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Finding Freedom for the Thoughts We Hate

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Finding freedom for the thoughts we hate

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

In his dissenting opinion in United States v. Schiavone (1929), Supreme Court Justice Oliver Wendell Holmes, Jr., famously defended tolerance as an indispensable constitutional value. He wrote: "If 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 brinkmanship 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
And the government used this or other undesirable conduct.

When we were there before 9/11, patrons went freely in and out of either door, one in each country. Aside from a stripe of black paint down the main floor marking the national boundary, we remember no signs—other than dividing lines painted on street pavement—indicating separate countries. Inside that’s still the case, which is good. Turns out most of the books are on the Canadian side. And in the elegant upstairs opera house, the stage is in Canada, the seats in the U.S.

Outside, though, things are different, according to a Toronto Star years—tried to walk from her home to the library for a “dance for international peace,” of all things, and was stopped by a U.S. border agent and told to line up and wait. As though customs with the cars. Indignant, she turned and walked home.

“That was the end of any sense of community here. The way we’re treated is really insulting lots of the time. The questions are degrading. They insinuate you have an ulterior motive even if you’re going to go get gas,” she told the paper. “But this is our community for God’s sake, founded on goodwill, intimately woven together.

“It’s just not fun anymore.”

Sept. 11, 2001, claims yet another victim.

“Monitor” columnist Katy Burns lives in Bow.

Constitutional Connections: Finding freedom for the thoughts we hate

GREAVE FROM D1

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 protesters 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 shouting “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 lawless 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 libel” 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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