**From cross burning to funeral protests, hate speech enjoys broad protection**

WASHINGTON — The white supremacists and neo-Nazis who marched through Charlottesville last week have the Supreme Court on their side.

In a series of cases dating back to the 1960s, the high court has struck down restrictions on so-called "hate speech" unless it specifically incites violence or is intended to do so.

The First Amendment, the justices have said, protected a Ku Klux Klan member decrying Jews and blacks in Ohio in 1969. It protected neo-Nazis seeking to march through heavily Jewish Skokie, Ill., in 1977. It protected a U.S. flag burner from Texas in 1989, three cross burners from Virginia in 2003 and homophobic funeral protesters in 2011.

Just two months ago, the high court ruled unanimously that even derogatory trademarks deserve First Amendment protection — a victory for an Asian-American rock band dubbed [The Slants](https://www.usatoday.com/story/news/politics/2017/01/16/supreme-court-slants-redskins-derogatory-trademarks-first-amendment/96505042/) as well as the [Washington Redskins](https://www.usatoday.com/story/sports/nfl/redskins/2015/07/08/washington-redskins-trademark-cancelled/29857765/).

You wouldn't know it from the public condemnation that has followed the [events in Charlottesville](https://www.usatoday.com/story/news/nation/2017/08/12/why-charlottesville-ground-zero-white-supremacists/562088001/), which led to the death of a 32-year-old female counter-protester and two state troopers.

Faced with the racist and anti-Semitic speeches and symbols of the marchers, the violence that resulted and [President Trump's equivocal denunciation](https://www.usatoday.com/videos/news/nation/2017/08/15/trump-both-sides-blame-charlottesville/104632332/) of "all sides," Republican as well as Democratic officials have said the groups should not be welcomed anywhere.

Ah, but they are — by virtue of Supreme Court precedent.

“I don’t quarrel with the president’s recognition that people had a right to march,” said Burt Neuborne, a professor of civil liberties at New York University School of Law who represented Ku Klux Klan members and others as an American Civil Liberties Union lawyer. “This is a time to distinguish legal rights from moral condemnation."

With rare exceptions, the Supreme Court has protected the free speech rights of even those bearing reprehensible messages. In *National Socialist Party of America v. Village of Skokie*, it didn't fault neo-Nazis who targeted a Chicago suburb inhabited by Holocaust survivors. In *Snyder v. Phelps*, it let protesters interrupt a fallen Marine's funeral by shouting homophobic slurs.

But the First Amendment also protected civil rights protesters in the 1950s, noted Lee Rowland, a senior staff attorney with the ACLU's speech, privacy and technology project.

“Up until the point where there is an actual and credible security threat at a particular event, we all should be cautious before we give the government the power to silence speech based on a guilt-by-association theory,” she said. "That power could be wielded against any of us.”

That 's the risk in Europe and other courts across the globe, where speech designed to threaten or stir up hatred is not protected, said Neuborne's NYU colleague Jeremy Waldron, who teaches legal and political philosophy at the law school. He believes local governments should be able to block protests such as the one in Charlottesville.

There is a growing consensis that "this march should not have been permitted to proceed," Waldron says. “It‘s the stirring up of hatred rather than the expression of hatred that’s important.”

That was the basis of the Supreme Court's 1969 decision in*Brandenburg v. Ohio*, which set the modern standard following McCarthyism's effort in the 1950s to suppress communism. The court struck down an Ohio law that prohibited the advocacy of violence because it did not pose an imminent threat.

Under that precedent, the Charlottesville white supremacists "certainly are OK, for the last 50 years at least," said Eugene Volokh, a UCLA School of Law professor and founder of the conservative Internet blog *The Volokh Conspiracy*. But "there's certainly an exception for threats of violence."

Even symbols of intimidation, such as the torches carried by many of the marchers in Charlottesville, are protected by the courts unless they have specific targets. Justice Clarence Thomas dissented from the 2003 case that protected cross burners in Virginia, reasoning that "those who hate cannot terrorize and intimidate to make their point," but he was on the losing end of an 8-1 decision.

The high court's defiant protection of free speech rights carries risks beyond the potential for violence, Neuborne said. In the current atmosphere, it could help fuel the further rise of the alt-right.

"This is exactly the argument that people made in the 1950s — that if we let communists speak, people will listen to them,” he said. “The right answer is letting the marchers go forward and being as strong as you possibly can in condemning the message.”