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# Finding Freedom for the Thoughts We Hate

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# Finding freedom for the thoughts we hate



**JOHN GREABE**

Constitutional Connections

Why doesn't constitutional promise of equality permit us to exclude views that dehumanize?

In his dissenting opinion in *United States v. Schwimmer* (1929), Supreme Court Justice Oliver Wendell Holmes, Jr., famously defended tolerance as an indispensable constitutional value. He wrote: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us

but freedom for the thought that we hate."

Yet accepting that the Constitution protects the thought that we hate can be difficult, even during the best of times. And these are far from the best of times. Nuclear brinksmanship has returned. Extreme partisanship prevails. Equality and religious liberty are cast as antagonists. Overt racism and bigotry are resurgent.

In unsettled periods such as these, many see a constitutional commitment to freedom for the thought that we hate as just another means of maintaining an unacceptable status

quo. Why should we tolerate offensive speech that hurts and divides – particularly within broadly inclusive spaces such as public universities? Why doesn't the constitutional promise of equality permit us to exclude from public debate views that dehumanize and seek to revive the sins of the past?

These are powerful questions. In response, those who favor a broader conception of the free-speech right often start with an appeal to the lessons of history. They note that the

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advances in legal equality made in the last century by minorities, women, and LGBTQ individuals were achieved, at least in part, through a parallel expansion of First Amendment speech protections. They point out that the protestors and others who successfully argued for equality pressed views that many in the majority initially found highly objectionable. And they argue that a legal regime which permits the government to regulate speech that a majority finds objectionable is unlikely over time to be friendly to the rights of minorities.

The historical argument is compelling. For most of our nation's history, courts did not interpret the Constitution to place significant limits on the government's ability to regulate speech. While courts looked with disfavor upon "prior restraints" of speech – e.g., speech licenses and pre-publication injunctions – they regularly confirmed the government's power to punish speech having a "bad tendency" to cause law violations or other undesirable conduct. And the government used this

power to prosecute dissidents.

Applying the "bad tendency" test, courts routinely upheld the convictions of those who engaged in speech prohibited by federal and state espionage, sedition, and anarchy statutes. In fact, in 1919, the Supreme Court upheld the conviction of prominent labor leader and Socialist Party presidential candidate Eugene Debs, who had publicly expressed sympathy for persons resisting the military draft during the World War I.

Debs, who had once received 6 percent of the nation's popular vote for president, received a 10-year federal prison sentence for his disloyal utterances.

Things slowly changed as the 20th century progressed. In fits and starts, the Supreme Court replaced the permissive "bad tendency" test with a far tighter standard that protected all speech, except that which created a "clear and present danger" of bringing about some substantive evil that government has the right to prevent. (Think here of the famous example that the government may prohibit shout-



AP file

**Berkeley police officers stand guard for planned speech by Milo Yiannopoulos in Berkeley, Calif., this past summer.**

ing "fire" in a crowded theater.)

And it began reversing criminal convictions in some (but not all) cases involving subversive speech. Eventually, in 1969, in *Brandenburg v. Ohio*, the Supreme Court adopted the highly speech-protective test that applies today: government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent law-

less action and is likely to incite or produce such action."

Thus, speech inciting the use of force or other illegal conduct may be regulated, but only if the government can show imminent harm, a likelihood of producing illegal action, and an intent to cause imminent illegality.

Over time, the Supreme Court also moved beyond the "incitement" context to recognize additional categories of speech that the government sometimes may regulate.

Such categories include obscenity, defamation, and commercial speech.

But the Supreme Court has never recognized a less-protected "hate speech" category.

Moreover, most First Amendment scholars agree that the older precedents that are friendliest to those who argue for the constitutionality of regulating hate speech – mid-20th century cases suggesting that "fighting words" and "group libels" can be punished – are likely no longer good law.

Those favoring a broader conception of the free-speech right also point to the practical difficulties in developing an objective and workable definition of "hate speech."

To be sure, difficult line-drawing problems permeate First Amendment law. But, free-speech advocates say, the problems with defining hate speech are so different in kind than the difficulties in defining obscenity, defamation, and commercial speech that they defy principled judicial administration. Supreme Court Justice John Harlan's observation that "one man's vulgarity is another's lyric" describes a powerful reality

that also applies in the hate-speech context. How would a divided society such as ours ever reach broad agreement on what constitutes hate speech?

Finally, and most basically, free-speech advocates say, there is no way to open the door to hate-speech regulation without simultaneously empowering government to determine what is acceptable to think and say. And the lessons of experience teach that government censorship is a path to despotism that we should avoid at all costs – even the undeniable costs of tolerating racist, bigoted, and other hateful speech.

The debate over whether government should be permitted to regulate hate speech always resurfaces during periods of coarse public discourse. But those who would consider reauthorizing government censorship of offensive ideas should think long and hard about the perils of a retreat from the free-speech ideal.

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