HATE

Why We Should Resist It with Free Speech, Not Censorship

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CHAPTER TWO

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"Hate Speech" Laws Violate Fundamental Free Speech and Equality Principles

As already noted, all "hate speech" laws, no matter how they are drafted, inherently violate the emergency and viewpoint neutrality principles. In this chapter, I explain why those principles are so important, especially for minority views and voices, thus illuminating the damage that "hate speech" laws would inflict on both liberty and equality. I next explore the reasons why the Supreme Court has allowed the government to restrict certain other categories of speech, explaining why the rationales for those decisions do not apply to constitutionally protected "hate speech." Finally, I explain both why "hate speech" laws are more problematic than speech regulations that are constitutionally permissible, and why authorizing government to enact "hate speech" laws would unleash government's power to suppress any speech whose message is disfavored, disturbing, or feared.

THE VIEWPOINT NEUTRALITY AND EMERGENCY PRINCIPLES: TWIN PILLARS OF LIBERTY AND EQUALITY

> "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . . The First Amendment does not guarantee that concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas."
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> —Justice William Brennan, *Texas v. Johnson* (1989)

> "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, . . . the remedy . . . is more speech, not enforced silence. Only an emergency can justify repression."
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> —Justice Louis Brandeis, *Whitney v. California* (1927)

Together, the core viewpoint neutrality and emergency principles bar government from regulating speech solely because its message is disfavored, disturbing, or feared. Instead, these complementary principles permit government to regulate speech only when necessary to avert an emergency because it directly causes specific imminent serious harm.

An important 1972 decision, *Chicago v. Mosley*, illustrates how essential these principles are for speech challenging the status quo and advocating equality. The Court's opinion was written by Justice Thurgood Marshall. The first African American to serve on the high Court, Marshall is best known for his trailblazing advocacy on behalf of racial justice, including as one of the NAACP lawyers who litigated the landmark *Brown v. Board of Education* school desegregation case. Marshall also is celebrated as a champion of First

Amendment freedoms. Because these freedoms were essential for the civil rights movement, Marshall's stalwart support of free speech is hardly coincidental.

Like so many key free speech rulings, *Mosley* upheld the freedom of speech for a pro–civil rights message and for a speaker who was a member of a racial minority. Specifically, it protected the right of Earl Mosley, an African-American postal employee, to continue peacefully picketing on public sidewalks near Jones Commercial High School in Chicago. He had been carrying a sign reading "Jones High School practices black discrimination. Jones High School has a black quota."

Just as freedom of speech has been a constant ally of the civil rights struggle, censorship has been its constant foe. In the *Mosley* case, as in so many others, the government sought to stifle a pro–civil rights message. In this instance, Chicago had enacted a new ordinance that outlawed any picketing near a public school, unless the picketing related to a labor dispute affecting the school. The Chicago Police Department warned Mosley that if he continued to picket, he would be arrested.

In striking down the new law, because of its discrimination among messages and speakers, Justice Marshall emphasized the mutually reinforcing principles of equality and liberty:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.

If we empowered government to enforce "hate speech" laws, eviscerating the hard-won viewpoint neutrality and emergency

principles, we would be rolling back the clock to an earlier period in our history, when government punished speech because of its feared harmful tendency. In the next section, I describe how the now-discredited bad tendency test operated as a license to suppress any speech with a disfavored, disturbing, or feared message, to underscore that reinstating it would be especially damaging to dissenting views.

THE HARMFUL IMPACT OF THE BAD TENDENCY TEST

Until the second half of the twentieth century, the Supreme Court enforced the deferential "bad tendency" standard to permit government to suppress speech whenever it maintained that the speech might cause harm at some future point. Under this standard, for example, in a series of decisions in 1919, the Court upheld criminal convictions for speech opposing U.S. involvement in World War I, on the rationale that the speech might induce some individuals to resist military service, which might in turn harm our national interests. Authorizing the government to punish speech based on such an attenuated, speculative connection between the speech and potential harm enabled the government to engage in rampant viewpoint discrimination, essentially silencing all dissent against its policies concerning the war or the draft.

In *Debs v. United States*, for example, the bad tendency test was applied to uphold the conviction of Socialist Party leader Eugene V. Debs, who had received 6% of the national vote in his 1912 U.S. presidential campaign, because he gave a wartime speech that criticized the draft. As we will see in Chapter 4, one of the most dismaying impacts of "hate speech" laws in other democratic countries is their regular enforcement against politicians for similar kinds of statements, criticizing government policies. As Justice Louis

Brandeis later observed in opposing the bad tendency test, "Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it." Indeed, it was precisely this rationale that prompted the censorship and imprisonment of Margaret Sanger and other pioneering birth-control advocates, who criticized laws that criminalized the use of contraception.

In the 1919 *Abrams* case, Justice Holmes, joined by Justice Brandeis, repudiated the bad tendency test in a powerful dissenting opinion, declaring that the First Amendment bars government from suppressing even "opinions that we loathe" and "believe to be fraught with death," unless they "so imminently threaten immediate interference" with national interests "that an immediate check is required to save the country."

"HATE SPEECH" LAWS UNDERMINE EQUAL RIGHTS MOVEMENTS

> "Without freedom of speech and the right to dissent, the Civil Rights movement would have been a bird without wings."
>
> —Congressman John Lewis

Equal rights advocates have always been dependent on a vigorous concept of free speech, including the viewpoint neutrality and emergency principles, because their views are often regarded as disfavored, disturbing, and feared, and therefore targeted for censorship. In Chapter 1, I described multiple illustrations of this pattern in the United States, and in Chapter 4 I will offer examples from other countries as well. Here, though, I want to take note of one especially salient historic episode in the United States: the twentieth-century civil rights movement. In his book *Hate Speech: The History of an American Controversy*, historian Samuel Walker documents

the opposition to "hate speech" laws by major civil rights organizations, including the NAACP, the American Jewish Congress, and the American Jewish Committee.

The opposition by the first two groups is especially noteworthy because both had initially supported such laws. Their about-faces reflected their experience with hostile government officials who employed a wide array of speech regulations in efforts to suppress their antidiscrimination advocacy. Based on their experience, these civil rights groups came to recognize that any speech regulations that did not conform to the viewpoint neutrality and emergency principles, including "hate speech" laws, could likewise be turned against them. After all, well into the second half of the twentieth century pro–civil rights advocacy was widely feared as subverting traditional societal institutions and law and order. It is no coincidence that the movement's leaders were demonized as communists, probably the most hated and feared group at the time, whose expression also was widely suppressed because of its feared harmful tendency. In the words of University of Chicago law professor Harry Kalven, "the NAACP is from the standpoint of the beleaguered South a second domestic conspiracy aiming at a revolution."

CONSTITUTIONALLY PROTECTED "HATE SPEECH" IS NOT INCLUDED IN THE CATEGORIES OF SPEECH THAT THE COURT HAS HELD TO BE UNPROTECTED BY THE FIRST AMENDMENT

The Supreme Court has recognized a "few," "narrowly limited," and shrinking sets of "historic and traditional categories" of speech, defined by their messages, which it has deemed to be outside the core of the First Amendment's protection due to their "low value," thus not furthering the First Amendment's central purposes. In the past, these categories have included defamation, commercial

advertising, obscenity, and fighting words. Since the 1960s, the Court has substantially narrowed both the list of such unprotected categories of expression and their definitions. Moreover, in a landmark 2010 decision, the Court decreed that it henceforth would not "carve out from the First Amendment any novel" additional categories of unprotected speech.

Whatever the merits of this "low value" doctrine, which has always been controversial, it never has applied to "hate speech." To the contrary, "hate speech" constitutes political speech, which the Court always has regarded as having uniquely high value, therefore being entitled to full First Amendment protection, even if the public might "despise" its message. The Court has consistently held that the First Amendment protects political speech that it has characterized with a wide variety of negative or critical adjectives, including "contemptuous," "controversial," "disagreeable," "distasteful," "hurtful," "inappropriate," "indecent," "insulting," "misguided," "offensive," "opprobrious," "outrageous," "patently offensive," "provocative," "scurrilous," "shocking," "unsettling," "upsetting," and "vulgar."

There is another fundamental reason why constitutionally protected "hate speech" cannot be considered of low value: such speech not only addresses public policy issues, but it also conveys specific viewpoints about them. The Court repeatedly has stressed that a speech regulation that "curtail[s] expression of a particular point of view on controversial issues of general interest is the purest example" of a law that violates the First Amendment.

In an important, highly pertinent 2017 decision, *Matal v. Tam*, the Court explained that the viewpoint neutrality principle specifically "protects the right to . . . present arguments for particular positions in particular ways, as the speaker chooses," expressly noting that "[g]iving offense is a viewpoint," which accordingly may not be suppressed. In *Matal*, the Court unanimously enforced these precepts

to strike down a federal statute that was, in effect, a "hate speech" law. Using key terms that many "hate speech" laws contain, this statute barred trademarks that "disparage" any persons "or bring [them] into contempt or disrepute." Moreover, the government maintained that the statute's purpose was to protect members of minority groups from being subjected to "demeaning messages," which is also the purpose of "hate speech" laws. Under this statute, the government had refused to register as a trademark a term that traditionally has been used as an epithet against people of Asian ethnicity: "slants." Simon Tam, lead singer of an Asian-American rock group, "The Slants," had chosen that name in order to "reclaim" the term and "drain it of its denigrating force." In holding the statute unconstitutional, the Court explained why no "hate speech" law can pass First Amendment muster, quoting Justice Oliver Wendell Holmes's famous formulation of the viewpoint neutrality principle: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"

GOVERNMENT MAY NOT PUNISH "HATE SPEECH" TO PROTECT GROUP REPUTATION OR DIGNITY

Some proponents of "hate speech" laws invoke the concept of group defamation, on the theory that constitutionally protected "hate speech," like defamation, is false and harms the reputations and dignity of individuals who belong to the disparaged groups. As its label signals, group defamation refers to speech that defames a broad group rather than particular individuals.

In the 1952 case of *Beauharnais v. Illinois*, by a 5–4 vote, the Supreme Court narrowly rejected a First Amendment challenge to an

Illinois group defamation statute. It had been enforced against someone who was circulating a petition addressed to the Chicago mayor and city council, protesting racial integration and making derogatory statements about African Americans. The Illinois Supreme Court had construed the statute as being limited to statements that had a "strong tendency . . . to cause violence and disorder." The Supreme Court held that the government could punish such statements consistent with the then-prevailing bad tendency test.

Since *Beauharnais*, the Supreme Court never has explicitly revisited the group defamation issue, but federal judges, as well as other experts, concur that the Court has implicitly overruled *Beauharnais* in a long series of subsequent decisions that have rejected its rationales. One of these was the Court's landmark 1964 decision in *New York Times v. Sullivan*, which made clear that the First Amendment strictly limits defamation lawsuits even by individuals. In *Sullivan* and subsequent cases, the Court has held that the expression at issue must constitute false statements of fact rather than opinions, and when the expression addresses matters of public concern, defamation plaintiffs bear a heavy burden of proof. Moreover, the Court has treated *Beauharnais* as a case about averting potential violence, underscoring that its holding is at odds with the emergency standard.

If government officials instead sought to justify a "hate speech" law on the traditional defamation rationale of protecting disparaged individuals and groups from reputational and dignitary harms, such a law also would violate longstanding First Amendment principles. Statements about groups involve generalizations, making them more akin to expressions of opinion than to the false statements of fact that constitute a prerequisite for a defamation claim. As the Court observed, "There is no such thing as a false idea." Moreover, even false statements of fact can't be punished except in strictly limited circumstances, when they directly inflict specific serious injury,

such as defaming a particular individual or defrauding someone. As Justice Robert Jackson declared: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . [E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

In addition to violating fundamental free speech principles, group defamation actions would also endanger speech supporting equality causes. Justice William O. Douglas, a staunch civil rights champion, made this point in his *Beauharnais* dissent:

> Today a white man stands convicted for protesting in unseemly language against our decisions invalidating [racially] restrictive covenants. Tomorrow a Negro will be hailed before a court for denouncing a lynch law in heated terms. Farm laborers in the West who compete with field hands drifting up from Mexico, . . . a minority which finds employment going to members of the dominant religious group—all of these are caught in the mesh of today's decision. . . . It is a warning to every minority.

GOVERNMENT MAY NOT PUNISH THE EXPRESSION OF POLITICAL IDEAS, INCLUDING "HATE SPEECH," BECAUSE SUCH EXPRESSION MIGHT CAUSE EMOTIONAL OR PSYCHIC HARM

> "It would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of [Skokie's] residents. The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from

> speech that 'invite(s) dispute, . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' . . . Yet these are among the 'high purposes' of the First Amendment."
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> —U.S. Court of Appeals for the Seventh Circuit, upholding rights of neo-Nazis to demonstrate in Skokie, Illinois (quoting U.S. Supreme Court)

Some proponents of "hate speech" laws stress the psychic or emotional harm that such speech can cause. As I relate in Chapter 6, social scientists concur that it is difficult to pinpoint the contributory role of any speech, including constitutionally protected "hate speech," to these kinds of harms. Beyond that, though, the First Amendment in principle bars government from punishing any political speech, including constitutionally protected "hate speech," on the ground that it might cause emotional or psychic harm. Instead, we must counter any potential negative emotional or psychic impact of such speech with non-censorial measures. Fortunately, as I show in Chapter 8, there is encouraging evidence that these kinds of measures can be effective. In fact, some psychologists believe that, in at least some cases, mental health might even benefit from exposure to constitutionally protected "hate speech," whereas it might actually be undermined by censorship.

The bar on punishing constitutionally protected "hate speech" because it might cause emotional or psychic harms flows from the central viewpoint neutrality principle. Any adverse emotional or psychic impact that speech might have on an audience member necessarily would result directly from "its message, its ideas, its subject matter, or its content"—factors that never justify censorship, as the Supreme Court unanimously explained in *Mosley*. Therefore, the Court has held that no civil lawsuit seeking damages for the tort of "intentional infliction of emotional distress" may be based on

expression about matters of public concern, including specifically constitutionally protected "hate speech."

SHOULD WE MAKE EXCEPTIONS TO SPEECH-PROTECTIVE PRINCIPLES FOR CONSTITUTIONALLY PROTECTED "HATE SPEECH"?

> "If any philosophy should be regarded as completely unacceptable to civilized society, that of plaintiffs [American neo-Nazis], who . . . have . . . deliberately identified themselves with a regime whose record of brutality and barbarism is unmatched in modern history, would be a good place to start. But there can be no legitimate start down such a road."
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> —U.S. Circuit Court of Appeals for the Seventh Circuit, Skokie case

I hope I have persuaded you that the viewpoint neutrality and emergency principles are essential for protecting controversial expression, and in particular dissenting views. If so, then the only remaining issue is whether we should—or could—make a special exception for constitutionally protected "hate speech."

If these fundamental free speech principles were breached for "hate speech" laws, it would be impossible, as a matter of both principle and practicality, to continue to enforce them to protect other controversial expression. The Supreme Court stressed both of these concerns in its 1971 decision in *Cohen v. California*, in which it barred a state from suppressing what the state argued to be a uniquely odious epithet. The Court explained that "the principle contended for . . . seems inherently boundless. How is one to distinguish this [word] from any other offensive word? . . . [N]o readily ascertainable general principle exists for stopping short of" making "public debate . . . palatable to" all of us. As the Court recognized in *Cohen*,

"the immediate consequence of" our robust freedom even for hateful speech "may often appear to be only verbal tumult, discord, and even offensive utterance." It then went on to explain the net gain, for all of us as individuals, and for our society overall, from this vibrant discourse, including its disfavored, disturbing, and feared messages:

> The constitutional right of free expression is powerful medicine in a society as diverse . . . as ours. It is designed . . . to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that . . . such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . .
>
> That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem . . . [an] individual['s] distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Many Americans may well consider other messages even more disfavored, disturbing, and feared than "hate speech"—for example, flag burning or advocating terrorism. After all, the opposition to flag burning has been so strong that it has fueled a proposed constitutional amendment to make an exception to the First Amendment to permit its punishment, and this amendment has received super-majority votes in both Houses of Congress. There has been no parallel effort concerning constitutionally protected "hate speech." Likewise, since the 9/11 terrorist attacks, laws that are aimed at checking terrorism have sailed through Congress and state legislatures. If our

legal system permitted "hate speech" laws as exceptions to the viewpoint neutrality and emergency rules, we could then anticipate additional "exceptional" laws barring other unpopular expression, including speech that is viewed as unpatriotic or endangering our national security.

In 1977–78, when the ACLU defended the free speech rights of neo-Nazis to hold a demonstration in Skokie, Illinois, which had a large Jewish population, including many Holocaust survivors, many ACLU members resigned from the organization in protest. Even though they were generally stalwart free speech supporters, they maintained that they drew the line at this particular expression. Yet, as a former executive director of the National Coalition Against Censorship observed, "Everyone has his or her Skokie." All of us hold some perspectives to be especially abhorrent, disturbing, or frightening, but we vary widely as to exactly what those are. Such especially reviled ideas are as broad and diverse as the views and values that we all hold. Assuming, purely hypothetically, that our legal system could make "just one" exception to the cardinal viewpoint neutrality and emergency principles for constitutionally protected "hate speech," there would be overwhelming political pressures to make "just one more" exception, over and over again.

The Court's increasingly strict enforcement of the viewpoint neutrality principle (and its complementary emergency test) is the most effective vehicle, in practice as well as in principle, for protecting *all* controversial expression. Neither the vehemence with which officials or citizens oppose particular views, nor the widespread nature of that opposition, warrants any exception to this crucial principle. As the Supreme Court has said: "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that . . . is a reason for according it constitutional protection."

The difficulty—indeed, impossibility—of cabining exceptions to the viewpoint neutrality and emergency principles solely for constitutionally protected "hate speech," or for some subset of such speech, is signaled by the experience in other countries with "hate speech" laws. As I recount in Chapter 4, in response to predictable political pressures, such laws have expanded in scope over time, and they have emboldened lawmakers to punish other speech expressing other disfavored views.