



**THE
FUTURE
OF
FREE
SPEECH**

HATE SPEECH AND THE FIRST AMENDMENT

WHAT IS HATE SPEECH?

Hate speech refers to offensive or derogatory words, signs, or symbols directed at a person or group based on inherent characteristics like race, religion, ethnicity, gender, or sexual orientation. It often involves slurs or expressions of bigotry and can foment hostility and social discord.

The First Amendment does not have an exception for hate speech.

KEY SUPREME COURT CASES

Brandenburg v. Ohio (1969)

This case involved a Ku Klux Klan leader's rally speech. The Court overturned his conviction and created a strict test for when speech advocating violence can be punished. Mere abstract advocacy of violence or hate is protected, only speech "directed to inciting or producing imminent lawless action" and likely to actually "incite such action" can be prohibited.

R.A.V. v. City of St. Paul (1992)

In this case, a city had an ordinance criminalizing symbols (like burning crosses or swastikas) that provoke anger on the basis of race, religion, or gender. The Supreme Court unanimously struck down that hate-speech law as unconstitutional. The law improperly singled out specific disfavored viewpoints (racist hate symbols) for punishment, a form of viewpoint discrimination, which the First Amendment forbids. *R.A.V.* confirmed that the government cannot ban speech simply because it conveys a hateful message, reinforcing that even hate symbols are protected speech in the eyes of the Constitution.

Snyder v. Phelps (2011)

This case tested whether extremely hurtful protest speech was protected. Members of the Westboro Baptist Church had picketed a military funeral with vile anti-gay and anti-military messages, and the fallen soldier's family sued for emotional distress. The Supreme Court, in an 8-1 decision, sided with the protesters. The Court reasoned that, however outrageous, the protest addressed matters of public concern (morality, policy) and was conducted peacefully in a public place. Because the speech related to broad public issues, it occupied the highest rung of the hierarchy of First Amendment values and could not be punished simply for causing pain. In short, even hateful speech on public issues is strongly protected, to avoid stifling debate.



**THE
FUTURE
OF
FREE
SPEECH**

HATE SPEECH AND THE FIRST AMENDMENT

EXCEPTIONS TO FIRST AMENDMENT PROTECTION

Incitement to Imminent Lawless Action

As established in *Brandenburg*, speech intended and likely to provoke imminent violence or law breaking is unprotected. For example, urging a mob to attack a minority group right now would not be protected. But advocating hateful ideas in general, or talking about violence in some abstract future sense, is protected, because the incitement exception is limited to immediate calls for unlawful action.

True Threats

Statements meant to seriously frighten or intimidate someone with violence are not protected speech. The line is drawn between merely offensive rhetoric and genuine threats of harm. If a speaker directs hateful words toward an individual or group in a way that a reasonable person would take as a serious intent to do violence, that crosses into unprotected territory. For example, a racial slur is protected, but if a Mafia boss says, “I’ll break your legs,” that’s a true threat.

KEY TAKEAWAYS

The First Amendment does not have an exception for hate speech. Courts reject the notion that government can be trusted with power to decide what speech is acceptable. Speech does not lose protection just because it is hateful or offensive. The rationale is that the government may not punish speech simply because of the speaker’s viewpoint, no matter how despised that viewpoint may be. This strong protection reflects a constitutional commitment that even speech that deeply offends us is entitled to the same protection as any other speech. The theory behind that is that the remedy for hateful speech is more speech (counterspeech, education, and debate), rather than government suppression.

THE GLOBAL CAUTIONARY TALE

In **Germany**, authorities conduct police investigations, with police showing up at people’s homes, targeting thousands of citizens for online speech, including climate activists and ordinary people who criticize local politicians. In **France**, President Macron has aggressively used legal mechanisms against political criticism, exemplified by unleashing lawyers against a citizen who displayed billboards sarcastically depicting Macron as Hitler to protest COVID policies. 34 civil society organizations have been banned by decree under Macron. Several of these organizations have been banned for speech crimes, including harsh criticism of the government and nebulous categories of hate speech.