AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

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

**United States v. Miselis, No. 19-4550** (4th Cir., 2020)

*In 1968, Congress passed the Anti-Riot Act. The act was passed in the wake of widespread urban riots in the summer of 1967 and a new wave of riots that followed the assassination of Martin Luther King, Jr. in April 1968. The act made it a federal crime to engage in interstate or foreign travel with the intent to incite a riot or participate in a riot. A riot was defined in part as an assemblage of three or more persons in which there are acts of violence that create a danger of damage or injury to property or persons. The legislation specified that inciting a riot did not include the mere advocacy of ideas, including the advocacy of violence.*

*In 2017, Michael Paul Miselis was living in Southern California and joined a local, militant white supremacist group called the “Rise Above Movement” (RAM). RAM was organized in order to engage in violent attacks on counter-protesters at white supremacist rallies, and the group engaged in organized training in hand-to-hand combat in preparation for such encounters. The group participated in violent skirmishes in Huntington Beach and Berkeley, both in California, in the spring of 2017. In August of 2017, members of the group traveled to Charlottesville, Virginia to participate in the “Unite the Right” rally, which likewise degenerated into violence.*

*Along with co-defendants, Miselis was charged with federal crimes under the Anti-Riot Act. He moved to have the charges dismissed on constitutional grounds, but the motion was denied. He entered a conditional guilty plea contingent on an appeal of the constitutional issues. He received a two-year prison sentence from the trial court. On appeal, the federal circuit court affirmed the trial court’s ruling. The circuit court concluded that the Anti-Riot Act was overbroad and did include some acts that were constitutionally protected, but that the overbroad components of the statute were severable and the constitutionally valid components could still be applied to Miselis’s actions.*

JUDGE DIAZ.

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We begin by setting out the principles that guide our overbreadth analysis. Here, the defendants bring a facial challenge to the Anti-Riot Act, meaning they claim that the statute is unconstitutional not as it applies to their own conduct, but rather “on its face,” as it applies to the population generally. . . .

[A] facial challenge typically requires a showing that “no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications.” . . .

In the First Amendment context, however, the fear of chilling protected expression “has led courts to entertain facial challenges based merely on hypothetical applications of the law to nonparties.” Under this “second type” of facial challenge, a statute “may be invalidated as overbroad” as long as “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *United States v. Stevens* (2010).

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To maintain an “appropriate balance” between the “competing social costs” at issue in the overbreadth context, the Supreme Court has “vigorously enforced the requirement that a statute’s overbreadth be substantial, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *United States v. Williams* (2008). . . .

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A glance at the Anti-Riot Act reveals that the category of unprotected speech that lies at the core of the statute’s prohibition is that which also lies at the origin of First Amendment jurisprudence: “incitement.” In general legal parlance, “incitement” refers to “[t]he act of persuading” — that is, of inducing — “another person to commit a crime.” . . .

The modern incitement test derives from the Court’s per curiam decision in *Brandenburg v. Ohio* (1969), which came down in 1969, the year *after* the Anti-Riot Act was enacted. . . .

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*Brandenburg* has . . . been widely understood, starting with the two concurring Justices, as having significantly (if tacitly) narrowed the category of incitement. . . . These days, then, advocacy of lawlessness retains the guarantees of free speech unless it’s directed and likely to produce imminent lawlessness.

As a corollary, we’ve understood *Brandenburg*’s protection to be limited to mere or “abstract” advocacy. *Rice v. Paladin Enterprise, Inc*. (4th Cir. 1997). . . . Speech taking some form “other than abstract advocacy,” by contrast, such as that which “constitutes . . . aiding and abetting of criminal conduct,” doesn’t implicate the First Amendment under our *Rice* decision. . . . In other words, *Rice* effectively recognizes a second category of unprotected speech inherent in that of incitement, which may be proscribed without regard to whether it’s directed and likely to produce imminent lawlessness.

With this delineation in mind, we consider whether the Anti-Riot Act encompasses the sort of advocacy that *Brandenburg* “jealously protects.”

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. . . . In our view, the presence of an overt-act element (or two, in fact), together with specific intent to incite or engage in a riot, simply indicates that the Anti-Riot Act was drafted as an attempt offense, of which it bears all the classic hallmarks, rather than a commission offense. *Martin v. Taylor* (4th Cir. 1988). . . . Indeed, as the indictment in this very case illustrates, the crime described by § 2101(a) is simply that of “Travel with Intent to Riot.”

The inescapable conclusion that Congress drafted the Anti-Riot Act to encompass unconsummated attempts to incite or engage in a riot explains why, as the defendants put it, the statute “does not criminalize rioting” alone, but also “behavior far-removed” from rioting. It also explains why the statute’s overt-act elements don’t implicate *Brandenburg*: because, as with inchoate offenses generally, the overt acts themselves — “which may be entirely innocent when considered alone,” — serve only to establish that a defendant specifically intended to carry out (and went far enough toward carrying out) an unlawful “purpose.”

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With respect to “incite” under § 2101(a)(1), we have little difficulty concluding that this verb encompasses no more than unprotected speech under *Brandenburg*. Thus, in the world of *Brandenburg*, “incite” most sensibly refers to speech that is directed and likely to produce an imminent lawlessness. . . .

Turning to § 2101(a)(2), however, we find that two verbs in the string “to organize, promote, [or] encourage” a riot fail to bear the requisite relation between speech and lawlessness. The loosest such relation in the bunch belongs to “encourage,” which means simply “to attempt to persuade (someone) to do something.” Speech tending to encourage a riot thus encompasses all hypothetical efforts to advocate for a riot, including the vast majority that aren’t likely to produce an imminent riot (even assuming they’re directed to producing a riot). Indeed, because mere encouragement is quintessential protected advocacy, the Supreme Court has recognized that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it” under *Brandenburg*. *Ashcroft v. Free Speech Coalition* (2002). It follows that *Brandenburg* protects speech having a mere tendency to encourage others to riot.

The verb “promote” occupies a similarly overinclusive position on the continuum of relation between advocacy and action. While “promote” admits of a wide range of meanings depending on context, we think that, in the context of an enterprise like a riot, it’s best understood to mean “to support or encourage something,” or “to advance” or “further something by helping to . . . introduce it. . . . It thus suffers from the same overbreadth, subsuming an abundance of hypothetical efforts to persuade that aren’t likely to produce an imminent riot. As a result, *Brandenburg* also protects speech having a mere tendency to promote others to riot.

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With respect to the verb “organize,” however, we reach a different outcome. As it pertains to an event like a riot, “organize” is readily understood to mean “to form or establish something . . . by . . . bringing people together into a structured group,” “to oversee the coordination of the various aspects of something” or “to arrange the components of something in a way that creates a particular structure.” We think speech tending to organize a riot might thus include communicating with prospective participants about logistics, arranging travel accommodations, or overseeing efforts to obtain weapons needed to carry out the planned violence.

Yet as these definitions and examples indicate, speech tending to “organize” others to riot consists not of mere abstract advocacy, but rather of concrete aid. For, by the time speech reaches the point of organizing a riot, it has crossed the line dividing abstract idea from material reality, even if its components must still be brought together, coordinated, arranged, or otherwise structured into form.

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With respect to speech “instigating” others to riot, we agree with the parties this verb is best understood as a direct synonym for the dictionary definition of “incite.” . . .

As to speech “urging” others to riot, however, we agree with the defendants that this verb suffers from a similarly inadequate relation between speech and lawless action as “encourage” and “promote” under § 2101(a)(2). . . .

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[B]ecause Congress drafted the Anti-Riot Act against the backdrop of a long line of cases, from Whitney to Dennis, in which mere advocacy of violence was regularly held to be unprotected, we find it all the more likely that the exclusion found in the final phrase of § 2102(b) means to attach criminal consequences to such advocacy, and isn’t just indifferent to it. We therefore hold this language to be overbroad as well.

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We think it plain that both types of riot [“acts of violence” and “threats” to commit acts of violence] describe conduct that Congress had the right to prevent in enacting the Anti-Riot Act. Indeed, regardless of any risk of bodily injury or property damage, acts of violence against others in and of themselves constitute well-recognized forms of unlawful conduct, finding no protection under the first or any other amendment. As for “threats of violence,” they too “are outside the First Amendment” under the doctrine of true threats, which “protects individuals” from even “the possibility that the threatened violence will occur.” *R.A.V. v. City of St. Paul* (1992). . . .

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To be sure, the Anti-Riot Act has a plainly legitimate sweep. The statute validly proscribes not only efforts to engage in such unprotected speech as inciting, instigating, and organizing a riot, but also such unprotected conduct as participating in, carrying on, and committing acts of violence in furtherance of a riot, as well as aiding and abetting any person engaged in such conduct. In other words, it encompasses just about every form of unprotected activity in relation to a riot. And the statute’s conduct-related applications appear to form the basis of every reported prosecution under it.

Yet the Anti-Riot Act nonetheless sweeps up a substantial amount of protected advocacy. Whereas *Brandenburg* removes advocacy relating to a riot from the protection of the First Amendment only if it is directed and likely to produce an imminent riot, the statute purports to regulate any speech tending merely to “encourage,” “promote,” or “urge” others to riot, as well as mere advocacy of any act of violence. Altogether, these areas of overbreadth cover the whole realm of advocacy that *Brandenburg* protects, and dwarfs that which it left unprotected. Thus, while the statute may have been perfectly consistent with the contemporary understanding of the First Amendment when it was enacted, *Brandenburg* causes it to encroach substantially upon free speech.

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“Even in the absence of a severability clause, the traditional rule is that the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.” Put differently, “we must retain those portions of the [a]ct that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress’ basic objectives in enacting the statute.” *United States v. Booker* (2005).

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Applying these principles to the Anti-Riot Act, we hold that the appropriate remedy is to invalidate no more than the language responsible for the statute’s overbreadth. That language consists of the words “encourage,” “promote,” and “urging” under §§ 2101(a)(2) and 2102(b), as well as the final phrase of § 2102(b), beginning with the words “not involving” and continuing through the end of that provision. Severed accordingly, these provisions of the statute look like this:

(a) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent — . . . . (2) to organize, ~~promote, encourage~~, participate in, or carry on a riot;. . . . and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph — Shall be fined under this title, or imprisoned not more than five years, or both. 18 U.S.C. § 2101(a)(2).

As used in this chapter, the term “to incite a riot”, or “to organize, ~~promote, encourage~~, participate in, or carry on a riot”, includes, but is not limited to, ~~urging or~~ instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, ~~not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts~~. 18 U.S.C. § 2102(b).

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[S]uch minimal severance is consistent with Congress’s basic objective in enacting the Anti-Riot Act. We think that objective is to proscribe, to the maximum permissible extent, unprotected speech and conduct that both relates to a riot and involves the use of interstate commerce. . . .

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. . . . [T]he defendants admitted to having each (as part of an assemblage of three or more) “personally committed multiple violent acts”—including but not limited to pushing, punching, kicking, choking, head-butting, and otherwise assaulting numerous individuals, and none of which “were in self-defense”—in Huntington Beach, Berkeley, and Charlottesville.

Such substantive offense conduct qualifies manifestly as “commit[ting] any act of violence in furtherance of a riot” within the ordinary meaning of § 2101(a)(3), as well “participat[ing] in” and “carry[ing] on a riot” within the ordinary meaning of § 2101(a)(2)—three wholly conduct-oriented purposes left unscathed by our partial invalidation of the statute. By the same token, the defendants’ offenses have manifestly nothing to do with speech tending to encourage, promote, or urge others to riot; mere advocacy of violence; or any other First Amendment activity. . .

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. . . . It follows that anything less than facial invalidation of the statute affords the defendants no relief from their convictions. . . .

*Affirmed.*