Abby Wing

History 450

10 May 2021

The First Amendment and Hate Speech: Reconciling Free Speech with Equal Protection

Today, the First Amendment reigns supreme in the American consciousness. According to constitutional scholar Akhil Amar, the First Amendment deserves protection due to its textual, doctrinal, and cultural firstness.[1] Paradoxically, Amar worries that the very popularity of the First Amendment may undermine it, "...Is there a danger," he asks, "that all sorts of less deserving ideas and principles will cleverly try to camouflage themselves as First Amendment ideas when they are really wolves in sheep's clothing?"[2] While Amar highlights the First Amendment's importance, he fails to consider the Fourteenth Amendment's role in altering society's perception of free speech. The First Amendment's provision that "Congress shall make no law...abridging the freedom of speech, or of the press," gives one the faulty impression that all forms of speech are constitutionally protected. On the contrary, the U.S. Supreme Court recognizes several free speech exceptions for the purpose of preventing harm.[3]

Free Speech and Equal Protection

On the other hand, many believe that the equal protection clause of the Fourteenth Amendment justifies hate speech prohibitions. The Fourteenth Amendment, which applies the

---

[1] Akhil Reed Amar "The First Amendment's Firstness," *UC Davis Law Review* 47, no. 4 (2014): 1035. The First Amendment's significance largely derives from the Reconstruction era when the Fourteenth Amendment applied the First Amendment to the states, 1022.

[2] Ibid, 1029.

[3] Geoffrey R. Stone and Eugene Volokh, "Common Interpretation: Freedom of Speech and the Press," *The National Constitution Center*, accessed April 29, 2021, available from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/266. The Court prohibits defamation, true threats, fighting words, obscenity, child pornography, and false commercial advertising, among other forms of speech.

Bill of Rights to the states, asserts that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...nor deny to any person within its jurisdiction the equal protection of the laws."[4] Furthermore, Title VII of the Civil Rights Act prohibits discrimination in the workplace "based on race, color, religion, sex and national origin."[5] In spite of the equal protection clause and Title VII, for the most part, the First Amendment protects hate speech. Without a clear framework through which to assess hate speech, society will fail to reconcile the tension between the First and Fourteenth amendments.

While countless other democracies place limits on hate speech, the United States treats hate speech as any other form of protected speech. In particular, the United Nations recognizes that hate speech undermines "democratic values, social stability, and peace."[6] The United States' failure to establish a doctrinal framework through which to regulate hate speech presents numerous issues. For instance, social media platforms act as forums for the spread of bigotry with minimal consequences.[7] However, in order to contend with the problem of hate speech, one must first understand different conceptions of the First Amendment. In my paper, I will analyze a number of thinkers' views concerning free speech and hate speech to come to a better understanding of how to contend with hate speech in a modern context.

Free Speech Absolutism and the First Amendment

In contrast to those who believe in speech regulations, free speech absolutists argue that the government should not restrict the right to free speech. For example, John Stuart Mill discusses the dangers of silencing opposing viewpoints, "If the opinion is right, they are deprived

---

[4] U.S. Constitution, amend. 14, sec. 1.
[5] Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964).
[6] United Nations, *United Nations Strategy and Plan of Action on Hate Speech: report of the Secretary-General*, (May 2019), available from https://digitallibrary.un.org/record/3889290?ln=en.
[7] While social media platforms are run by private corporations, they also act as public forums.

of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error."[8] According to Mill, one cannot determine the truth without the presence of false opinions. Mill also discusses how one cannot assume infallibility without hearing at least one contrasting opinion. Furthermore, Mill maintains that one can gain a more complete sense of the truth through exposure to multiple viewpoints, "Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth. They are a part of the truth, sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjointed from the truths by which they ought to be accompanied and limited."[9] Mills asserts that an absolutist approach to free speech gives society access to the truth.

Similarly, Alexander Meiklejohn maintains that free speech is necessary for self-government. In particular, Meiklejohn states that the First Amendment's protects popular sovereignty, "The revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people."[10] Meiklejohn discusses how the First Amendment protects public avenues for speech rather than speech itself. For example, if one violates the rules of public order, one forfeits one's right to speak. In addition, Meiklejohn states that the First Amendment safeguards one's right to hold a belief, "A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe."[11] Meiklejohn asserts that the government can only limit speech which inhibits public discussion.

---

[8] John Stuart Mill, "Of the Liberty of Thought and Discussion," in *On Liberty* (United Kingdom: Longmans, 1859), 33.
[9] Ibid, 83.
[10] Alexander Meiklejohn, "The First Amendment Is an Absolute." *The Supreme Court Review*, (1961): 254, *JSTOR*, www.jstor.org/stable/3108719. Accessed 30 Apr. 2021.
[11] Ibid, 259—260.

Mill and Meiklejohn both view freedom of political speech as an essential part of the democratic process. In relation to speech during wartime, Meiklejohn states that "So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged."[12] Meiklejohn asserts that political speech limitations undermine the First Amendment. Likewise, Mill asserts that false opinions must coexist with true opinions. On the other hand, free speech absolutists place more emphasis on the right to speak rather than the effect of speech. Mill and Meiklejohn's approaches do not contend with the broader societal implications of free speech.

Free Speech Relativism and the First Amendment

Conversely, free speech relativists favor a more restrictive view of speech. Particularly, Stanley Fish acknowledges the need to reevaluate the First Amendment on an ad-hoc basis, "...decisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech they want silenced."[13] Fish maintains that all speech is never "free of consequences and free from state pressure."[14] On the contrary, Fish acknowledges the role of politics in determining the value of speech. Additionally, Fish discusses how no speech environment is truly free, "...no such thing as a public forum purged of ideological pressures or exclusion."[15] While Fish acknowledges the risks of restricting speech, he contends that the threat

---

[12] Alexander Meiklejohn, "Clear and Present Danger," in *Free Speech and Its Relation to Self-Government* (Clark, New Jersey: The Lawbook Exchange, Ltd, [1948], 2014), 46.
[13] Stanley Fish, "There's No Such Thing as Free Speech, and It's a Good Thing, Too" in *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford University Press, 1994): 110.
[14] Ibid, 114.
[15] Ibid, 116.

of tyranny outweighs the need for absolute free speech. Therefore, he argues, courts must take an ad-hoc approach to free speech.

In contrast with Mill and Meiklejohn, Fish contends that free speech restrictions are inevitable. Specifically, Fish maintains that in the presence of exceptions, the right to free speech is never absolute, "...freedom has never been general and has always been understood against the background of an originary exclusion that gives it meaning."[16] In response to critics of free speech relativism, Fish states "freedom of expression would only be a primary value if it didn't matter what was said, didn't matter in the sense that no one gave a damn but just liked to hear talk."[17] According to Fish, no speech is content neutral; groups use the First Amendment to advance particular agendas while maintaining the necessity of censoring opposing viewpoints. On the other hand, some critics state that speech restrictions deny society access to the truth. In Fish's view, the government must restrict harmful speech in spite of that speech's potential future value.

Furthermore, Catherine MacKinnon believes that one must assess the First Amendment in relation to the Fourteenth Amendment. In her view, pornography denies women free speech as well as equal protection under the laws. MacKinnon also maintains that the First Amendment perpetuates sexual abuse, "Protecting pornography means protecting sexual abuse as speech, at the same time that both pornography and its protection have deprived women of speech, especially speech against sexual abuse."[18] In particular, MacKinnon takes issue with the argument that pornography conveys ideas.[19] MacKinnon maintains that ideas do not cause

---

[16] Ibid, 104.
[17] Ibid, 106.
[18] Catharine A. MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press [1993], 1996), 9.
[19] Ibid, 14.

violence in the same manner as actions, "...it is not the ideas in pornography that assault women: men do…"[20] According to MacKinnon, pornography enacts sexual abuse. In addition, MacKinnon highlights how free speech silences victims of pornography, "Speech theory does not disclose or even consider how to deal with power vanquishing powerlessness; it tends to transmute this into truth vanquishing falsehood, meaning what power wins becomes considered true."[21] MacKinnon posits that absolute free speech disadvantages victims of sexual abuse.

Likewise, Charles R. Lawrence III advances a view of free speech that incorporates antisubordination theory. Similar to MacKinnon, Lawrence acknowledges the tension between the Fourteenth Amendment and the First Amendment. In the context of the workplace, Lawrence asserts that discriminatory speech should not receive First Amendment protections, "This speech, like the burning cross in R.A.V, does more than communicate an idea. It interferes with the victim's right to work at a job where she is free from degradation because of her gender."[22] According to Lawrence, discriminatory speech denies victims their First Amendment rights. Lawrence also states that free speech absolutism ignores the harms of discriminatory speech, "We treat the marketplace of ideas as if all voices are equal, as if there are no silencing voices or voices that are silenced."[23] Lawrence contends that the First Amendment does not adequately protect marginalized groups from discrimination.

As proponents of free speech relativism, Fish, MacKinnon, and Lawrence all acknowledge that free speech limitations protect the First Amendment from threats. Particularly, Fish discusses how many use the First Amendment to justify harmful actions, "...free-speech

---

[20] Ibid, 15.
[21] Ibid, 78.
[22] Charles R. Lawrence III, "Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment," *Villanova Law Review* 37, no. 4 (1992): 799.
[23] Ibid, 802.

principles don't exist except as a component in a bad argument in which such principles are invoked to mask motives that would not withstand close scrutiny."[24] Likewise, Lawrence believes that free speech absolutism ignores the effects of discrimination. Lawrence's view of the First Amendment derives from his commitment to the Fourteenth Amendment's equal protection clause. According to Lawrence, speech which infringes upon the rights of historically marginalized groups does not deserve protection. On the other hand, while widely regarded as a free speech absolutist, Mill agrees that the government must regulate harmful speech, "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[25] Free speech relativism proves beneficial in regard to its consideration of the negative consequences of free speech.

Do Speech Restrictions Promote Equality?

In contrast with MacKinnon, Nadine Strossen believes that speech restrictions do not benefit minority groups and women. For example, Strossen outlines the downsides of banning pornography, "By undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality."[26] Strossen disagrees with those who wish to censor hate speech and pornography, as she views such measures as counterproductive to the goal of promoting equality.[27] Conversely, Strossen discusses the importance of free speech for marginalized groups. According to Strossen, the Civil Rights Movement and women's rights movement both benefited from free speech.[28] Strossen also argues that laws against harmful speech often disempower marginalized groups, "The first individuals prosecuted under the

---

[24] Ibid, 111—112.
[25] Mill, "Of the Liberty of Thought and Discussion," in *On Liberty*, 33.
[26] Nadine Strossen, "Hate Speech and Pornography: Do We Have to Choose between Freedom of Speech and Equality," *Case Western Reserve Law Review* 46, no. 2 (Winter 1996): 461.
[27] Ibid, 457.
[28] Ibid, 464.

British Race Relations Act of 1965, which criminalized the intentional incitement of racial hatred, were black power leaders."[29] In Strossen's perspective, societies that do not respect human rights often institute measures outlawing sexual speech with the intent of suppressing women.[30] Strossen contends that free speech is necessary for overcoming racism and sexism.

Strossen's view of speech contrasts significantly with Fish, MacKinnon, and Lawrence's perspectives. Unlike MacKinnon, Strossen does not see restrictions on pornography and hate speech as conducive from an equality standpoint.[31] Strossen believes that the government should only restrict speech that violates the clear and present danger doctrine.[32] On the other hand, MacKinnon asserts that even when one separates speech from action, one must still contend with the tension between the First and Fourteenth amendments, "The courts cannot have it both ways, protecting discriminatory activity under the First Amendment on the same ground they make a requirement for its illegality under the Fourteenth."[33] According to MacKinnon, the Fourteenth Amendment should prohibit pornography, as pornography denies women equal protection of the laws by preventing them from exercising their First Amendment rights. In spite of this tension, Strossen asserts that outlawing pornography undermines women's agency, "It would perpetuate the disempowering notion that women are essentially victims...It would harm women who voluntarily work in the sex industry."[34] Therefore, in Strossen's view, one cannot use the Fourteenth Amendment as a justification for banning pornography. On the other hand, Strossen fails to acknowledge instances in which one person's speech infringes upon another's.

---

[29] Ibid, 466.
[30] Ibid, 473.
[31] Ibid, 458.
[32] Ibid, 455.
[33] MacKinnon, *Only Words*, 9.
[34] Strossen, "Hate Speech and Pornography," 460—461.

Hate Speech and the First Amendment

In regard to hate speech, free speech absolutists maintain that the First Amendment protects all speech, regardless of its consequences. While Mill asserts the necessity of free speech from a truth-finding perspective, he also recognizes the silencing effects of oppression, "History teems with instances of truth put down by persecution."[35] Mills maintains that in the long run, truth will triumph in spite of oppression. At the same time, Mill opposes speech which causes harm. In addition, both Mill and Meiklejohn contend that speech that disrupts public debate does not warrant protection. In particular, Meiklejohn states that the government cannot deny a person access to public debate, "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'"[36] Mill and Meiklejohn do not view hate speech restrictions as necessary unless that speech causes harm and/or disrupts public debate.

On the other hand, free speech relativists assert that the First Amendment should not protect hate speech. Fish contends that the powerful often discriminate against the powerless under the guise of the First Amendment.[37] Similarly, MacKinnon and Lawrence discuss how the First Amendment does not recognize the effects of power imbalances, "If First Amendment doctrine and theory is to truly serve First Amendment ideals...it must take into account the historical reality that some members of our community are less powerful than others and that those persons continue to be systematically silenced by those who are more powerful."[38] According to MacKinnon and Lawrence, the First Amendment must serve the powerless as well

[35] Mill, "Of the Liberty of Thought and Discussion," in *On Liberty*, 21.
[36] Meiklejohn, "The First Amendment Is an Absolute," 255.
[37] Fish, "There's No Such Thing as Free Speech," 75—76.
[38] Lawrence, "Crossburning and the Sound of Silence," 803—804.

as the powerful. While free speech relativism provides a moral framework for interpreting the First Amendment, it does not adequately address the downsides of hate speech regulations.

On the other hand, while Strossen recognizes the damaging effects of hate speech, she disagrees with those in favor of speech restrictions. Strossen asserts that the First Amendment can combat hate speech, "Positive intergroup relations will more likely result from education, free discussion, and the airing of misunderstandings and insensitivity, rather than from legal battles; anti-hate-speech rules will continue to generate litigation and other forms of controversy that increase intergroup tensions."[39] Furthermore, censorship proves divisive and does not combat discriminatory attitudes. Strossen states that education can combat racism and sexism. Similar to Mill, Strossen believes in the clear and present danger doctrine. However, Strossen and Mill diverge from Meiklejohn in relation to harmful speech. Meiklejohn disagrees with the clear and present danger doctrine, as he contends that the government can restrict speech only in extreme circumstances.[40] However, Strossen, Mill, and Meiklejohn all challenge the notion that hate speech limitations promote equality.

Implications of the Hate Speech Debate

When addressing hate speech in a modern context, one must consider multiple conceptions of speech. Free speech absolutists contend that the right to speak takes precedence over the content of a person's speech. Furthermore, free speech absolutists assert that the government must permit all speech within the scope of public debate. On the other hand, free speech relativists argue that the government must recognize the Fourteenth Amendment's guarantee of equal protection when regulating speech. In addition, free speech relativists assert

---

[39] Strossen, "Hate Speech and Pornography," 460.

[40] Meiklejohn, "Clear and Present Danger," 48.
Meiklejohn asserts that Congress does not possess the authority to prevent all substantive evils.

that the impact of speech matters more than its intent. However, many believe that speech limitations lead to negative consequences. While free speech absolutists contend that regulating hate speech undermines the First Amendment, free speech relativists argue that hate speech bans reinforce the First Amendment. Today, when faced with the problem of regulating hate speech, the Court must develop a framework that incorporates elements of free speech absolutism and relativism.

An overview of the hate speech debate reveals the difficulties of reconciling free speech with equal protection. An absolutist perspective ignores the ways in which the powerful use the First Amendment to infringe upon the Fourteenth Amendment rights of the powerless. On the other hand, a relativist outlook curtails individual liberty without addressing underlying issues which cause hate speech in the first place. Therefore, the U.S. Supreme Court must develop a doctrine to assess whether a particular instance of hate speech infringes upon an individual's right to equal protection under the laws. This approach would allow the Court to negotiate between the absolutist and relativist frameworks.

In contemporary times, the prevalence of hate speech presents numerous challenges. Particularly, the anonymous nature of the Internet makes it difficult for social media platforms to regulate hate speech. The rise of anti-racism in recent years puts pressure on the Court to contend with the issue of hate speech. When addressing hate speech, it is important to take a multi-faceted approach. For instance, as Strossen mentions, education is one of many strategies for combatting hate speech. In any case, hate speech undermines the equal protection clause by threatening the First Amendment rights of individuals. In the future, the U.S. Supreme Court must develop a doctrine for regulating speech that violates the Fourteenth Amendment.