



HOW TO **DEFEND** THE CONSTITUTION **WHEN THE KKK COMES TO TOWN** BY LESLIE KENDRICK '06

A **S A LAW PROFESSOR**, I usually explain free speech to my students by talking about when the Nazis tried to march in Skokie, Illinois, in the late 1970s.

As many Americans are aware, a great deal of what most would call hate speech is protected by the First Amendment. The Nazis in Skokie are the classic case. In 1977, the National Socialist Party of America proposed to march in this predominantly Jewish community, home to many Holocaust survivors. The ACLU defended their right to wear Nazi uniforms and display swastikas, and courts upheld that right. The Nazis won (though they ultimately decided to march elsewhere).

Until now, I would have said there is no better illustration that the United States has the strongest speech protections in the world. But my new go-to illustration is Charlottesville, summer of 2017. Since the spring, when our city council voted to remove a prominent monument to Robert E. Lee and to rename parks containing the Lee statue and a monument to his fellow Confederate general Stonewall Jackson, Charlottesville has been the site of targeted demonstrations by neo-Nazis, white nationalists and, this past Saturday [July 8], the Ku Klux Klan.

As in Skokie, the demonstrations in Charlottesville have proved the strength of the First Amendment but also shown its steep cost. The Nazis chose Skokie precisely because its residents would find their message deeply offensive. Hate groups have targeted Charlottesville precisely because it voted to take down the monument, and because it is a community actively grappling with a thorny Confederate and Jim Crow past.

Not only that, but the Ku Klux Klan, neo-Nazis and white national-

ists all reject a basic tenet of the American system: that all people are created equal. So why does our Constitution protect them?

Not because they deserve respect. In popular culture, people sometimes act as though “exercising my First Amendment rights” should earn them a pat on the back and, if not agreement, at least grudging respect. Nothing about the First Amendment requires that. We permit hate speech, but we need not respect it.

We also need not worry that we’re wrong in our lack of respect. Judge Learned Hand, quoting Oliver Cromwell, said that every courthouse and public building should have inscribed above its entrance, “Consider that ye may be wrong.” But there are certain facts that do not require hedging, and the fundamental equality of all people is one of them.

Free speech is also not, as some judges have argued, a safety valve that prevents bad actions. Racist and anti-Semitic speech is not the hallmark of an otherwise enlightened society. And anyone who

thinks speech is a harmless safety valve has not pictured the combination of armed Klansmen, hundreds of angry counter-protestors, and a police force tasked with keeping order. Whatever this is about, it isn’t safety.

The law offers two reasons to protect free speech, even in the face of social disgust or unrest. First, democracy may require it. After much wrestling, the courts concluded, in cases about socialists and communists, that a person does not have to agree with American values in order to get the protection of the First Amendment. The Constitution protects even those who would try to destroy it, up to the point of a clear and present danger. Otherwise, what we have are not legitimate democratic outcomes but manufactured consensus. On this view, democracy does not prevail if the Klan is censored. Democracy prevails if the Klan speaks and loses on the merits.

Second, the alternative is letting the government choose who can speak and who cannot. Given the government’s track record—not just the McCarthy era and the Red Scare but censorship of abolitionist pamphlets before the Civil War and Southern states’ attempts to shut down press coverage of the civil rights movement—maybe it is not outlandish to think it is better to let the Klan speak than to let the government decide who should.

But these reasons have their costs, and those costs are not borne equally. They fall disproportionately on African-American, Jewish, Muslim and other minority members of the community. They are

the ones who absorb these very public, very ugly assertions that they are worth less than other Americans.

They are the ones who get the message that these monuments were erected to be—and still are—symbols of white supremacy. When the KKK and neo-Nazis show up to defend “history” in a place with a legacy, like Charlottesville’s, for displacing its black residents, that message could not be clearer.

The fact is that free speech is not free, and we do not split the check evenly.

One thing we must all do is be conscious of these costs. Another is to recognize that, in permitting all viewpoints, the First Amendment puts the responsibility on us to choose what to espouse and what to reject. All views are not equally good. It may be vital to the legitimacy of our system that we have the freedom to choose. It is vital to its survival that we choose wisely.

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