raised misunderstood 1A issues about censorship and incitement

The Jan. 6 insurrection at the U.S. Capitol raised a host of questions about free expression where the law of the First Amendment is widely misunderstood.

Missouri Sen. Josh Hawley, who went to Stanford, graduated from Yale Law School and clerked for Chief Justice John Roberts, claimed Simon & Schuster assaulted the First Amendment by canceling his book contract because of his effort to throw out the results of the 2020 presidential election. He was wrong.

Donald Trump Jr. said "Free-speech no longer exists in America" because Twitter and Facebook suspended the president's social media account after he stirred up supporters to march on the Capitol Jan. 6. He was wrong.



Protesters gathering outside the Capitol

The New York Times Editorial Board claimed the president “incited his followers to violence” for which he should “be held accountable” through possible “criminal prosecution.” It was probably wrong.

Rather than violating the First Amendment, Simon & Schuster and the tech companies were exercising the First Amendment – the free editorial discretion they possess under the First Amendment to decide they did not want to publish what Hawley and Trump had to say, legal scholars said.

As for criminal incitement described by The New York Times, the inciter must specifically urge unlawful acts when there is an imminent likelihood the acts will occur. Calling on people to “fight” and to march to the Capitol wouldn’t constitute illegal incitement, absent additional evidence.

Even though Hawley, Trump and the Times’ editorial page were wrong on the law, they have a point in the broader discussion of a free society.

Many people see free speech as more a cultural norm than a legal one. They view it much broader than protection from the government. Big tech seems just as ominous a threat to many people as the government. And many conservatives, such as Hawley, argue Big Tech acts as an arm of “cancel” culture, directing most of its editing toward conservative speakers – a claim not supported by research but believed by many conservatives.

In addition, one important theory of free speech is that it serves as a “safety valve” to allow partisans – even ones spouting QAnon fictions – to let off steam – whether it’s in conspiratorial postings or in marches on the Capitol. Justice Louis Brandeis expressed it this way when, a century ago, prominent San Francisco suffragist Charlotte Whitney was prosecuted for helping form the Communist Labor Party of America. Brandeis wrote: “fear breeds repression; . . . repression breeds hate; . . . hate menaces stable government; . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and the fitting remedy for evil counsels is good ones.”

The “woke mob”

Conservative and liberal legal scholars ridiculed Hawley’s statement “on the woke mob at Simon & Schuster.”

Hawley said: “This could not be more Orwellian. Simon & Schuster is canceling my contract because I was representing my constituents, leading a debate on the Senate floor on voter integrity, which they have now decided to redefine as sedition. Let me be clear, this is not just a contract dispute. It’s a direct assault on the First Amendment. Only approved speech can now be published. This is the Left looking to cancel everyone they don’t approve of. I will fight this cancel culture with everything I have. We’ll see you in court.”

Donald Trump Jr. also brought up Orwell after his father's social media accounts were shuttered. "We are living Orwell's 1984," he said – [on Twitter](#). "Free-speech no longer exists in America." Secretary of State Mike Pompeo and Sens. Marco Rubio, R-Fla. and Ted Cruz, R-Tex., [chimed in](#) with Pompeo likening the actions to the Chinese Communist Party, Rubio to "erasing" political opponents and Cruz to censorship.

One basic of the First Amendment is that it protects people from the government – Congress shall make no law – not from private parties such as a book publisher and social media companies.

If the government were to force a book publisher or social media company to publish certain statements – that would violate the First Amendment. But for the private companies to refuse to publish a public official's claims – widely debunked – is an exercise in editorial discretion.

Mark Sableman, a First Amendment lawyer at Thompson Coburn LLC in St. Louis, said in an email that he supported both Simon & Schuster's and the tech companies' editorial decisions.

"I support publishers who make editorial decisions about the books they publish, and I think S&S made a credible decision in concluding that, now that they know more about Hawley, they don't want to be associated with him and they no longer trust (or at least have much less faith in) his judgments."

Sableman said he supported Facebook and Twitter exercising their editorial discretion rather than sitting back and doing nothing. Section 230 of the Communications Decency Act protects social media companies from lawsuits growing out of third-party postings – such as Trump tweets – so social media companies can sit idly on the sidelines while their platforms are abused. That's what most social media companies have done until recently.

But Section 230 also has a so-called "Good Samaritan"

provision intended to encourage social media companies to remove indecent or otherwise objectionable posts. Still for many years the social media giants didn't fully exercise that power to delete highly objectionable content – partly because there were no consequences for leaving it up and because more traffic meant more business.

Sableman is glad they are now acting more deliberately.

“There was one plainly wrong call by the social media companies. It was what they often did until a few months ago – stand on the sidelines, let their facilities be used for great harm, cover themselves with Section 230 immunity, and disclaim any responsibility for how their facilities were used (even though section 230 both encourages them to take action and even immunizes them from liability for doing so). Morally, it is indefensible to turn a blind eye to seriously misleading, harmful content.”

Don't worry about Trump

Gregory P. Magarian, a First Amendment expert at Washington University law school and former clerk to Justice John Paul Stevens said he is concerned about the power of social media giants but glad to see them dulling the power of leaders to use social media for ill.

“I want a wide range of ideas, even those I loathe, to be heard,” he told The New York Times and I think Twitter especially holds a concerning degree of power over public discourse. (but) The First Amendment doesn't require any private forum to publish anyone's speech. Neither Twitter nor Simon & Schuster has any obligations under the First Amendment.”

He added: “Any suggestion that people like Trump and Hawley, and the viewpoints they espouse, will ever lack meaningful access to public attention is ludicrous. We should worry about

private power over speech, but presidents and senators are the last speakers we need to worry about.”

Magarian added in an email, “Donald Trump and Josh Hawley will always get their messages out. Almost nobody else enjoys that unearned advantage. These men used their expressive power to do world-historically terrible things. Private publishers are responding by dulling their expressive power. Thank goodness that little thing, at least, is going right.”

American Civil Liberties Union Senior Legislative Counsel Kate Ruane put out a statement of concern about the social media companies actions. “It should concern everyone when companies like Facebook and Twitter yield the unchecked power to remove people from platforms that have become indispensable to the speech of billions – especially when political realities make those decisions easier.”

Clarence Brandenburg in a farm field

Clarence Brandenburg, a KKK leader, invited a Cincinnati TV reporter to cover a KKK rally in a Hamilton, [Ohio farm field in August 1964](#). The small Klan crowd dressed up in the obligatory sheets and even had a goose-stepping Nazi there giving a Heil Hitler salute.

Brandenburg promised “revengeance” (*sic*) if the federal government and courts continued to “suppress the white, Caucasian race.” He also announced that the Klan members were planning to march on Washington, D.C., on Independence Day. Dr. Martin Luther King’s March on Washington had occurred the previous year and the Civil Rights Act had just passed.

Although Brandenburg was convicted of criminal syndicalism in the lower court, the Supreme Court decided there was no way he was about to take over the government. The Supreme Court held

that advocacy of violent overthrow of the government is protected speech unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

The Brandenburg test of imminent lawless action elevated the protection of free speech and long has been celebrated by civil libertarians.

The test supports the view that Trump may not have engaged in illegal incitement. Legal experts point out that Trump didn't specifically advocate illegal action.

“If you don't fight like hell, you're not going to have a country anymore,” he said. He told his supporters to “show strength” and to “fight much harder.”

But he also stated, “I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.”

Advocating that protesters fight or fight harder is not clearly advocating illegal action, particularly when followed by advocacy of peaceful protest.

On the other hand, Trump still was tweeting about Vice President Mike Pence's betrayal as rioters were pursuing senators.

In a much-watched video, rioters pursued Capitol Police Officer Eugene Goodman up stairs to the corridor leading to the Senate chamber. That was 2:14 pm., one minute after the Senate suspended its election debate. Ten minutes later, with rioters invading the Senate chamber, Trump tweeted this:

“Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to

previously certify. USA demands the truth!"

Chants of "Hang Mike Pence" were heard in the Capitol and it became a trending Twitter handle until Twitter deleted it.

Benjamin Wittes, editor of the politically balanced Lawfare blog, wrote that, "With several people dead and the Capitol invaded, and the president having both called the rioters to town and told them to march on the Capitol, there is no way that Trump's role in the events of last week will escape investigation..."

"Did Trump merely give an incendiary speech and then sit back and watch with pleasure as the mob attacked Congress? What was his role while these latter events were taking place? Did he have contact with anyone actively involved in the mayhem during the attacks? Did anyone do so on his behalf or with his blessing? Law enforcement needs to seek answers to these questions, and for public accountability purposes, Congress does too. These investigations need to happen—and they will."

On the day of the attack, Wittes tweeted about Trump's action, "it doesn't border on sedition. It is sedition." He went on to cite the Seditious conspiracy statute that makes it crime punishable for up to 20 years in prison to conspire "by force to prevent, hinder, or delay the execution of any law of the United States."