

THE FIRST AMENDMENT AND HATE SPEECH: A DELICATE BALANCE

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Abstract

*The Constitution of the United States*¹ enshrines the right to free speech as a fundamental aspect of American liberty. Considering the prevalence of hate speech in America, it is imperative to understand the legal framework surrounding this protected speech. The Supreme Court has consistently upheld the *First Amendment's*² protection of free speech, including hate speech, through landmark cases such as *Matal v. Tam*³ and *Brandenburg v. Ohio*.⁴ These cases provide a clear understanding of the legal restrictions on hate speech under the *First Amendment* and serve as a guiding principle for interpreting this complex issue.

Despite several attempts to curtail free speech, the Supreme Court defends this basic freedom per the *Constitution's*⁵ parameters. The Court

¹ U.S. CONST., <https://constitution.congress.gov/constitution/>, (last visited Jan. 31, 2023).

² U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan.31, 2023).

³ *Matal v. Tam*, No. 15-1293 (2017), <https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 89 S. Ct. 1827, 23 L.Ed.2d 430, <https://www.law.cornell.edu/supremecourt/text/395/444>, (last visited Mar. 18, 2023).

⁵ U.S. CONST., <https://constitution.congress.gov/constitution/>, (last visited Jan.

acknowledges that free speech is necessary for a functioning democracy and is a pillar of individual liberty. Yet, it is essential to underline that speech must conform to the law to avoid legal limits imposed by legislation. As we see in *Matal v. Tam*⁶ where the court recognized that under the *First Amendment*⁷, even profane speech is protected. *Brandenburg v. Ohio*⁸ defined the legal boundaries of free speech, particularly comments that may inspire violence or criminal conduct. Furthermore, Steven J. Heyman's *Hate Speech, Public Discourse, and the First Amendment*⁹ focuses on the complicated legal and social challenges surrounding free speech, emphasizing the need of safeguarding this basic right while also evaluating its influence on society.

Introduction

The *First Amendment to the United States Constitution*¹⁰ guarantees all Americans the basic freedom of speech. The amendment clearly states, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹¹ This powerful

31, 2023).

⁶ *Matal v. Tam*, No. 15-1293 (2017), <https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

⁷ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan.31, 2023).

⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 89 S. Ct. 1827, 23 L.Ed.2d 430, <https://www.law.cornell.edu/supremecourt/text/395/444>, (last visited Mar. 18, 2023).

⁹ Steven J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, SSRN (Jul. 29, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186262, (last visited Mar. 18, 2023).

¹⁰ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan.31, 2023).

¹¹ *Id.*

provision has become a cornerstone of American liberty and a distinguishing element of our society for centuries.

With the advent of social media, the reach and influence of speech have grown considerably. Social media allows people to voice their ideas and share them with a large audience. The impact of social media on individuals and society underscores the importance of responsible and enlightened speech. According to a 2020 Pew Research Center poll, “64% of Americans say social media has a primarily negative impact on how things are going in the United States.”¹² This view reflects the rising concern about the impact of harmful content which includes hate speech in the digital age. It is critical to recognize that the influence of hate speech extends beyond the physical realm and into the digital world. As defined by the Merriam-Webster Dictionary, hate speech constitutes “speech that is intended to insult, offend, or intimidate a person because of some trait (as race, religion, sexual orientation, national origin, or disability).”¹³ Grasping the concept of hate speech requires understanding freedom of speech as a fundamental right for American citizens.

This essay will go into several essential issues to offer a full understanding of the difficult balance between free speech protection and hate speech regulation. First, we will analyze the *Constitution's*¹⁴ fundamental right to free expression, as reaffirmed by the Supreme

¹² Brooke Auxier, *64% of Americans Say social media Have a Mostly Negative Effect on the Way Things Are going in the U.S. today*, Pew Research Center Fact Tank (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/>, (last visited Mar. 18, 2023).

¹³ *Hate Speech*, Merriam-Webster Dictionary (2023), <https://www.merriam-webster.com/dictionary/hate%20speech>, (last visited Feb. 8, 2023).

¹⁴ U.S. CONST., <https://constitution.congress.gov/constitution/>, (last visited Jan. 31, 2023).

Court's unanimous decision in *Matal v. Tam*.¹⁵ The Court's standards for dealing with hate speech, such as the barring of dialogue that poses an urgent and likely risk of criminal behavior, will then be examined, as reinforced in *Brandenburg v. Ohio*.¹⁶ Finally, we will discuss Steven J. Heyman's *Hate Speech, Public Discourse, and the First Amendment*¹⁷, an astute study on the complexity of hate speech and its link to the *First Amendment*,¹⁸ which advocates for a more nuanced approach to its regulation.

Is Hate Speech Protected by the Supreme Court?

From civil rights to education, voting to liberty, the Supreme Court has played a crucial role in molding numerous facets of American culture in many cases including *Brown v. Board of Education*¹⁹, *Harper v. Virginia Board of Elections*²⁰, and *New York Times Co. v. United States*²¹. The Supreme Court, as the highest court in the land, is responsible for interpreting the *Constitution*²² and ensuring the right to “equal justice

¹⁵ *Matal v. Tam*, No. 15-1293 (2017), <https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

¹⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 89 S. Ct. 1827, 23 L.Ed.2d 430, <https://www.law.cornell.edu/supremecourt/text/395/444>, (last visited Mar. 18, 2023).

¹⁷ Steven J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, SSRN (Jul. 29, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186262, (last visited Mar. 18, 2023).

¹⁸ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan. 31, 2023).

¹⁹ *Brown v. Board of Education*, 347 U.S. 483 (1954), Justia Law, <https://supreme.justia.com/cases/federal/us/347/483/>, (last visited Mar. 18, 2023).

²⁰ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), Justia Law, <https://supreme.justia.com/cases/federal/us/383/663/>, (last visited Mar. 18, 2023).

²¹ *New York Times Co. v. United States*, 403 U.S. 713 (1971), Justia Law, <https://supreme.justia.com/cases/federal/us/403/713/>, (last visited, Mar. 18, 2023).

²² U.S. CONST., <https://constitution.congress.gov/constitution/>, (last visited Jan. 31, 2023).

under the law”.²³ The Supreme Court has established an important precedent about the confines of hate speech in the case *Matal v. Tam*.²⁴

In 2017, the United States Supreme Court addressed the topic of hate speech and its relevance to the *First Amendment*²⁵ in *Matal v. Tam*.²⁶ Simon Shiao Tam's trademark application for his band, "The Slants," was denied by the Patent and Trademark Office (USPTO) through the disparagement clause of the *Lanham Act* (15 U.S. Code Section 1052(a))²⁷ because the name was deemed too derogatory and offensive to be awarded trademark protection. “Tam contested the denial of registration through the administrative appeals process, to no avail. He then took the case to federal court, where the *en banc* Federal Circuit ultimately found the disparagement clause facially unconstitutional under the *First Amendment's Free Speech Clause*.”²⁸ Nonetheless, the Supreme Court granted review of this case and upheld the Federal Circuit Court's decision in Tam's favor, saying that the *Lanham Act* section cited by the USPTO was unconstitutional because it violated the *First Amendment's* free speech protection.²⁹

The band members aimed to challenge and dismantle prevalent prejudices against Asian people.³⁰ Tam's legal battle brought the complex issue of hate speech to the forefront of the Supreme Court's attention. The

²³ *The Supreme Court of the United States, About the Court*,

<https://www.supremecourt.gov/about/about.aspx>, (last visited Mar. 18, 2023).

²⁴ *Matal v. Tam*, No. 15-1293 (2017),

<https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

²⁵ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan. 31, 2023).

²⁶ *Matal v. Tam*, No. 15-1293 (2017),

<https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

²⁷ 15 U.S.C § 1052(a) (1946), <https://www.law.cornell.edu/uscode/text/15/1052>, (Feb. 17, 2023)

²⁸ *Matal v. Tam*, No. 15-1293 (2017),

<https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

²⁹ *Id.*

³⁰ *Id.*

Court was tasked with examining the core principles of the amendment and determining their role in this case. The Supreme Court upheld the Federal Court's verdict, reinforcing the fundamental freedom of speech guaranteed by the *Constitution*³¹. This means that the government may not impose certain ideas or viewpoints on individuals, even if they are deemed offensive.³²

Furthermore, there is a delicate balance between protecting individual expression and ensuring speech does not harm others. While the *First Amendment*³³ provides a robust framework for free speech, it is important to acknowledge that hate speech can have serious consequences and must be regulated accordingly. As a result, the basic principle of the *First Amendment* is that it empowers all Americans to express themselves independently of their government and raises the question of whether free speech may go too far and where the boundary between legal and unlawful hate speech is drawn.

Can Free Speech Go Too Far?

*Brandenburg v. Ohio*³⁴ was a landmark case that addressed hate speech and its *First Amendment*³⁵ limitations. This case has affected how the *First Amendment* is interpreted and how hate speech is regulated in the United States. Clarence Brandenburg, a leading Klu Klux Klan officer, was arrested for making offensive statements during a rally. Brandenburg was convicted under *Ohio's Criminal Syndicalism Act*, which made it

³¹ U.S. CONST., <https://constitution.congress.gov/constitution/>, (last visited Jan. 31, 2023).

³² *Matal v. Tam*, No. 15-1293 (2017), <https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

³³ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan. 31, 2023).

³⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 89 S. Ct. 1827, 23 L.Ed.2d 430, <https://www.law.cornell.edu/supremecourt/text/395/444>, (last visited Mar. 18, 2023).

³⁵ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan.31, 2023).

illegal to advocate for crime, sabotage, violence, or other criminal acts of terrorism to accomplish economic or political transition. Brandenburg challenged his conviction, arguing that the criminal syndicalism provision violated the *First* and *Fourteenth Amendments*³⁶. Nonetheless, Brandenburg's conviction was upheld by the Ohio intermediate appellate court.³⁷

The Supreme Court eventually overturned his conviction, defining the limits of free expression in terms of public safety. The Court reaffirmed the principle that "advocacy could be punished only where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," as fashioned by previous case law (*Herndon v. Lowry*³⁸, *DeJonge v. Oregon*³⁹, *Yates v. United States*⁴⁰, and *Noto v. United States*⁴¹).⁴²

This decision exemplified the tough balance between public safety and free speech. Even though free speech is regarded as a fundamental right, the *Brandenburg v. Ohio*⁴³ decision affirmed the unconstitutionality of speech that encourages or is likely to encourage impending criminal

³⁶ U.S. CONST. amend. XIV, <https://constitution.congress.gov/browse/amendment-14/>, (last visited Jan. 31, 2023).

³⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 89 S. Ct. 1827, 23 L.Ed.2d 430, <https://www.law.cornell.edu/supremecourt/text/395/444>, (last visited Mar. 18, 2023).

³⁸ *Herndon v. Lowry*, 301 U.S. 242 (1937), Justia Law, <https://supreme.justia.com/cases/federal/us/301/242/>, (last visited Mar. 18, 2023).

³⁹ *DeJonge v. Oregon*, 299 U.S. 353 (1937), Justia Law, <https://supreme.justia.com/cases/federal/us/299/353/>, (last visited Mar. 18, 2023).

⁴⁰ *Yates v. United States*, 354 U.S. 298 (1957), Justia Law, <https://supreme.justia.com/cases/federal/us/354/298/>, (last visited Mar. 18, 2023).

⁴¹ *Noto v. United States*, 367 U.S. 290 (1961), Justia Law, <https://supreme.justia.com/cases/federal/us/367/290/>, (last visited Mar. 18, 2023).

⁴² *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 89 S. Ct. 1827, 23 L.Ed.2d 430, <https://www.law.cornell.edu/supremecourt/text/395/444>, (last visited Mar. 18, 2023).

⁴³ *Id.*

activity. This pivotal decision supported the notion that while free speech is important, it can be limited if it clearly harms public safety.⁴⁴

Is Hate Speech ‘Free’ Speech?

In America, the *First Amendment*⁴⁵ ensures our freedom to be heard equally. *Hate Speech, Public Discourse, and the First Amendment*⁴⁶, by Steven J. Heyman, delves into the difficult issue of hate speech and its relationship to the *First Amendment*. Heyman highlights the importance of free expression while noting how hate speech may violate people's rights. First, speech that infringes on the rights of others, such as "an assault or threat of violence" or (inciting unlawful conduct), is not protected. Secondly, tort law, which may hold persons accountable for speech that causes deliberate and unjustifiable mental suffering, is another area of law that pertains to speech. Intentional infliction of mental distress, defamation, and breach of privacy are examples of this. Thirdly, the freedom to engage in democratic discourse involves consideration for the rights of others and the community.⁴⁷

Heyman claims in the article that hate speech is a sort of symbolic violence that may bring an amount of distress, stigmatization, and physical violence to its targets—violating their basic rights. He also expresses the idea that hate speech may undermine the democratic ideal of fair participation in public discussion and erode the trust and social cohesion essential for a healthy democratic society.⁴⁸ As a response,

⁴⁴ *Id*

⁴⁵ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan. 31, 2023).

⁴⁶ Steven J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, SSRN (Jul. 29, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186262, (last visited Mar. 18, 2023).

⁴⁷ *Id*.

⁴⁸ *Id*.

while social media platforms should be free and open to debate all forms of speech, it is equally critical that they take responsibility regarding information that may promote violence or present a hazard to people or groups while retaining social media platforms' open and accessible nature. Because social media allows for the quick distribution of information, it has generated new obstacles to addressing hate speech. To curb the spread of hate speech and other harmful content, social media companies should examine the content on their platforms and take appropriate action without interfering with free expression. This is essential in today's environment because media is ubiquitous, and we are constantly exposed to it. The media is not just a source of entertainment but also a powerful asset for shaping beliefs, attitudes, and actions.

With the Supreme Court's rulings on hate speech—Heyman claims that the standard *First Amendment* approach (which considers hate speech to be protected expression unless it incites imminent illegal action) poses limitations for dealing with hate speech. To guarantee that regulations do not infringe upon the constitutional right to free expression; laws prohibiting hate speech should be carefully designed and given rigorous judicial analysis. Also, it is the government's and the courts' obligation to balance the right to free expression with other vital communal objectives such as public safety, privacy, and the maintenance of order.⁴⁹ It is important in defining and maintaining the liberties necessary for a healthy and thriving democracy.

Conclusion

The right to free expression is guaranteed under the *First*

⁴⁹ Steven J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, SSRN (Jul. 29, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186262, (last visited Mar. 18, 2023).

*Amendment of the United States Constitution.*⁵⁰ Through major cases such as *Matal v. Tam*⁵¹ and *Brandenburg v. Ohio*,⁵² the Supreme Court has repeatedly affirmed this protection—including for hate speech. These decisions give an understanding of the *First Amendment's* legal constraints on hate speech. Although free speech is a pillar of American liberty and democracy, it must be exercised responsibly and in conformity with the law to avoid legal consequences. As decided in *Brandenburg v. Ohio*, speech that incites unlawful conduct and directly endangers public safety is not protected.⁵³ The Supreme Court ruled in *Matal v. Tam* that free speech cannot be curtailed only because it is deemed offensive.⁵⁴ Nevertheless, Steven J. Heyman's *Hate Speech, Public Discourse, and the First Amendment*,⁵⁵ emphasizes the importance of balancing the competing interests of promoting free expression and protecting individuals from harm, as well as the importance of the government exercising caution in regulating hate speech to avoid undermining the fundamental value of free expression in a democratic society. Ultimately, maintaining and promoting free speech is critical for sustaining the health of our democracy, allowing for the open exchange of ideas and opinions, and ensuring that all voices are heard. While regulating speech presents problems and complications, it is critical that we work toward achieving a balance that maintains the

⁵⁰ U.S. CONST. amend. I, <https://constitution.congress.gov/constitution/amendment-1/>, (last visited Jan. 31, 2023).

⁵¹ *Matal v. Tam*, No. 15-1293 (2017), <https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

⁵² *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 89 S. Ct. 1827, 23 L.Ed.2d 430, <https://www.law.cornell.edu/supremecourt/text/395/444>, (last visited Mar. 18, 2023).

⁵³ *Id.*

⁵⁴ *Matal v. Tam*, No. 15-1293 (2017), <https://www.law.cornell.edu/supremecourt/text/15-1293>, (last visited Feb. 8, 2023).

⁵⁵ Steven J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, SSRN (Jul. 29, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186262, (last visited Mar. 18, 2023).

ideals of free expression while simultaneously minimizing harm and preserving public safety.