AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Free Speech/Advocacy

**Kansas v. Boettger, \_\_\_ U.S. \_\_\_** (2020).

*Timothy Boettger, who was upset with the local police department because he felt they had failed to investigate how his daughter’s dog had wound up dead in a ditch over a shotgun wound. Furious, he told Cody Bonham, a longstanding acquaintance and son of a local detective that Bonham “was going to end up finding [his] dead in a ditch.” Boettger was subsequently arrested, tried and convicted for violating a Kansas law that prohibited persons for making threats in reckless disregard for causing fear. He appealed his conviction on the ground that the First Amendment as incorporated by the due process clause of the Fourteenth Amendment permitted persons to be convicted for true threats only if they intended to intimidate. The Supreme Court of Kansas agreed and reversed his conviction. Kansas appealed to the Supreme Court of the United States.*

 *The Supreme Court of the United States denied certiorari. Justice Clarence Thomas dissented from that denial. He claimed that the framers of the First Amendment did not intend to protect reckless threats. Is Thomas’s historical analysis correct and, if so, should that history be dispositive? Many, though not all scholars, think Americans in 1791 understood the freedom of speech to be limited to the prohibition of prior restraints and, perhaps, certain true statements about public officials. If that history is correct, is Thomas committed to overturning almost all contemporary constitutional free speech law?*

. . . . The petition for a writ of certiorari is denied.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I5e7c03c6af1911eabea3f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5e7c03c6af1911eabea3f0dc9fb69570), dissenting from the denial of certiorari.

. . . .

It does not appear that the ratifiers of the First or Fourteenth Amendments understood the freedom of speech to protect reckless threats. In 1754, Parliament passed a statute making it a crime to “knowingly send any Letter without any Name subscribed thereto, or signed with a fictitious Name ... threatening to kill or murder any of his Majesty’s Subject or Subjects, or to burn their [property], though no Money or Venison, or other valuable Thing shall be demanded.” . . . More than a dozen States and Territories enacted “copies” of this statute between the founding and Reconstruction.  New Jersey, for example, made it a crime to “knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, ... threatening to maim, [wound](https://1.next.westlaw.com/Link/Document/FullText?entityType=gdrug&entityId=Iff1648e16c7111e18b05fdf15589d8e8&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), kill or murder any person, or to burn his or her [property], though no money, goods or chattels, or other valuable thing shall be demanded.” The founding and Reconstruction generations would have understood these statutes to require a mental state of general intent. . . . The prevalence of statutes from the founding through Reconstruction that did not require intent to intimidate provides strong evidence of the meaning of the freedom of speech protected by the Fourteenth Amendment.

This evidence is reinforced by the fact that many of these States also guaranteed the freedom of speech in their constitutions. If statutes criminalizing reckless threats violated the freedom of speech, one would expect these States not to have such laws, but many of them did. At the very least, one would expect state courts to hold such laws unconstitutional, but it appears that none did. Near the end of the 19th century, one court observed that these laws had “never been supposed to be obnoxious to freedom of speech.”

. . . .

The Kansas Supreme Court held the State’s reckless threat statute unconstitutional, relying on *Virginia v.* [*Black*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003269919&pubNum=0000780&originatingDoc=I5e7c03c6af1911eabea3f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s (2003) statement that “ ‘[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death.’ But two other state courts of last resort have read [*Black*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003269919&pubNum=0000780&originatingDoc=I5e7c03c6af1911eabea3f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))differently. The Supreme Court of Connecticut found that “nothing in [*Black*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003269919&pubNum=0000780&originatingDoc=I5e7c03c6af1911eabea3f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) itself suggests that the [C]ourt intended to overrule the preexisting consensus among the federal circuit courts of appeals that threatening speech may be punished under the [F]irst [A]mendment when a reasonable person would interpret the speech as a serious threat.”. . .

. . . .

The decisions in these cases—and the split among state courts of last resort—resulted from the lack of clarity in [*Black*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003269919&pubNum=0000780&originatingDoc=I5e7c03c6af1911eabea3f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Because the Court should squarely decide whether the Constitution permits States to criminalize threats of violence made in reckless disregard of causing fear, I respectfully dissent from the denial of certiorari.