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Who Really Benefits From the First Amendment?

The purpose of free speech is to give the marginalized an escape hatch from the status quo, not to entrench political power

BY NADINE STROSSEN

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AS A POLITICAL LIBERAL AND CIVIL LIBERTIES CRUSADER SINCE MY STUDENT days in the 1960s and '70s, I have long defended freedom of speech across the ideological spectrum. I continue to adhere to the longstanding liberal principle that Evelyn Beatrice Hall famously formulated in her 1906 biography of Voltaire, and which the U.S. Supreme Court has consistently enforced since the 1960s as the “viewpoint neutrality principle”: “I disapprove of what you say, but I will defend to the death your right to say it.” Or, as Oscar Wilde spun it: “I may not agree with you, but I will defend to the death your right to make an ass of yourself.”

Liberals like me have long assumed that political and classical liberalism go hand-in-hand, and that for those of us on the political left, support for free speech—even for “the thought that we hate,” in Justice Oliver Wendell Holmes’ famous phrase—is a defining value, or at least a more important value than it is for those on the right. After all, former Supreme Court Justice William Brennan, arguably the court’s most influential liberal in modern history, hailed the viewpoint neutrality principle as the First Amendment’s “bedrock.”

Yet in recent times, as we’re all well aware by now, this core tenet has come under heavy fire from left-leaning individuals and groups, including student activists, academics, journalists, cultural leaders, and Democratic politicians, many of whom have advanced the argument that words can be a form of violence itself. The question is: What accounts for this shift? Why has the political and cultural left in America—of which I understand this

magazine to see (or have seen) itself as a part—appeared to turn so decisively against the First Amendment?

Perhaps it's best to begin by considering whether this is such a new phenomenon after all. In 1992, the liberal journalist Nat Hentoff, a longtime *Village Voice* columnist, wrote the aptly titled book *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other*, demonstrating that the differences between the American left and right concerning free speech were almost never over *whether* speech should be censored, but only about *which* speech should be censored. Hentoff's book resonated deeply with me at the time, and has continued to do so, since it reflects my own long-standing experience in various leadership roles at the American Civil Liberties Union (ACLU).

In 1977-78, when the ACLU defended the free speech rights of neo-Nazis in Skokie, Illinois, whose population included many Holocaust survivors, our position was opposed in the courts by another organization that had typically been our ally: the Anti-Defamation League. Even a full 15% of ACLU members at the time resigned their membership in protest. Also in the late 1970s, so-called “radical feminists” began advocating government restrictions on “pornography,” the term they used for sexual expression that is “demeaning” or “degrading” to women.

Starting in the 1980s, many liberals sought to restrict several types of controversial language in popular media, stressing child-protection rationales. Tipper Gore, for example—then-wife of then-Sen. Al Gore, D-Tenn., and mother to an 11-year-old daughter who had acquired a copy of Prince's *Purple Rain*—spearheaded regulation of music lyrics that were deemed violent or sexist, leading to the now-ubiquitous Parental Advisory labels known as “Tipper Stickers.” Democratic lawmakers around this time also sponsored measures to restrict depictions of violence on television, and soon after access to the internet became widespread, the Clinton administration championed a law that criminalized “indecent” and “patently offensive” online expression. In 1997, after the “conservative” Rehnquist court overturned these key provisions of the 1996 Communications Decency Act on First Amendment grounds, the prominent First Amendment lawyer Floyd Abrams wrote a blistering *New York Times Magazine* article titled “Clinton vs. the First Amendment,” concluding that “it has become the norm, not the exception, for Clinton Administration lawyers to find themselves minimizing First Amendment interests and defending laws or policies that maximize threats to free expression.”

Liberal advocacy of wide-ranging restrictions on expression about sex or gender on the rationale that it constitutes “sexual harassment” is another old story. Likewise, since the 1980s, many liberals have advocated campus “hate speech codes” that are invariably too broad, punishing and chilling all manner of expression about various categories of personal and group identity. Furthermore, in the aftermath of the 1995 Oklahoma City bombing and the 9/11 terrorist attacks, many liberals in government and civil society have supported restrictions on “extremist” or “terrorist” speech, whose inevitably vague contours have actually had negative human rights repercussions, including by making it difficult for human rights activists to accurately document terrorist atrocities.

Nor has it been the case that the more politically liberal an administration is, the more it respects the freedom of the press, as indicated by the Clinton administration’s record. In 2013, in response to “revelations that the Obama Justice Department had secretly seized the phone records of a large number of journalists for The Associated Press” and “the chilling effect of the Obama administration’s leak investigations—including the ramped-up criminal prosecution of those who provide information to the press,” then-Public Editor of *The New York Times* Margaret Sullivan charged the Obama administration with “unprecedented attacks on a free press.”

Given this history—which of course is the mirror image of an equally extensive history on the political right—should we be surprised that today’s political left is determined to censor “disinformation,” “extremism,” and “hate,” and to advance the belief that offensive language is the same as not only violent language, but also physical violence?

Let’s examine the “words are violence” phenomenon a little more closely, as it appears to be increasing in salience and influence on the left, perhaps posing even more of a threat to a robust free speech culture than right-wing attempts to shut down speech that conservatives deem “hateful” to, for example, American history, traditional values, or certain religious holidays. While these attacks from the right are generally reflected in government policies, which are therefore vulnerable to First Amendment challenges, the cultural pressures that shape—and limit—discourse in academia, journalism, and other key private sector institutions are not subject to First Amendment constraints.

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In the 1980s, as I said, left-leaning professors and students on U.S. college campuses launched the movement for campus hate speech codes, which sought to punish individually targeted racist slurs. Similarly, in the same time period, “radical feminists” sought to legally equate the depiction of sexual violence—for example, in works of art and journalism—with real sexual violence in the physical world. In the intervening decades, these initiatives have expanded in both support and scope. Today, accusations of “hate speech” and “violent speech” shut down even good-faith discussions of public policy options that are deemed inconsistent with the perceived consensus at that moment, even if such “consensus” is neither broadly held nor static. Worse yet, individuals who are accused of engaging in such expression have been fired from positions in culturally influential fields such as academia, journalism, and publishing, suppressing their speech across the board with literally incalculable chilling impacts on the speech of countless others.

Even though courts have consistently enforced the cardinal “viewpoint neutrality principle” to bar *official* suppression of ideas solely on the ground that any listeners consider them hateful or violent, powerful private sector forces—including social media mobs—have been increasingly successful in suppressing disfavored ideas by invoking the false and dangerous equation between free expression and physical violence. This strategy

has prevailed on many college campuses, where free speech is especially important, given the special truth-seeking and educational missions of universities. Surveys consistently show that substantial majorities of American college students and faculty members now engage in self-censorship across a spectrum of important political topics, both in the classroom and in social settings, to avoid the risk of retaliation.

Because many campus communities skew overwhelmingly liberal or progressive, and because progressive views tend to disproportionately dominate fields that favor workers with academic degrees, self-censorship is particularly acute among nonprogressives: conservatives, libertarians, moderates, the politically indifferent, and even “old-style” liberals. Empirical evidence confirms, moreover, that fears of retaliation are rational, given numerous documented instances of retaliatory measures ranging from social ostracism, to online and in-person bullying, to the denial of extracurricular leadership positions, recommendation letters, and career opportunities. Many left-leaning members of campus communities explicitly admit (or boast) that they would deny employment and other professional opportunities to academics with conservative views about public policy issues.

Beyond encouraging self-censorship, much of the political left has also embraced more coercive modes of censorship. Contrary to important free speech principles, the “heckler’s veto” has become a favored tool for suppressing disfavored ideas or expression in many campus contexts, ranging from student newspapers to guest speaker presentations.

When a speaker conveys ideas that some audience members find offensive, no rights have been violated. Nor have any rights been violated when some audience members nondisruptively protest by conveying ideas that are offensive to the speaker and to other audience members. But disruptive protests, which effectively veto the event, violate both the speaker’s right to convey information and ideas and the listeners’ right to receive them.

The Foundation for Individual Rights and Expression (FIRE), on whose Advisory Board I serve, recently published a compilation of reported campus cancellation incidents targeting faculty members between 2015 and 2021. FIRE documented a total of 563 attempts to sanction faculty members for expression that was constitutionally protected but controversial in the campus community. In a full two-thirds of these cases, the faculty member was subject to some form of punishment; in one-fifth of cases the faculty member was fired; and most alarmingly, *30 tenured professors were fired for constitutionally protected speech*. Of the total number of documented incidents, FIRE reports that 345 (61%) involved

the expression of views that were suppressed by individuals and groups to the left of the targeted faculty member. Notably, the evidence indicated that a significant number of these 345 incidents may well have targeted liberal views espoused by liberal professors, which were attacked by campus factions even further to the left. As the FIRE report stated: “[W]e think a significant number of these incidents involve a scholar who identifies as ‘somewhat’ or ‘slightly’ liberal being targeted by those who identify as ‘very’ or ‘extremely’ liberal.” Furthermore, a substantial number of the total documented incidents—202, or 35%—targeted the expression of views that were suppressed by those to the right of the targeted faculty member.

People concerned about such developments are frequently told that “cancel culture isn’t real,” or at least that it is grossly exaggerated. The FIRE numbers refute these claims while helpfully underscoring that the political left has far less of a monopoly on “cancel culture” than is typically understood. This evidence demonstrates that the viewpoint neutrality principle continues to serve as an essential safeguard for all people and persuasions, including those on the left. Contrary to prevalent left-leaning rhetoric, free speech is far more than a right-wing fig leaf for “hate” or “violence,” even if in certain cases it might be opportunistically exploited as such.

Every movement now considered “progressive”—abolition, women’s suffrage, gender equality, reproductive freedom, labor rights, social democracy, civil rights, opposition to war, LGBTQ+ rights—was at one time supported only by a minority, and viewed as dangerous or worse. Unsurprisingly, many of these movements only began to flourish and progress toward the previously unattainable goal of majority consensus *after* the Supreme Court started to strongly enforce the free speech guarantee (including the core viewpoint neutrality principle) in the second half of the 20th century. The lesson many on the left seem to have forgotten is that in a democracy, there is a constant danger that minority groups—whether defined by identity, ideology, or otherwise—will be subject to “the tyranny of the majority.” The specific purpose of the Bill of Rights, including the First Amendment’s free speech guarantee, is to ensure that the majority cannot deny basic rights to any minority, no matter how small or unpopular. Powerful people and popular ideas don’t need First Amendment protections; marginalized people and unpopular ideas do. The resulting beneficiaries are not only the exponents of ideas that are unpopular in their time and place, but also our overall society. As George Bernard Shaw observed more generally, “All great truths begin as blasphemies.”

Leaders of every equal rights movement in U.S. history have testified to the essential role that free speech played in advancing their cause. In 1860, Frederick Douglass famously declared that “Slavery cannot abide free speech. Five years of its exercise would banish the auction block and break every chain in the South.” The great civil rights champion and longtime Georgia Congressman John Lewis memorably commented that “Without freedom of speech, the Civil Rights Movement would have been a bird without wings.” In 2019, law professor Dale Carpenter, a prominent champion of LGBTQ+ rights, wrote that “[T]he First Amendment created gay America ... [G]ay cultural and political institutions ... would have been swept away in the absence of a strong and particularly libertarian First Amendment. No other [constitutional right] helped us more.”

“Powerful people and popular ideas don’t need First Amendment protections; marginalized people and unpopular ideas do.”

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To this day, advocates for equal rights and social justice are subject to censorial measures that seek to stifle their free expression. Government officials in the United States and other Western democracies have been enforcing many measures to curb the free association rights of peaceful protesters, and police have deployed speech-suppressive tactics, including unjustified force and arrests. Multiple U.S. states have imposed restrictions on K-12 and campus curricula concerning race and gender, and public schools and libraries have been subject to record levels of book bans—in many cases targeting books by and about Black and LGBTQ+ Americans. Fortunately, free speech advocates have been mounting strong legal challenges to these repressive measures, but this is only thanks to the same robust free speech principles that also protect the expressive rights of people with opposing views.

It should therefore go without saying that any argument in favor of censorship, in addition to being questionable on the basis of principle, is strategically unwise. Every pro-censorship argument currently being made by the left and the right can and will be coopted by the other side once it has or regains sufficient power. In the 1980s, right-wing crusaders against sexual expression they viewed as inconsistent with “traditional family values”—including speech in favor of feminism, reproductive freedom, and LGBTQ+ rights—opportunistically parroted the rhetoric of the radical anti-pornography feminists who were also active at that time; the Meese Pornography Commission under President Ronald Reagan bolstered its calls to censor sexual expression by invoking the radical feminists’ claims that certain sexual expression leads to discrimination and violence against women. Today, conservative Republican school boards, state legislatures, and governors are enacting laws that ban teaching about such vital topics as race and gender on the grounds that it might be divisive or make students uncomfortable. What progressive in good conscience could not recognize that this censorial rhetoric and rationale has deep roots in their own movement?

Cherian George, a fellow free speech scholar and advocate who was born in Singapore and teaches in Hong Kong, has discussed with me what he considers the “bizarre” phenomenon of “the American left’s eagerness to suppress or punish speech.” In 2018, after he spent three months teaching a seminar on censorship to Ph.D. students at the University of Pennsylvania, George’s conclusion was that members of “the American left ... take the country’s freedoms for granted.” As he commented:

In the activist circles that I inhabit in Asia, the left (including feminists and those fighting for minority rights) is solidly aligned with free speech advocates, because they know from experience that whenever speech is restricted, they suffer disproportionately. Perhaps the American left feel they can afford to be blasé, even reckless, about free speech, because they know that when they really need it, the First Amendment will be there for them. It’s a risk that progressives in most of the rest of the world can’t afford to take.

Given the assaults against free speech that progressives suffer even in America, this is a risk they can’t afford to take either.

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