

# The New York Review of Books

## Why We Must Still Defend Free Speech

David Cole  
SEPTEMBER 28, 2017 ISSUE



*Evelyn Hockstein/The Washington Post/Getty Images*

*White nationalists marching on the University of Virginia campus, Charlottesville, August 2017*

Does the First Amendment need a rewrite in the era of Donald Trump? Should the rise of white supremacist and neo-Nazi groups lead us to cut back the protection afforded to speech that expresses hatred and advocates violence, or otherwise undermines equality? If free speech exacerbates inequality, why doesn't equality, also protected by the Constitution, take precedence?

After the tragic violence at a white supremacist rally in Charlottesville, Virginia, on August 12, these questions take on renewed urgency. Many have asked in particular why the ACLU, of which I am national legal director, represented Jason Kessler, the organizer of the rally, in challenging Charlottesville's last-minute effort to revoke his permit. The city proposed to move his rally a mile from its originally approved site—Emancipation Park, the location of the Robert E. Lee monument whose removal Kessler sought to protest—but offered no reason why the protest would be any easier to manage a mile away. As ACLU offices across the country have done for thousands of marchers for almost a century,

the ACLU of Virginia gave Kessler legal help to preserve his permit. Should the fatal violence that followed prompt recalibration of the scope of free speech?

The future of the First Amendment may be at issue. A 2015 Pew Research Center poll reported that 40 percent of millennials think the government should be able to suppress speech deemed offensive to minority groups, as compared to only 12 percent of those born between 1928 and 1945. Young people today voice far less faith in free speech than do their grandparents. And Europe, where racist speech is not protected, has shown that democracies can reasonably differ about this issue.

People who oppose the protection of racist speech make several arguments, all ultimately resting on a claim that speech rights conflict with equality, and that equality should prevail in the balance.\* They contend that the “marketplace of ideas” assumes a mythical level playing field. If some speakers drown out or silence others, the marketplace cannot function in the interests of all. They argue that the history of mob and state violence targeting African-Americans makes racist speech directed at them especially indefensible. Tolerating such speech reinforces harms that this nation has done to African-Americans from slavery through Jim Crow to today’s de facto segregation, implicit bias, and structural discrimination. And still others argue that while it might have made sense to tolerate Nazis marching in Skokie in 1978, now, when white supremacists have a friend in the president himself, the power and influence they wield justify a different approach.

There is truth in each of these propositions. The United States is a profoundly unequal society. Our nation’s historical mistreatment of African-Americans has been shameful and the scourge of racism persists to this day. Racist speech causes real harm. It can inspire violence and intimidate people from freely exercising their own rights. There is no doubt that Donald Trump’s appeals to white resentment and his reluctance to condemn white supremacists after Charlottesville have emboldened many racists. But at least in the public arena, none of these unfortunate truths supports authorizing the state to suppress speech that advocates ideas antithetical to egalitarian values.

The argument that free speech should not be protected in conditions of inequality is misguided. The right to free speech does not rest on the presumption of a level playing field. Virtually all rights—speech included—are enjoyed unequally, and can reinforce inequality. The right to property most obviously protects the billionaire more than it does the poor. Homeowners have greater privacy rights than apartment dwellers, who in turn have more privacy than the homeless. The fundamental right to choose how to educate one’s children means little to parents who cannot afford private schools, and contributes to the resilience of segregated schools and the reproduction of privilege. Criminal defendants’ rights are enjoyed much more robustly by those who can afford to hire an expensive lawyer than by those dependent on the meager resources that states dedicate to the defense of the indigent, thereby contributing to the endemic disparities that plague our criminal justice system.

Critics argue that the First Amendment is different, because if the weak are silenced while the strong speak, or if some have more to spend on speech than others, the outcomes of the “marketplace of ideas” will be skewed. But the marketplace is a metaphor; it describes not a scientific method for identifying truth but a choice among realistic options. It maintains only that it is better for the state to remain neutral than to dictate what is true and suppress the rest. One can be justifiably skeptical of a debate in which Charles Koch or George Soros has outsized advantages over everyone else, but still prefer it to one in which the Trump—or indeed Obama—administration can control what can be said. If free speech is critical to democracy and to holding our representatives accountable—and it is—we cannot allow our representatives to suppress views they think are wrong, false, or disruptive.

Should our nation’s shameful history of racism change the equation? There is no doubt that African-Americans have suffered unique mistreatment, and that our country has yet to reckon adequately with that fact. But to treat speech targeting African-Americans differently from speech targeting anyone else cannot be squared with the first principle of free speech: the state must be neutral with regard to speakers’ viewpoints. Moreover, what about other groups? While each group’s experiences are distinct, many have suffered grave discrimination, including Native Americans, Asian-Americans, LGBT people, women, Jews, Latinos, Muslims, and immigrants generally. Should government officials be free to censor speech that offends or targets any of these groups? If not all, which groups get special protection?

And even if we could somehow answer that question, how would we define what speech to suppress? Should the government be able to silence all arguments against affirmative action or about genetic differences between men and women, or just uneducated racist and sexist rants? It is easy to recognize inequality; it is virtually impossible to articulate a standard for suppression of speech that would not afford government officials dangerously broad discretion and invite discrimination against particular viewpoints.

**B**ut are these challenges perhaps worth taking on because Donald Trump is president, and his victory has given new voice to white supremacists? That is exactly the wrong conclusion. After all, if we were to authorize government officials to suppress speech they find contrary to American values, it would be Donald Trump—and his allies in state and local governments—who would use that power. Here is the ultimate contradiction in the argument for state suppression of speech in the name of equality: it demands protection of disadvantaged minorities' interests, but in a democracy, the state acts in the name of the majority, not the minority. Why would disadvantaged minorities trust representatives of the majority to decide whose speech should be censored? At one time, most Americans embraced “separate but equal” for the races and separate spheres for the sexes as defining equality. It was the freedom to contest those views, safeguarded by the principle of free speech, that allowed us to reject them.

As Frederick Douglass reminded us, “Power concedes nothing without a demand. It never did and it never will.” Throughout our history, disadvantaged minority groups have effectively used the First Amendment to speak, associate, and assemble for the purpose of demanding their rights—and the ACLU has defended their right to do so. Where would the movements for racial justice, women's rights, and LGBT equality be without a muscular First Amendment?

In some limited but important settings, equality norms do trump free speech. At schools and in the workplace, for example, antidiscrimination law forbids harassment and hostile working conditions based on race or sex, and those rules limit what people can say there. The courts have recognized that in situations involving formal hierarchy and captive audiences, speech can be limited to ensure equal access and treatment. But those exceptions do not extend to the public sphere, where ideas must be open to full and free contestation, and those who disagree can turn away or talk back.

The response to Charlottesville showed the power of talking back. When Donald Trump implied a kind of moral equivalence between the white supremacist protesters and their counter-protesters, he quickly found himself isolated. Prominent Republicans, military leaders, business executives, and conservative, moderate, and liberal commentators alike condemned the ideology of white supremacy, Trump himself, or both.

When white supremacists called a rally the following week in Boston, they mustered only a handful of supporters. They were vastly outnumbered by tens of thousands of counterprotesters who peacefully marched through the streets to condemn white supremacy, racism, and hate. Boston proved yet again that the most powerful response to speech that we hate is not suppression but more speech. Even Stephen Bannon, until recently Trump's chief strategist and now once again executive chairman of Breitbart News, denounced white supremacists as “losers” and “a collection of clowns.” Free speech, in short, is exposing white supremacists' ideas to the condemnation they deserve. Moral condemnation, not legal suppression, is the appropriate response to these despicable ideas.

**S**ome white supremacists advocate not only hate but violence. They want to purge the country of nonwhites, non-Christians, and other “undesirables,” and return us to a racial caste society—and the only way to do that is through force. The First Amendment protects speech but not violence. So what possible value is there in protecting speech advocating violence? Our history illustrates that unless very narrowly constrained, the power to restrict the advocacy of violence is an invitation to punish political dissent. A. Mitchell Palmer, J. Edgar Hoover, and Joseph McCarthy all used the advocacy of violence as a justification to punish people who associated with Communists, socialists, or civil rights groups.

Those lessons led the Supreme Court, in a 1969 ACLU case involving a Ku Klux Klan rally, to rule that speech advocating violence or other criminal conduct is protected unless it is intended and likely to produce imminent lawless action, a highly speech-protective rule. In addition to incitement, thus narrowly defined, a “true threat” against specific individuals is also not protected. But aside from these instances in which speech and violence are inextricably intertwined, speech advocating violence gets full First Amendment protection.

In Charlottesville, the ACLU's client swore under oath that he intended only a peaceful protest. The city cited general concerns about managing the crowd in seeking to move the marchers a mile from the originally approved site. But as the district court found, the city offered no reason why there wouldn't be just as many protesters and counterprotesters at the alternative site. Violence did break out in Charlottesville, but that appears to have been at least in part because the police utterly failed to keep the protesters separated or to break up the fights.

What about speech and weapons? The ACLU's executive director, Anthony Romero, explained that, in light of Charlottesville and the risk of violence at future protests, the ACLU will not represent marchers who seek to brandish weapons while protesting. (This is not a new position. In a [pamphlet](#) signed by Roger Baldwin, Arthur Garfield Hays, Morris Ernst, and others, the ACLU took a similar stance in 1934, explaining that we defended the Nazis' right to speak, but not to march while armed.) This is a content-neutral policy; it applies to all armed marchers, regardless of their views. And it is driven by the twin concerns of avoiding violence and the impairment of many rights, speech included, that violence so often occasions. Free speech allows us to resolve our differences through public reason; violence is its antithesis. The First Amendment protects the exchange of views, not the exchange of bullets. Just as it is reasonable to exclude weapons from courthouses, airports, schools, and Fourth of July celebrations on the National Mall, so it is reasonable to exclude them from public protests.

Some ACLU staff and supporters have made a more limited argument. They don't directly question whether the First Amendment should protect white supremacist groups. Instead, they ask why the ACLU as an organization represents them. In most cases, the protesters should be able to find lawyers elsewhere. Many ACLU staff members understandably find representing these groups repugnant; their views are directly contrary to many of the values we fight for. And representing right-wing extremists makes it more difficult for the ACLU to work with its allies on a wide range of issues, from racial justice to LGBT equality to immigrants' rights. As a matter of resources, the ACLU spends far more on claims to equality by marginalized groups than it does on First Amendment claims. If the First Amendment work is undermining our other efforts, why do it?

These are real costs, and deserve consideration as ACLU lawyers make case-by-case decisions about how to deploy our resources. But they cannot be a bar to doing such work. The truth is that both internally and externally, it would be much easier for the ACLU to represent only those with whom we agree. But the power of our First Amendment advocacy turns on our commitment to a principle of viewpoint neutrality that requires protection for proponents and opponents of our own best view of racial justice. If we defended speech only when we agreed with it, on what ground would we ask others to tolerate speech they oppose?

In a fundamental sense, the First Amendment safeguards not only the American experiment in democratic pluralism, but everything the ACLU does. In the pursuit of liberty and justice, we associate, advocate, and petition the government. We protect the First Amendment not only because it is the lifeblood of democracy and an indispensable element of freedom, but because it is the guarantor of civil society itself. It protects the press, the academy, religion, political parties, and nonprofit associations like ours. In the era of Donald Trump, the importance of preserving these avenues for advancing justice and preserving democracy should be more evident than ever.

—August 24, 2017

---

\* The leading collection of essays advancing this critique is Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview, 1993). For a thoughtful defense of hate speech regulation on liberal premises, see Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012). ☞

---

## RELATED



**Jefferson & Charlottesville**  
Annette Gordon-Reed



**Why Free Speech Is Not Enough**  
David Cole



**Should Hate Speech Be Outlawed?**  
John Paul Stevens

© 1963-2018 NYREV, Inc. All rights reserved.