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## FREE SPEECH RECONSIDERED

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**I**T MUST BE a terribly confusing time for free speech enthusiasts—especially in America, where the Bill of Rights remains the enlightened testament to a secular religion unlike any other in the world. Among the precious freedoms Americans cherish, one stands out above the rest. One liberty, embodied in the First Amendment, is first for a reason. It is lodged in the hearts of citizens and engraved as an endowed birthright in their memory. Indeed, for most people, it is the supreme virtue of American society, defining what it means to be a citizen of the United States.

Before they attended to the matter of bearing arms, unreasonable searches and seizures, trial by jury, compensation for property taken by eminent domain, and cruel and unusual punishments, the Framers of the Constitution, our Founding Fathers, were under pressure from some states to create a general right of expression, declaring that “Congress shall make no law . . . abridging the freedom of speech.”

It is a pretty dramatic opening statement, followed by a catalog of rights and freedoms that would make the Constitution of the United States arguably the most celebrated and contested governmental contract with its people the world has ever known.

And it all starts with free speech.

But the free speech we enjoy today is very much unlike, if not altogether unrecognizable from, what the Founders envisioned. Never before has the Free Speech Clause of the First Amendment elicited so much ambivalence and bewilderment. Nearly everyone seems to have a strong opinion about the sanctity of free speech. But the consensus that was once absolute now has skeptics. More and more are recovering addicts from the drunken free-speech hedonism of the past. The new normal of self-doubt and second thoughts has left many people unsure of how they really feel about the First Amendment. Constitutional certainty has given way to more complicated and nuanced assessments of right from wrong.

During the summer of 2017, an assembly of several hundred assorted white supremacists, KKK, neo-Nazi, and Alt-Right agitators staged a rally in downtown Charlottesville, Virginia, under the slogan, “Unite the Right.” The ostensible purpose for the march was to protest the decision by the city to remove a statue from a University of Virginia park honoring the Confederate general Robert E. Lee. As the rally commenced, the protestors almost immediately started chanting, “Jews will not replace us!” Obviously, nostalgia for the Confederacy and the preservation of General Lee’s statue was not the only item on their list of grievances. The connection between a statue of a man who probably had not met many Jews in his lifetime and the world’s oldest prejudice was not immediately apparent. What occurred, however, and what could have easily been predicted, was the usual chaos that emerges from a gathering mob with a hateful agenda. The white supremacists came prepared for the night and for a fight. There were counter-protests by self-proclaimed anti-fascists, violent skirmishes, and one death.

The city had tried to avoid a calamity by moving the rally to a different location—a larger park a mile away where the statue of General Lee was not located and where, arguably, the rally would be less pitched for violence. Those efforts were blocked by a federal judge who ruled that the city must grant the white supremacists a permit to exercise their right to freedom of speech—at the very location where their assembly would have the greatest effect and meaning.<sup>4</sup>

Standing beside their clients in court and prevailing on their behalf, not unlike forty years earlier when they represented neo-Nazis in Skokie, Illinois, were lawyers from the American Civil Liberties Union (ACLU). And once again, as in Skokie, the ACLU faced harsh criticism for representing the instigators in Charlottesville. After all, the ACLU bills itself as a progressive legal entity that is supposed to champion the rights of the oppressed, the marginalized, and the mistreated. Why, after all these years, do they still find themselves vindicating the rights of Nazis when their overall mission is to promote diversity, equal protection, and mutual tolerance? It has been reported that some of its supporters called to express their outrage and cut off further donations. That, too, happened in Skokie decades earlier. One current board member of the Virginia chapter resigned, but not before writing on Twitter: “I won’t be a fig leaf for Nazis. Don’t defend Nazis to allow them to kill people.”<sup>5</sup> Former board member Wendy Kaminer wrote that, going forward, the ACLU might just hesitate in taking on free-speech cases that “advance the goals of white supremacists or others whose views are contrary to our values.”<sup>6</sup>

What was different this time, however, was that it was not only ACLU donors and former board members who were questioning the judgment of an organization that refuses to prioritize the speakers they routinely defend. After all, some speakers express an actual idea that contributes to public debate and enriches an informed society. But there are also speakers like the ones who gathered in Charlottesville who cynically weaponize the First

Amendment in order to provoke a fight, incite lawlessness, and threaten vulnerable minorities. For them, the First Amendment is a convenient and effective cover to spread mayhem. Would it not be a better use of legal resources, and a more righteous calling, if the ACLU focused on assisting the first group of speakers and left the second group to fend for themselves without top-notch legal representation?

This time, in Charlottesville, it was not just their benefactors but the ACLU itself that was having second thoughts about how to define its core mission. Earlier in the year, the organization had filed a lawsuit on behalf of British, far-right political commentator Milo Yiannopoulos' right to speak at the University of California in Berkeley. Now they found themselves successfully representing white supremacists in Charlottesville. Staff lawyers began to grouse. Had the ACLU become just a *pro-bono* sap for right-wing agitators, those for whom the Constitution was not a sacred document but rather an operating manual for undermining democracy and imposing the will of an angry mob? Here they were, mounting a legal defense for racist and anti-Semitic groups whose civil liberties were directed toward saving a statue of a man who had led an army that defended the slavery of an entire people—America's original sin.

Some of the ACLU's internal conflict may have begun in 2008 when, following the election of Barack Obama, it defended four students who spray-painted "Hang Obama by a Noose" and "Let's shoot that nigger in the head" on a wall at North Carolina State University. The organization also lent its services in 2015 to defend the Washington Redskins football team in its effort to retain its nickname despite mounting pressure from Native Indian-Americans who believe that such misappropriation represents a desecration of their cultural history.<sup>7</sup>

Perhaps for the first time in its history, the ACLU wondered whether it had forfeited the greater good of its progressive agenda merely to remain true to its First Amendment bona fides. Is it not

also an organization dedicated to equality and racial justice? As evidence of this newfound moral revulsion at work, more than 200 staffers (out of a total of 1,300) signed a letter to the ACLU's executive director, questioning whether the rigid stance it had historically taken in defense of free speech was now eroding its moral authority to advance the arguably more laudable goals of social justice and equal protection. The letter recommended that the ACLU become more discriminating in the kinds of First Amendment cases it takes on in the future. After all, as one ACLU staff attorney said, "The ACLU can have a proactive First Amendment stance without giving free legal services to Nazis."<sup>8</sup>

On May 1, 2018, without fanfare and perhaps so as not to highlight that it had lost some of its First Amendment mojo, a committee of the ACLU that had been established to address the concerns expressed in the joint letter released new guidelines on how the organization would decide upon which free-speech cases to litigate. The most important change in policy: It would no longer represent clients who choose to test the limits of the First Amendment by marching with guns in order to express their views.

The fact that the letter was written and signed by so many, and that some action, albeit quietly, was taken, suggests that even die-hard free speech absolutists may now be willing to concede that not all speech, by all speakers, is worth defending. A soul-searching experience such as this, taken by even a single ACLU lawyer forty years ago during the Skokie litigation, would have been unimaginable.

And the ACLU is not alone. Confusion about free speech abounds everywhere. And not only from those who make their living defending it. Many question what free speech really means in a world of social media trolling, cyberbullying, cloak and dagger hacking of America's presidential election, militant protest rallies by groups that spread hate, incitement to violence, the spreading of fear, and college campuses that are repressing the openness of mind that was once the whole point of a liberal arts education.

These feelings are deeply felt but not often publicly stated. But it is there, a clear signal that the First Amendment is flawed. We have been applying it too rigidly and permissively, and in ways that our Founding Fathers would have found not in keeping with its original purpose. So much energy has been expended on limiting any restriction on free speech and defending the First Amendment from any deviation that we have desecrated and complicated its essential meaning beyond recognition. Civil liberties reflected in free speech is one thing; uncivil insanity typified by harmful speech is quite another.

Our Founding Fathers believed that free speech would make the government more responsive to the people by empowering ordinary citizens to make their displeasure with the government freely known. And free speech would enable the people to become better citizens, fully engaged in a government by the people, fully participating in democracy from the soapbox to the ballot box.

How do marching Nazis, Klansmen, and White Supremacists who hate Jews, blacks, and Muslims have anything to do with those noble intentions?

Free speech absolutists are its loudest defenders, but free speech does not mean that we must be forcibly exposed to so much violence as noise—the kind that benefit only First Amendment blowhards. Being loud and berating is not the same as being right. Free speech absolutism is not a virtue; it is a cult. Most people, fortunately, do not live in a world of absolutes. Absolutism is the tyranny of the fanged few—the ideological bullies feasting on the masses of less impassioned public opinion. There have always been legal limits to free speech, even as some pretended that the First Amendment allowed for no exceptions—a short text with an elongated sense of personal liberty that now, perhaps, finally needs to be reexamined.

I will discuss this in greater detail later, but shouting “Fire!” in a crowded theater is not protected speech, nor is libel and defamation, obscenity, “fighting words,” incitement to imminent lawlessness, and true threats of violence. There is already precedent that

makes speech less free than we have for so long been taught to believe.

Ironically, given that speech was ushered to the head of the line alongside the freedoms of religion, press, and assembly—all designated as first among equals—it was the people, and not even the Founders themselves, who insisted on singling out this particular right from the rest. The original draft of the Constitution did not include free speech at all. Charles Pinckney, a South Carolina legislator, proposed adding a free speech clause to the Constitution. A slight majority of the eventual signers, among whom were Alexander Hamilton and James Madison, rejected it. It was the pesky and persistent representatives of four states—Virginia, New York, Rhode Island, and Maryland—that made the insertion of free speech into the Constitution a condition of their adoption.<sup>9</sup>

The deliberations surrounding free speech preceded the creation of this country. Granting this liberty top billing on the grand marque of the Age of Rights was itself, appropriately, the subject of fierce democratic deliberation. Free speech has always informed the debates of the United States and, in fact, made them possible. Indeed, what eventually became the centerpiece of our democracy—the guarantee of free speech—was the subject of passionate debate. And that is what the Founding Fathers believed to be the political essence and moral imperative of free speech: citizens engaged in healthy debate, trading arguments like currency—a harmless exchange of words that form ideas, all for human betterment and good governance.

America's free speech guarantee is the very cornerstone of its liberal tradition, the primary calling card of its democracy, and the embodiment of its noble experiment in self-rule. In 1937, Supreme Court Justice Benjamin Cardozo described free speech as “the matrix, the indispensable condition of nearly every other form of freedom.”<sup>10</sup> Nothing else threatens the sensitivities of American exceptionalism as much as impinging on free speech. And it accounts for why this nation is willing to celebrate free speech with

patriotic fervor even when courts so often end up protecting speech that is anti-American both in word and deed.

Perhaps the best example of this apparent paradox reveals itself in the burning of the American flag. In *Texas v. Johnson*, decided in 1989,<sup>11</sup> the Supreme Court ruled that burning the American flag, rather than saluting it, waving it, or watching it unfurl in the wind, is protected expression under the First Amendment. Expressive for sure, but also arguably an act of aggression, infuriating and harmful to anyone who has had a loved one die in battle defending that very flag. And yet, extreme tolerance for political dissent, even as it provides a platform for anti-American animus, is what distinguishes the United States from most nations around the world. We prefer patriotism, but it is not un-American to criticize the government—even in vociferously vulgar terms. Totalitarian societies demand total conformity and national obedience. A truly democratic society, however, if sincere in its beliefs, gives dissidents the freedom to speak their minds—disloyal though they may be, and hostile in the manner by which they choose to express their opposition.

The American colonies had lived in terror of a British monarch who saw subversion lurking in every shadow and who was quick to charge sedition with every benign protest. The first order of business in forming a new nation was to make sure that paranoid tyrants could no longer stand in the way of a citizen's right to speak freely. We have come a long way since the restive days of King George III. Today, denouncing the president is a quasi-spectator sport. Protestors, under certain limits, are all welcome. *Saturday Night Live* is a weekly television takedown of Oval Office pretensions. Showtime's *Our Cartoon President* is a devastating parody of the president, his family, and government insiders. Donald Trump may possess the thinnest of skins, and his wishes for censorship linger beneath the surface of a fragile ego. Nonetheless, we are living in a golden age of irreverent presidential mockery—megalomania be damned.

Democracy, after all, is a messy state of affairs, and that mess, for most Americans, also accounts for its allure. The patriotic

love for this country carries with it the obligation to protect the rights of even those who despise this country and who feel compelled to make their antipathies widely known. Over the years, the Supreme Court has invalidated laws that would ban neo-Nazis from marching in Skokie, Illinois, which was once a hamlet of Holocaust survivors,<sup>12</sup> or punish those who would deliver a hateful message in the form of a burning cross on an African-American's lawn.<sup>13</sup> The father of a dead marine who sought to bury his son was denied recovery of damages for the emotional distress he suffered when a church group picketed the funeral in order to voice their objections to gays serving in the military. They were holding signs that read: "God Hates Fags" and "Thank God for dead soldiers."<sup>14</sup> The soldier was not a homosexual, but his funeral, along with other final resting places for soldiers around the United States, have become protest venues of choice for this particular church. Other signs read: "Thank God for 9/11" and "God hates America."

And for the majority of constitutional scholars, the ACLU, and eight of the nine members of the Supreme Court who set aside the monetary award received by the father of that dead marine and upheld the right of the church group to ruin the one opportunity he had to say goodbye to his son who had served his country with honor and distinction, these rulings make perfect sense and are consistent with the meaning and purpose of the First Amendment. After all, shouldn't neo-Nazis, the Ku Klux Klan, and homophobic houses of worship be permitted to voice their opinions—in nearly any fashion they choose—even if that means communicating their message to land a specific blow for maximum effect? These are not acts of expression meant for the general public. They are intended for a particular listener, often delivered right to their faces and, in the case of the neo-Nazis in Skokie, right on their village green. The speaker always selects the right targets—people who are vulnerable to harm due to historical, racial, and biological factors beyond their control. And the harm is real, both in its

psychological and physical dimensions, enough so that it manifests itself in emotional scarring and bodily sickness, leaving citizens debilitated by the harmful expression of another. The medical research supporting these findings is beyond dispute and will be discussed more fully in later chapters.

And yet, in the case involving the church group and the aggrieved father, the Chief Justice of the Supreme Court, who wrote the opinion, delivered a tutorial on the First Amendment, reminding everyone—as if anyone needs any further reminders—why this decision was legally correct and consistent with the free speech priorities of the United States.

Many call this glorification of unfettered speech, this slavish devotion to the First Amendment, free speech absolutism. It is a default position that favors, reflexively, the rights of the speaker over the listener, regardless of what the speaker has to say, how he or she may choose to say it, and the effect the speech ultimately has on the recipient of his or her message. For many Americans, the First Amendment’s Free Speech Clause is inviolable. Yes, begrudgingly, some free speech diehards recognize a handful of proscribed categories of speech that are without constitutional protection and are therefore considered non-speech.

Saying openly that one believes in hate speech codes or the censorship of nearly any form of speech is not the way to get invited to fashionable parties. It was not always this way. During the 1960s, with protest movements and social upheavals marking a new political consciousness in America, courts began to apply the First Amendment more strictly, and consistently, against government attempts to restrict the free speech of its citizens. Burning a draft card, wearing a jean jacket emblazoned with the message “Fuck the Draft,” even torching an American flag were ruled to be constitutionally protected communications of a political nature that, while offensive to some, ultimately addressed serious issues of public concern.

Before then, and especially during both World War I and II, the First Amendment did not come to the rescue of those accused of

rousing public sentiment with grand gestures of political dissent that might serve to expose the nation to foreign threats. Going back even further, the Alien and Sedition Act of 1798 during President Adams' administration and the suspension of *habeas corpus* in 1861 during the Civil War under President Lincoln, were not declared unconstitutional even though these measures criminalized political activism and completely laid waste to the Free Speech and Assembly clauses of the First Amendment. Most Americans at the time wholly supported the Sedition Act even though today such a governmental maneuver would be denounced as fascist censorship of the first order and a blatant disregard of constitutional guarantees.

In fact, the First Amendment did not produce much case law at all during the first 160 years of its existence. Free speech was always regarded as a virtue of American democracy, but actually placing restrictions upon governmental prior restraints was far less developed and hardly ever occurred. Free speech was surely a feature of the Bill of Rights, but the government felt equally free to curtail speech during times of national emergency. It was not so obvious to ordinary citizens that, should they ever find themselves arrested for protesting the government, the First Amendment would always be available for their defense. Similarly, a citizen's free speech liberties were never regarded as being so versatile and potent that they could be deployed to help bring down the democracy.

If it were possible for the Founding Fathers to drop in on modern times and observe how their Constitution was now being interpreted, they would be appalled to learn that neo-Nazis, cross burners, and homophobic churchgoers were exploiting their First Amendment freedoms to prey upon vulnerable citizens. Surely that is not what they had in mind when they codified free speech as a central tenet of American democracy. What was initially conceived as a bill of right against a tyrannical king who punished his subjects for speaking their minds, and which was created to enhance self-government and democratic deliberation in all forms, is now being used by illiberal, intolerant, and undemocratic citizens

to cause harm to those they do not like, depriving them of the dignity and tranquility they otherwise deserve.

Surely this is a misapplication of the First Amendment, a distortion that privileges speech over other civic values—namely, mutual respect, civility, common decency, and equal protection. These, too, were intended to be virtues of our democratic culture. The aspiration, after all, was always to create an environment that enabled and motivated citizens to participate in self-governance. How can one meaningfully avail themselves of democratic participation if they are being singled out for disrespect, if they are made to feel threatened, fearful, anxious, and without access to the public square? When it comes to a standoff between those who wish to assert their right to free speech in a hostile manner and those who merely wish to enjoy the privileges of citizenship, our legal system, generally, sides with the speaker.

The rebellion against King George III and the Revolutionary War that ensued coincided with the Age of Rights, inspiring a new nation with a living Constitution founded on humanistic, enlightened principles of liberty. But these new people of the Americas, now called the United States, walked away from the experience of living under the British crown determined to enjoy liberties previously unknown to them. The revolution was hard-won, and the rights they fought for would never be taken lightly. But some rights were weighted over others, with conflicting claims in a liberal society. Speech inexplicably has become a zero-sum game, a trump card that a cynical speaker always knows can be played to his or her advantage. *“My free speech will cancel out your rights to experience your own brand of American freedom.”* Frightened and emotionally traumatized citizens, assaulted by another’s speech, are not free.

Free speech, paradoxically, leads to a one-sided conversation. The constitutional right to speak is being exploited by bullies granted a bully pulpit, courtesy of the First Amendment. Law professor John A. Powell wonders, “What would it look like if we cared just as deeply about equality? What if we weighed the two as

conflicting values, instead of the false formalism where the right to speech is recognized but the harm caused by that speech is not?”<sup>15</sup> In allowing for such disparate treatment, by extending rights that favor speakers regardless of their effect on listeners, we have enabled a good deal of humiliation, indignity, and actual harm—to both the body and tranquility of mind—to flourish with the blessing of the First Amendment.

But this is a modern constitutional innovation at the federal level. The language adopted in the 1821 New York State Constitution, for instance, which eighteen other states followed and which is still in existence today, reads: “Every citizen may freely speak, write, and publish his sentiments on all subjects, being *responsible for the abuse of that right*.”<sup>16</sup> Pennsylvania was the first state, actually, to incorporate the expressed “abuse” exception, back in 1790. The “abuse” of the right to free speech was always contemplated as a check upon a liberty that could very well interfere with the citizenship of another. The abuse was never excused; it always balanced out the right—until more recent times.<sup>17</sup> Indeed, this parallel duty not to abuse the right of free speech seems to have been forgotten. It is, however, very much present in the laws of Europe.