Finding Freedom for the Thoughts We Hate

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It took an expert marksman 30 seconds. Therefore, when the Bill of Rights was drafted, an expert marksman could fire two rounds in one minute. They didn't conceive of guns capable of firing more than 100 rounds per minute. And even with the limited technology of the time, the Founders hadn't intended the Amendment to guarantee an individual’s unrestricted right to stokepile weapons for personal reasons. The Amendment was intended to reduce states’ fear of being overrun by a standing federal army by protecting state militias.

Two hundred years of jurisprudence followed the Founders’ narrow view of the Amendment. So let's stop pretending the modern overly broad reading of the Second Amendment is based on the Founders’ intent. And let’s take an honest look at its impact.

In 1966, in Dunblane, Scotland, a gunman murdered 16 young children and their teacher. In response, Great Britain enacted strong restrictions on the private ownership and storage of guns. There has been one mass shooting in the entire U.K. since. In 1999, two students murdered 12 classmates and one teacher at Columbine High School. Instead of gun laws, politicians and the gun lobby that owns them offered their thoughts and prayers.

Those thoughts and prayers didn’t stop the tragedies at Sandy Hook, Virginia Tech, Pulse Nightclub, the Aurora Theater, a Las Vegas concert, and elsewhere.

It’s time politicians offered more than thoughts and prayers.

MALIA EBEL
Concord

**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. Schwimmer (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 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

**A Little Perspective**

FAYE FLAM WRITING FOR BLOOMBERG: In the latest science shocker, researchers discovered that a number of people around the world are eating foods such as cheese, butter and full-fat yogurt without doing deadly harm to their bodies. This was treated as health heresy. It's not just fear but a mean-spiritedness that surrounds attitudes toward food and health, at least here in the United States. Popping up as the first comment on a recent New York Times story on fat and health was this sentiment: "How about [you] don't make a pig out of yourself every time you eat?" But when it comes to fat, people aren't pigs. What's interesting about this newest study is that it compared people with a wide range of eating habits from all over the world, and virtually no one among the thousands of thousands of participants ate more than 40 percent fat. Fat consumption tends to be self-limiting - much more so than sugar. People don't routinely binge on sticks of butter, but they often consume massive amounts of sweet stuff. In the study, those who had the shorter lifespan and higher disease rates were not the rich gluttons of the world. They were people from poorer countries who ate starchy diets - most likely because that’s what they could afford. It’s nice imagine that a just God arranged things so that the starchy, cheap diets of the world’s poorer people would endow them with health and longevity denied to all the rich gluttons dipping lobster in drawn butter. But if such salvation exists, there’s no evidence it’s happening in this life.

**NHsnapshot**

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.

The historical argument is
compelling. For most of our
country’s history, courts did not
interpret the Constitution to
place significant limits on the
government’s ability to regu­
late speech. While courts
looked with distaste upon
“prior restraints” of speech—
e.g., speech licenses and
pre-publication injunctions—they
regularly confirmed the gov­
ernment’s power to punish
speech having a “bad ten­
dency” to cause law violations
or other undesirable conduct.

And the government used this
power to prosecute dissi­
dents.

Applying the “bad ten­
dency” test, courts routinely
upheld the convictions of
those who engaged in speech
prohibited by federal and
state espionage, sedition, and
anarchist statutes. In fact,
in 1919, the Supreme Court
upheld the conviction of promi­
nent labor leader and Social­
ist Party presidential candi­
date Eugene Debs, who had
publicly expressed sympathy
for persons resisting the mil­
itary draft during the World
War I.

Debs, who had once received
6 percent of the na­	ion’s popular vote for presi­
dent, received a 10-year fed­
eral 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 stan­
dard 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 fa­
mous example that the gov­
ernment may prohibit shout­
ing “fire” in a crowded the­
ater.)

And it began reversing
criminal convictions in some
(but not all) cases involving
subversive speech. Eventu­
ally, in 1969, in Brandenburg v.
Ohio, the Supreme Court
admitted the highly speech-
protective test that applies to
today: government may not
forbid or proscribe advocacy
of the use of force or of law vi­
olation except where such ad­
vocacy is directed to inciting
or producing imminent law-
less action and is likely to in­
cite 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 recog­
nize additional categories of
speech that the government
sometimes may regulate.

Such categories include ob­
scenity, defamation, and com­
mercial speech.

But the Supreme Court
has never recognized a less-
protected “hate speech” cate­
gory.

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 sug­
gest that “fighting words”
and “group labels” can be pun­
ished—are likely no longer
good law.

Those favoring a broader
conception of the free-speech
right also point to the practi­
cial difficulties in develop­
ing 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, defama­
tion, and commercial speech
that they defy principled judi­
cial administration. Suprem­
ate 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 regula­
tion 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 per­
mitted to regulate hate
speech always resurfaces
during periods of coarse pub­
lic discourse. But those who
would consider reauthorizing
government censorship of of­
fensive ideas should think
long and hard about the perils
of a retreat from the free-
speech ideal.

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ititutional law.