

Thompson v. Trump: Lost in the Funhouse of Brandenburg

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ABSTRACT: D.C. Circuit Court Judge Amit Mehta’s ruling in Thompson v. Trump denying immunity to ex-President Donald Trump in actions brought against him by a variety of plaintiffs for inciting the January 6th insurrection offered a moment of relief to the left side of the Great Partisan Divide in these dark times. Mr. Trump could finally be held responsible for a bit of the havoc he wreaked.

The author advises not to celebrate too quickly. The Supreme Court—in the great likelihood that the case ends up there—may not see eye to eye with Judge Mehta. Two issues will be central to the High Court’s analysis and to this Essay. The first is whether the ex-President’s remarks fell outside of the Court’s “capacious” view of the “outer perimeter” of presidential functions. The second issue as to whether his speech that day falls under the long-standing Brandenburg exception to free speech presents a minefield of perplexing, previously unidentified issues that threaten consistency in the decisions it produces. The author brings each of these issues to light, positing their implications for Mr. Trump’s immunity with respect to the civil suits arising out of the January 6th attack on Congress and ultimately providing an inventory of questions that the Court must weigh in on to produce a workable standard for assessing when speech is deemed to incite imminent lawless action.

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I. INTRODUCTION

“Today is a major victory for the rule of law, and . . . exhibits the finest tradition of our legal system”¹ “It’s good to see that no one is above the law. Everyone should be held accountable for their actions.”²

In the midst of today’s existential challenges to national sovereignty, democracy, public health, and the environment, D.C. Circuit Court Judge Amit Mehta’s ruling in *Thompson v. Trump* denying immunity to ex-President Donald Trump in actions brought against him by a variety of plaintiffs for inciting the January 6th insurrection³ was a moment of good news to those on the left side of the Great Partisan Divide. Mr. Trump would now face the music, and the historical record would cut through all the bizarre, alt-right flak designed to obscure the armed attack on democracy.

But don’t celebrate too quickly. The Supreme Court—assuming the case goes that far—may not see eye to eye with Judge Mehta.

II. THE “OUTSIDE PERIMETER”

In general, an incumbent or former President cannot be sued for damages arising from acts, however disastrous or poorly motivated, made during office.⁴ As Justice Lewis Powell, Jr. explained in the five-to-four opinion in *Nixon v. Fitzgerald*, to require the Chief Executive to defend him or herself against an avalanche of actions as they look after the country and the world would present a dangerous distraction, and their desire to avoid a life of depositions and trials after they step down from the presidency may skew their judgment while in office.⁵ In response to the liberal dissenters’ concern that the President was being handed a blank check, Justice Powell ticked off a list of disincentives which would presumably prevent a President wreaking havoc

1. *Breaking: Historic Ruling Denies Immunity for Donald Trump in Capitol Insurrection Lawsuit*, NAACP (Feb. 18, 2022), <https://naacp.org/articles/breaking-historic-ruling-denies-immunity-donald-trump-capitol-insurrection-lawsuit> [https://perma.cc/APN9-VBJE] (quoting Joseph Sellers, a partner at Cohen Milstein and co-lead counsel for the NAACP and Members of Congress in *Thompson v. Trump*).

2. Katelyn Polantz, Marshall Cohen & Tierney Sneed, *Judge Says Trump Could Be Culpable for January 6 and Says Lawsuits Against the Former President Can Proceed*, CNN: POLITICS (Feb. 19, 2022, 10:55 AM), <https://www.cnn.com/2022/02/18/politics/trump-giuliani-swalwell-january-6-lawsuit/index.html> [https://perma.cc/424C-UF23] (quoting Capitol Police Officer James Blassingame Jr.).

3. See *Thompson v. Trump*, No. 21-cv-00400, No. 21-cv-00586, No. 21-cv-00858, 2022 WL 503384, at *1, 53–54 (D.D.C. Feb. 18, 2022).

4. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

5. *Id.* at 751–53.

or self-dealing with impunity, including the threat of impeachment, exposure by the press, the loss of public support in a bid for reelection, a diminution of their influence, and harm to their legacy.⁶

But there is one exception: “The President’s absolute immunity extends to all acts within the ‘outer perimeter’ of his duties of office,” but not those that fall outside of his functions.⁷ As Judge Mehta put it, the “scope of presidential immunity for civil money damages . . . is unquestionably capacious, though not categorical.”⁸

In addressing the issue in the *Thompson* case, his Honor cataloged a series of Mr. Trump’s remarks as President that fall beyond the outer perimeter of presidential functions, despite having been made at events dealing with matters of public concern:

At a rally promoting his reelection, an incumbent President touts his policy accomplishments and makes promises about a second term, but during his speech he instructs members of the crowd to “punch” a protester “in the face right now.” Or, take a President who speaks at a party fundraising event before a group of high-dollar donors, where he not only discusses pending legislation but also falsely and with malice accuses a political opponent who is blocking the legislation of running a child-trafficking operation. Or, consider a President who appears at a campaign event for a candidate of his party who is running for Congress, and during his remarks touts the candidate because his election will help advance his agenda, but also calls on the crowd to destroy property as a sign of support. In each of these scenarios, the conduct of the President comes in the context of words uttered on matters of public concern, but it is doubtful that anyone would consider the President immune from tort liability for harm resulting from his speech. To be sure, these scenarios may seem far-fetched, but they illustrate an important point: blanket immunity cannot shield a President from suit merely because his words touch on matters of public concern.⁹

Judge Mehta may have missed the point. In the examples he gave, he divided Presidential remarks given at events or on matters of public concern into two categories: (1) those relating to public concerns and the presidential function; and (2) those—like punching the reporter—that fall outside of the Chief Executive’s far-ranging bailiwick and carry no immunity. The question in the *Thompson* case is different. It’s whether the events of January 6th themselves—i.e., the President’s efforts to intervene in the final stage of the electoral process—fell outside the outer perimeter of his job.

6. *Id.* at 757–58.

7. *Id.* at 732.

8. *Thompson v. Trump*, 2020 WL 503384, at *12.

9. *Id.* at *16.

Article II, section 1 of the *United States Constitution* explicitly describes the process by which the Electoral College operates to select a president: “The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President”¹⁰ The task of the Electoral College on January 6th of counting the electoral ballots and declaring the next president clearly and exclusively involved the Senate and Vice-President. Thus, any attempt by an incumbent president to interfere with the outcome of the process, whether by the incitement of an angry mob or a casual statement that the process was flawed and should not proceed, clearly falls outside of presidential functions.

Additionally, there’s little doubt that disrupting the process was the purpose of the rally and the assault on the Capitol building. As Mr. Trump himself told the crowd of angry, armed right-wing protesters, “[w]e have come to demand that Congress do the right thing and only count the electors who have been lawfully slated,” and went on to instruct them that “we’re going to walk down Pennsylvania Avenue . . . [a]nd we’re going to the Capitol, and we’re going to try and give . . . our Republicans . . . the kind of pride and boldness that they need to take back our country.”¹¹ Indeed, the events of January 6th were billed as the “March to Save America” and publicity specified that, “[a]t 1:00 p.m., we will march to the Capitol building and call on Congress to stop the steal.”¹²

III. *BRANDENBURG* FREE SPEECH TEST

However, even if the demonstration that day had been entirely peaceful, the Trump team’s argument that his conduct was “within the ‘outer perimeter’ of his . . . responsibilit[ies]”¹³ is a non-starter. The only relevant question is whether the President’s remarks were protected by the First Amendment, as his lawyers’ claim, and thus whether the cases brought against him represent unconstitutional restraints on his speech.

Since the landmark case of *Brandenburg v. Ohio* in 1969, it is settled law “that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*”¹⁴ The phrase “directed to” suggests

10. U.S. CONST. art. II, § 1, cl. 3.

11. Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/ZY7R-8K8Z>].

12. Philip Bump, *When did the Jan. 6 Rally Become a March to the Capitol?*, WASH. POST (Feb. 10, 2021, 11:11 PM), <https://www.washingtonpost.com/politics/2021/02/10/when-did-jan-6-rally-become-march-capitol> [<https://perma.cc/VC3J-TE4A>].

13. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

14. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

that the intent of the speaker to incite imminent violence is critical and subsequent opinions make it clear that such intent is required. For example, four years later in *Hess v. Indiana*, an anti-war protester was found not to have incited violence by the High Court because, among other things, “there was no evidence . . . that his words were intended to produce . . . imminent disorder.”¹⁵

A. INTENT

Herein lies the rub: Despite exhorting the angry mob to “fight like hell[] [a]nd if you don’t fight like hell, you’re not going to have a country anymore,”¹⁶ proving Mr. Trump’s intent to bring about imminent violence may not be a slam dunk for several reasons. First, he attempted to cover his derrière by noting in his inflammatory speech: “I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard”¹⁷ and later tweeting “I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order – respect the Law and our great men and women in Blue.”¹⁸ These thinly-veiled attempts to avert liability as he incited the crowd may provide our conservative justices with just enough cover to find an absence of intent.

B. NATURE OF THE EVENT

But, even if Mr. Trump is found to have intended to induce the events of January 6th, there are other potential avenues to immunity. The first is the diametrically opposed characterization of what, in fact, he had induced on that day. From the evidence-based vantage point of the left side of the Great Divide, it’s clear: a violent insurrection. On the other hand, as bizarre and unfounded as it is, the Republican National Committee and a large swath of the country now characterize what transpired on January 6th as “legitimate political discourse.”¹⁹ Notwithstanding former Justice Stephen Breyer’s wishful insistence that the Supreme Court is not made up of “junior varsity politicians,”²⁰ it is difficult to view the Court as nonpartisan, such as when, in

15. *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

16. Naylor, *supra* note 11.

17. *Id.*

18. Philip Bump, *What Donald Trump Has Said About the Capitol Rioters*, WASH. POST (July 22, 2021, 10:38 AM), <https://www.washingtonpost.com/politics/2021/07/22/what-donald-trump-has-said-about-capitol-rioters> [<https://perma.cc/E4QJ-3VQJ>] (quoting a Tweet from Mr. Trump).

19. Josh Dawsey & Felicia Sonmez, *‘Legitimate Political Discourse’: Three Words About Jan. 6 Spark Rift Among Republicans*, WASH. POST (Feb. 8, 2022, 7:01 PM), <https://www.washingtonpost.com/politics/2022/02/08/gop-legitimate-political-discourse> [<https://perma.cc/HG9M-3EG9>].

20. Jeff Shesol, *The Willful Naïveté of Stephen Breyer*, N.Y. TIMES: OPINION (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/opinion/breyer-supreme-court.html> [<https://perma.cc/R8ZV-EXBA>].

one of innumerable examples, Republican- and Democrat-appointed justices split cleanly along party lines in *Bush v. Gore*.²¹

Justice Clarence Thomas, for example, could be a concern in this respect. His wife, Ginni, is a prominent Make America Great Again (“MAGA”) ²² leader who condemned the House investigation into the events of January 6th as “legal harassment to private citizens who have done nothing wrong.”²³ Her husband, in turn, “speak[s] [generally] of a shared Thomas philosophy,”²⁴ making one wonder if he would share her view on the storming of the Capitol. Whatever Justice Thomas’ take on that day, it seems unlikely that five members of the Court would reinvent it as, in the words of Representative Andrew S. Clyde (R-Ga.), “a normal tourist visit.”²⁵ Reassuringly in this regard, without actually mentioning January 6th, Justice Neil Gorsuch recently lamented that “[d]emocracies fall apart from within . . . [t]hey crumble because (one faction) seeks to impose its will on others.”²⁶

C. WELCOME TO THE FUNHOUSE

Mr. Trump may have an alternative path to immunity. The second prong of *Brandenburg* requires that speech aimed at “inciting or producing imminent lawless action . . . is likely to incite or produce such action.”²⁷ Watching the horde of irate protesters march the Capitol after the President beseeched them to, it is reasonable to infer that, beyond merely being *likely* to produce imminent lawless carnage, his speech *actually did* produce it.

21. See *Bush v. Gore*, 531 U.S. 98, 98 (2000). In that decision, Justices Rehnquist, O’Connor, Scalia, Kennedy, and Thomas, all appointed by Republican presidents, voted to stop the Florida recount while Mr. Bush was ahead, and Justices Ginsburg, Breyer, Souter, and Stevens, appointed by Democratic presidents, voted against it. See *id.* at 98–99, 111, 123.

22. See Caleb Ecarma, *Ginni Thomas Didn’t Just Praise MAGA Supporters on January 6. She Actually Attended the “Stop the Steal” Rally*, VANITY FAIR (Mar. 14, 2022) <https://www.vanityfair.com/news/2022/03/ginni-thomas-attended-stop-the-steal-rally> [https://perma.cc/EX3H-QKDY]. “Make America Great Again” was Donald Trump’s 2016 presidential campaign slogan. “[T]he slogan is often reduced to ‘MAGA.’” Tom Porter, *The Winning Slogan From Every US Presidential Campaign Since 1948*, BUS. INSIDER (May 15, 2019, 8:53 AM), <https://www.businessinsider.com/every-winning-slogan-from-us-presidential-campaigns-1948-2016-2019-5> [https://perma.cc/FSE5-CW9Q].

23. Ecarma, *supra* note 22 (quoting letter from the Conservative Action Project to Congress, signed by Ginni Thomas).

24. Danny Hakim & Jo Becker, *The Long Crusade of Clarence and Ginni Thomas*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html> [https://perma.cc/SNgL-R886].

25. Andrew Solender, *GOP Rep. Clyde Defends Comparing Jan. 6 To ‘Normal Tourist Visit’ During Explosive Exchange*, FORBES (July 28, 2021, 3:55 AM), <https://www.forbes.com/sites/andrewsolender/2021/07/28/gop-rep-clyde-defends-comparing-jan-6-to-normal-tourist-visit-during-explosive-exchange/?sh=3d205d9b506d> [https://perma.cc/MXQ8-F4XC].

26. Devin Dwyer, *Justices Sonia Sotomayor and Neil Gorsuch Agree: Misinformation is Threat to America*, ABC NEWS (Apr. 14, 2021, 7:09 PM), <https://abcnews.go.com/Politics/justices-sonia-sotomayor-neil-gorsuch-agree-misinformation-threat/story?id=77078448> [https://perma.cc/8BG5-XTPH].

27. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

It is here, though, in assessing whether speech is likely to incite or produce action, that we enter the linguistic/doctrinal funhouse. First, in both common usage and the formal dictionary definition, incitement has two different senses. One is to “urge on” and the other is “to move to action.”²⁸ Speech that is merely likely to *encourage* an individual or group to take some action is far different than speech that is likely to *produce* the action. If, when Mr. Trump told the crowd, “we’re going to walk down Pennsylvania Avenue . . . [a]nd we’re going to the Capitol,”²⁹ no one went anywhere, he would have incited the crowd in the former sense of the word, but not in the latter.

Inciting and producing action are used disjunctively in the *Brandenburg* test. The speaker may either incite or produce an intended action.³⁰ Since the sense of incitement whereby speech has moved the listener to action has the same meaning as speech that has “produced” action, then the other sense of incitement—mere encouragement—must be the intended meaning of the term as it is used in *Brandenburg*. Otherwise, the terms would be nonsensically redundant. The bottom line is that speech that is likely to either encourage or successfully move listeners to imminent lawless action will satisfy the *Brandenburg* test and defeat immunity. In this respect, the test thus casts a wider net than is apparent at first glance and, as applied to *Thompson v. Trump*, bodes poorly for the ex-President.

And we’re not out of the funhouse yet. The “encouragement” sense of incitement itself has two senses. In the first sense, I have encouraged another to, say, rob a bank with me when he or she becomes intrigued with the idea. But I can suggest to the pillar of the community, to no avail, that it’s a good idea to rob a bank with me, and I can nonetheless be seen to have encouraged the listener, however repugnant the idea may strike him or her. In one sense of the term, encouragement need not have any influence on the listener, and in the other sense, it is seen to move the listener closer to doing whatever he or she was encouraged to do. We have resolved this very question with the offense of solicitation in criminal law, wherein a speaker must merely utter the encouragement, whether or not it has any effect on—or is even received or understood by—the listener.³¹ Which of these two competing meanings of the “encouragement” sense of incitement inheres in the *Brandenburg* test is an open question. *Thompson* must now be looked at through the various senses of the second prong of the *Brandenburg* test.

28. *Incite*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/incite> [<https://perma.cc/59Z5-5EGG>].

29. Naylor, *supra* note 11.

30. *Brandenburg*, 395 U.S. at 447 (The state may forbid “advocacy . . . directed to inciting or producing imminent lawless action.” (emphasis added)).

31. MODEL PENAL CODE § 5.02(2) (AM. L. INST. 2021) (“It is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.”); WAYNE R. LAFAYE, CRIMINAL LAW § 11.1(c)-(d) (6th ed. 2017) (“What if the solicitor’s message never reaches the person intended to be solicited . . . ? The act is nonetheless criminal . . . [T]he crime of solicitation requires no agreement or action by the person solicited”) (ebook).

D. THOMPSON'S JOURNEY THROUGH THE FUNHOUSE

The widespread assumption that Mr. Trump's announcement to the crowd that "we're going to the Capitol" and warning that "if you don't fight like hell, you're not going to have a country anymore"³² convinced the demonstrators to descend upon the Capitol may, in an odd way, be problematic. It may represent the *post hoc, ergo propter hoc* fallacy in which one event is presumed to be the cause of an immediately subsequent event.³³ If, in fact, the demonstrators had gathered, already harboring the intent to invade the Capitol to "stop the steal," then, as stirring as the ex-President's speech may have been, it would not have served as the *cause* of the subsequent violence or influenced their pre-existing intent. Therefore, Mr. Trump's speech cannot be said to have been likely to produce (or make the protestors more likely to engage in) the carnage that day. One cannot logically be said to have made remarks that are likely to produce or increase the chance of an action that the listener is already committed to performing. Indeed, the more we learn through the House of Representatives, Federal Bureau of Investigation ("FBI"), Department of Justice ("DOJ"), D.C. police, and media investigations, the more it appears that a large swath of the crowd, many armed, had already decided to breach the Capitol building before anyone spoke on January 6th.³⁴ After all, as noted, the event was called the "March to Save America" and entailed a trek to the Capitol building to "stop the steal."³⁵ Assuming this is correct, then under the second prong of the *Brandenburg* test, immunity would still apply.

However, there are two possible exceptions to this conclusion. In criminal law, we sanction attempted offenses that are factually impossible to complete.³⁶ Such actors are, after all, as badly intended as those whose acts can, in fact, produce harm. Applying this reasoning, even though it would have been impossible for Mr. Trump to have uttered a message likely to incite the group to violence since it was already committed to it, *Brandenburg* would be satisfied, and Mr. Trump would lose his immunity.³⁷

32. Naylor, *supra* note 11.

33. PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 135–38 (8th ed. 2003); *Kramer Serv., Inc. v. Wilkins*, 186 So. 625, 627 (Miss. 1939) ("Post hoc ergo propter hoc is not sound as evidence or argument.").

34. Ken Dilanian & Ben Collins, *There Are Hundreds of Posts About Plans to Attack the Capitol. Why Hasn't this Evidence Been Used in Court?*, NBC NEWS (Apr. 20, 2021, 10:28 AM), <https://www.nbcnews.com/politics/justice-department/we-found-hundreds-posts-about-plans-attack-capitol-why-aren-n1264291> [<http://perma.cc/3RLS-5ZJ8>]; Reuters, *Capitol Rioters Planned to Capture and Kill Politicians, Say Prosecutors*, THE GUARDIAN (Jan. 15, 2021, 4:50 AM) <https://www.theguardian.com/us-news/2021/jan/15/capitol-rioters-planned-capture-kill-officials-say-prosecutors> [<https://perma.cc/V4CN-H9Q7>].

35. Bump, *supra* note 12.

36. LAFAYE, *supra* note 31, at §§ 11.2–11.5.

37. And the fun isn't over. There is another, more objective test with respect to whether a speaker's remarks are likely to produce imminent harm. One could ask instead whether the speech in question would move the ordinary person to violence (rather than the reasonable

The other exception relates to the sense of incitement as encouragement *per se*, whether it has any effect on the listeners or not. Under the incitement-in-a-vacuum meaning, former-President Trump needs only to have urged imminent lawless action, even if no one in the crowd was listening, to meet the *Brandenburg* test and lose his immunity.

It seems more realistic that, while many in the crowd came with the intent to storm the Bastille, others were convinced by the President to do it. Indeed, a number of defendants from January 6th now argue that they were only following the directions of the Commander-in-Chief in rushing the Capital in an attempt to disrupt the certification.³⁸ As one rioter explained even before the rally began, “IF TRUMP TELLS US TO STORM THE F***** CAPITAL IMA DO THAT THEN!”³⁹ Another stated that “[b]ecause our President, President Donald Trump, asked us to go to the march on the 6th. And he said, ‘Be there.’ So I went and I answered the call of my president.”⁴⁰ The argument bears a rough resemblance to the “advice of counsel” excuse, whereby it is deemed to have been reasonable for an accused to believe his or her actions were lawful⁴¹ and, in this case, patriotic. As thinly veiled as the excuse may be in many cases, it seems likely that some in the large crowd that occupied the Capitol may well have been swayed by the President’s fervent speech. It is, of course, no small irony that some of Mr. Trump’s most ferocious supporters may help pave the way to his being tied up in legal claims for years to come.

Assuming that at least some of the demonstrators who broke in had taken their cue from the President, this would represent strong evidence—though not determinative *per se*—that *Brandenburg*’s likelihood-of-lawlessness test had been met. Oddly, though, the fact that some crowd members responded this way does not absolutely establish that the speech was *likely to produce* this result since, hypothetically, one can be moved to action by speech that seems *unlikely* to have produced its intended effect. I could, for example, implore a group of people to break down the door of my neighbor’s house and destroy the stereo he plays too loud for my taste, and simply because a couple of them actually did what I’d asked does not make my attempt to incite violence *likely* to produce its intended effect. Hypotheticals aside, assuming Mr. Trump’s remarks did convince some in the crowd to descend upon the House and

person, who, by definition, cannot be incited to lawless violence). The ordinary individual would be unlikely to have stormed the Capitol, whereas Trump’s far-right audiences are more inclined to follow his lead. While the *Brandenburg* test is silent on this point, the objective approach would ignore the actual circumstances under which the speech occurred, thereby diluting the danger of the speech and the speaker’s responsibility for the harm that flowed from it.

38. Erin Snodgrass, *At Least 10 People Charged in the Capitol Siege Are Blaming Trump for Their Involvement in the Attack*, BUS. INSIDER (Feb. 9, 2021, 10:00 PM), <https://www.businessinsider.com/10-charged-in-capitol-siege-blame-trump-for-their-involvement> [https://perma.cc/G2ZY-QE9R].

39. *Id.*

40. *Id.*

41. *United States v. Scully*, 877 F.3d 464, 476–78 (2d Cir. 2017).

Senate, the *Brandenburg* test would seem to have been met, resulting in the former President's loss of immunity.

As it is, even if all the confusion in the infrequently invoked,⁴² ill-defined *Brandenburg* test were to be ironed out, the test itself would remain on shaky ground. Predicting the likelihood of the effect of speech on behavior is a perilous endeavor. As the late physicist Stephen Hawking put it, “[w]hile physics and mathematics may tell us how the universe began, they are not much use in predicting human behavior because there are far too many equations to solve.”⁴³

IV. MORE CRACKS IN THE FUNHOUSE

The *Brandenburg* test is further flawed, as the following hypothetical twists on the events of January 6th will illustrate. Imagine that the crowd then-President Trump spoke to on January 6th seemed more docile and less inclined to storm the Capitol, but that, as unlikely as it appeared, Mr. Trump and the other speakers were so compelling in their remarks that the crowd became an angry mob and besieged the Capitol. Since it was *unlikely* that the speeches would produce the lawless action that occurred, then former-President Trump would—unlike the holding in *Thompson v. Trump*⁴⁴—remain cloaked in First Amendment immunity simply because of a superior ability to incite lawlessness.

Now think of the same armed, far-right crowd that was present on January 6th and imagine that, instead, the rally Mr. Trump and others spoke at had taken place two weeks before January 6th, with the crowd reconnoitering two weeks later to lay siege to the Capitol. Once again, Mr. Trump would remain immune from suit under *Brandenburg*, this time simply because there was a delay in the lawlessness he'd provoked.⁴⁵

And if that's not enough, consider one of the oddest aspects of the *Brandenburg* test, an aspect which inadvertently appears to negate the inchoate crime of solicitation. For example, think about A riling up his co-worker B about their low pay and the ease with which the business's cash on hand can be taken without detection three weeks from now when the business manager is on vacation. Whether or not B agrees, or the heist is ever pulled off, A has committed the inchoate crime of solicitation in which, at common law, a speaker need only have “enticed, advised, incited, ordered, or otherwise

42. See *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (one of the few cases further clarifying the *Brandenburg* test).

43. Elizabeth Flock, *As Stephen Hawking Turns 70, Six Life Lessons You Should Learn From Him*, WASH. POST (Jan. 6, 2012), https://www.washingtonpost.com/blogs/blogpost/post/as-stephen-hawking-turns-70-six-life-lessons-you-should-learn-from-him/2012/01/06/gIQAoTpCfP_blog.html [https://perma.cc/Z6XT-HRFS].

44. See *Thompson v. Trump*, No. 21-cv-00400, No. 21-cv-00586, No. 21-cv-00858, 2022 WL 503384, at *1, 53–54 (D.D.C. Feb. 18, 2022).

45. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (The state may forbid advocacy “directed to inciting or producing *imminent* lawless action.” (emphasis added)).

encouraged” another to commit a crime or join the speaker in its commission.⁴⁶ The case against A is open and shut.

On the other hand, no distinct or defensible line exists between A’s remarks to B and the incitement to steal. Since the act that A advocated was not imminent and his remarks to B may not have been likely to convince his colleague to participate in the scheme, A’s remarks will fall outside of *Brandenburg* and he will appear to retain immunity from prosecution because “the constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of . . . law violation”⁴⁷ which, in fact, the state has done via the charge of solicitation aimed at punishing A’s remarks.⁴⁸ Most courts and scholars interpret *Brandenburg* as having supplanted the “clear and present danger” test of *Schenck*.⁴⁹ Perhaps, as far as the immunity rules for speech go, the third time around will be the charm.

V. CONCLUSION

As we’ve seen, the question of Mr. Trump’s immunity from civil suit arising from his performance on January 6th is more complicated than meets the eye. Judge Mehta seems to have ultimately produced the correct answer but skipped over a plethora of *Brandenburg* issues in arriving at it. More important, the cheer that went up on the left side of the Great Partisan Divide upon the release of his opinion may have been premature. Considering the questions raised above and the creative jurisprudence of the conservative majority on the High Court⁵⁰—think here of the grant of personhood to corporations or the rationale in *Bush v. Gore*⁵¹—if and when the justices decide *Thompson v. Trump*, they will have many paths to take in the opinion.

Even more important is the realization that, upon close examination, we see that the *Brandenburg* test hides a labyrinth of unresolved potential meanings that could make textualists tear their hair out and claims of First Amendment immunity open to conflicting results.

46. LAFAVE, *supra* note 31, at § 11.1. Under the Model Penal Code, “[a] person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime” MODEL PENAL CODE § 5.02(1) (AM. L. INST. 2021).

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

48. *See* *United States v. Williams*, 553 U.S. 285, 298–300 (2008) (the Court acknowledged the issue but did little to clarify the tension between *Brandenburg* and solicitation).

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

50. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365–66; *Abrams v. United States*, 250 U.S. 616, 623–24 (1919); *Dennis v. United States*, 341 U.S. 494, 516–17 (1951). Some cases, like *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* *Brandenburg*, 395 U.S. at 447, substituted a broad and vague “bad tendency” test in place of the *Schenck* test. Holmes’ reasoning in *Schenck*, as reflected in his famous passage that a person cannot yell fire in a crowded theatre, is better expressed in the narrower language of the *Brandenburg* test. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

51. *Bush v. Gore*, 531 U.S. 98, 104–11 (2000).