



THEN: The neo-Nazi group that sought in 1977 to march in the largely Jewish suburb of Skokie, Illinois. (The photo was taken a year later in St. Louis, Missouri.)

TIMES PAST
1977

Should the First Amendment Protect Hate Speech?

Forty years after the courts upheld neo-Nazis' First Amendment rights, is it time to reconsider which kinds of speech deserve constitutional protection? **BY BROOKE ROSS**

After surviving unspeakable horrors at nine different concentration camps during the Holocaust, Ben Stern, a Jewish man from Poland, never thought he would have to face Nazis again.

In 1946, after World War II (1939-45), he and his wife emigrated from Europe

to the United States to start new lives. They settled in Skokie, Illinois, a suburb of Chicago, and spent the next 30 years raising a family.

But Stern's quiet life was upended in 1977. To his shock, the Nazis were back—specifically, a small group of American neo-Nazis called the National Socialist Party of America.

(Neo-Nazis advocate hatred of Jews, non-whites, and other minorities.) They planned to hold a rally—complete with Nazi uniforms and flags bearing swastikas—in the largely Jewish suburb.

The town of Skokie issued an order prohibiting the demonstration. But the neo-Nazis found an unlikely ally



NOW: The white supremacists who marched to oppose the removal of a Robert E. Lee statue in Charlottesville, Virginia, last August

in the American Civil Liberties Union (A.C.L.U.), a legal rights group that took their case. The dispute reached the U.S. Supreme Court, which helped clear the way for a lower court to rule that the neo-Nazis had a right to march under the First Amendment, which protects freedom of speech.

The landmark case helped clarify that all people have the right to rally publicly, no matter how offensive their views. But now, 40 years later, some legal experts are starting to question whether all speech—including hateful speech—deserves constitutional protection. The debate has come under renewed focus in the aftermath of a violent white supremacy rally in Charlottesville, Virginia, last year, which left one person dead and several others injured.

American laws are “the most protective of free speech of any nation on Earth and any nation in history,” says Lee Bollinger, the president of Columbia University and a free speech legal expert. But the question, he says, is “should free speech be extended to

speakers whose purpose and message is to deny free speech, people who want to overthrow the government by violence and—if successful—bring about the end of free speech?”

‘Hitler’s Tyranny Followed Us’

Formed in the 1970s, the National Socialist Party of America (N.S.P.A.) was a small but powerful hate group. Its members held regular anti-black demonstrations in southwest Chicago, aimed at keeping African-Americans out of that neighborhood.

But when Chicago tried to make it more costly for the neo-Nazis to march—requiring the group to purchase expensive insurance for its rallies—the N.S.P.A. decided to bring its message of white superiority to nearby Skokie. In March 1977, it requested a permit to hold a rally there later that year.

It was a particularly cruel choice

of location because Skokie, a town of about 70,000 people, was nearly 60 percent Jewish. And like the Sterns, thousands of residents were survivors of the Holocaust, the mass slaughter of millions of European Jews and other oppressed groups by the forces of Nazi Germany from 1933 to 1945.

“I couldn’t believe it, that in this great country of ours, that we were going through this again,” Stern, now 96, told *The Mercury News* last year. “We came to the States, and Hitler’s tyranny followed us.”

After an outcry from residents, Skokie officials attempted to block the march. But the N.S.P.A. argued that it had a constitutional right to assemble. With the backing of lawyers at the A.C.L.U.—a group better known for

defending civil rights marchers in the South than preachers of hatred—the neo-Nazis sued.

The U.S. Supreme Court weighed in early on the legal dispute. It struck down

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lower court rulings that were preventing the rally from taking place, saying that those courts had followed improper protocol. This cleared the way for state and federal courts to continue hearing the case over the next several months. Eventually, a federal district court ruled in favor of the neo-Nazis. The march could go on as planned.

The Bill of Rights

Why would the courts side with the neo-Nazis? It's because of the First Amendment, which is part of the Bill of Rights—the first 10 amendments to the U.S. Constitution. The First Amendment protects Americans' freedom of speech and religion, as well as freedom of the press, the right to assemble peacefully, and to petition the government for change.

While it also has been interpreted by the courts as protecting most hate speech, the First Amendment does not

give anyone the right to make threats or false statements, or use language that incites violence. One oft-cited example is that you don't have the right to falsely yell "Fire!" in a crowded movie theater.

In polls, Americans regularly rank freedom of speech as their most important constitutional right. According to a Rasmussen Reports survey released last year, an overwhelming 85 percent

Americans regularly rank freedom of speech as their most important right.

of Americans said the right to speak freely is more important than making sure no one is offended by what others say. The Supreme Court has long grappled with how to interpret the meaning of "freedom of speech" (see "Key Free Speech Cases," facing page). But it has often taken a position similar to the American public's, ruling time and time again in favor of First Amendment rights.

America's protection of hate speech is in sharp contrast with other

countries' stance on the issue. At least half a dozen European nations, along with Brazil, prohibit the use of Nazi symbols and flags. Even more countries, including Germany and France, have made denying the Holocaust a crime.

Violence in Charlottesville

But the events in Charlottesville, as well as a recent rise in hate crimes across the nation, have some people saying it's time to rethink the protection of hate speech in the U.S., if only to prevent violence (see "Hate Crimes in America," below). Last August, the A.C.L.U. defended the right of neo-Nazis, white supremacists, and the Ku Klux Klan to stage a march protesting Charlottesville's plan to remove a statue of Confederate General Robert E. Lee. The demonstration went forward with protesters numbering in the hundreds, many of them armed with assault rifles.

As a crowd of people who disagreed with them arrived to counter-

Hate Crimes in America

Is a recent rise in hateful incidents linked to hate speech?

Swastika stickers posted on the door of a Jewish synagogue in Chicago. A Muslim woman wearing a hijab assaulted in downtown Los Angeles. Racist graffiti spray-painted on a predominantly African-American high school in Cincinnati. Hateful incidents like these were on the rise in 2017. According to a recent report by Voice of America, at least 1,056 hate crimes were committed in nine of the nation's largest cities last year. That's an 18 percent increase from 2016.

A separate report released by the Anti-Defamation League (A.D.L.) in February found 1,986 cases of harassment, vandalism, or physical assaults against Jews in 2017. That's the second most since the A.D.L.



A crowd gathers in Orlando, Florida, to honor the victims of the 2016 mass shooting at Pulse, a gay nightclub.

started keeping track in the 1970s, and a nearly 60 percent increase from 2016.

A hate crime is defined by the F.B.I. as a criminal offense motivated "by an offender's bias" against a certain group of people. Hate crimes and hate speech aren't the same. But some say events like the violent white supremacist rally in Charlottesville last year show that people with extreme views are feeling

more emboldened to speak out in public, and that this hateful speech may be one cause for the rise in hate crimes.

"There's not an easy answer of one leads to another," says Steven Freeman, a lawyer at the A.D.L. But, he adds, "when there's more hate in the atmosphere and more extremism and more expressions of bias and prejudice, it isn't a surprise when people act on it." —Joe Bubar

Key Free Speech Cases

Here's how the U.S. Supreme Court has ruled in some other major First Amendment cases

1942

Chaplinsky v. New Hampshire

Walter Chaplinsky, a New Hampshire man, was arrested for cursing at a law enforcement officer in public. Chaplinsky claimed he'd been denied his freedom of speech. The Supreme Court ruled against him, establishing the "fighting words doctrine," which says words that "incite an immediate breach of the peace" (or are likely to provoke the average person to retaliate) are not protected under the First Amendment.

1969

Brandenburg v. Ohio

Clarence Brandenburg (*below*), an Ohio member of the Ku Klux Klan, was arrested after making a speech in which he advocated violence. The Supreme Court reversed the conviction, ruling that the government can't punish provocative speech unless it incites "imminent lawless action."



1989

Texas v. Johnson

To protest the policies of President Ronald Reagan, Gregory Lee Johnson (*above*) burned a U.S. flag outside Dallas Convention Center in 1984. He was arrested, but he argued that his act was a form of symbolic speech. The Supreme Court agreed, ruling that symbolic speech is constitutionally protected even when it's as offensive as burning a flag. However, in a 2003 case, *Virginia v. Black*, the Court ruled that states can make it illegal to burn a cross (a symbolic act often carried out by the Ku Klux Klan) when its purpose is to intimidate others. —Joe Bubar



demonstrate, violence erupted. An alleged white supremacist plowed his car into counter-protesters, killing a woman and injuring 19 others.

In the aftermath, about 200 A.C.L.U. staff members signed an open letter criticizing the organization's longstanding practice of defending white supremacists in free speech cases. One member of the A.C.L.U. of Virginia board even resigned, writing on Twitter that "what's legal and what's right are sometimes different."

Some people say that speech should be regulated in the same way that the government regulates food safety and highway speed limits.

"If you do something in a threatening or intimidating way, the First Amendment should not be protecting you," says Thane Rosenbaum, a professor at the New York University School of Law. "You have a right to be a Klansman, but not if it is expressed in a way that is intimidating."

But some free speech advocates

maintain that defending the First Amendment rights of hate groups, including white supremacists, protects freedom of speech for everyone. Indeed, some people worry that restricting certain kinds of speech

could pave the way for the government to restrict any speech it doesn't favor.

"Nobody wants to be hurt by hateful speech," says Philippa Strum, an expert in U.S. constitutional law at the Wilson Center in Washington, D.C. "But the problem is, if we outlaw speech, that means the

government or others in authority are going to be picking and choosing what we hear. We need to be able to hear all sides because that's how we become intelligent voters and responsible citizens."

Standing Up to Hate

Since the Charlottesville protest, the A.C.L.U. has been reevaluating its criteria for accepting free speech cases, particularly those that involve public rallies. The group indicated that it would

consider the potential for violence and whether protesters could be armed.

In the meantime, experts on both sides of the debate point out that just because hate groups have the right to speak doesn't mean others can't respond. That's exactly what happened in Skokie. The neo-Nazis never ended up marching in the town because Ben Stern and other residents in the community exercised their own First Amendment rights.

They actively campaigned in Skokie and beyond, recruiting a staggering 60,000 people—fellow Jews and supporters—who promised to take to the streets in protest if the neo-Nazis turned up. When the neo-Nazis heard of the massive counter-demonstration being planned, they moved their rally to another location.

"It was a great example of the way Americans should respond to hate speech," Strum says. "As citizens, we all have rights, but we also have responsibilities to speak up and counter bad speech with good speech. It's what we do in a democracy." •

With reporting by Joseph Berger.

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