American Free-Speech Exceptionalism

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

The recent tragedy in Charlottesville – when compared to a different event occurring at the same time in a foreign land – provides an especially graphic illustration of how U.S. free-speech doctrines differ from the approaches of other major democratic nations.

As Americans are painfully aware, on August 12th, 2017 neo-Nazis and white supremacists gathered in Charlottesville, Virginia for a "Unite the Right" rally. Demonstrators displaying slogans and symbols evoking hatred and violence against racial minorities and Jews encountered vociferous counter-demonstrators. The events took a horribly tragic turn when a white supremacist-sympathizer drove his vehicle into a crowd of counter-demonstrators, killing Heather Heyer and injuring 19 others. Two policemen monitoring the demonstration also died when their helicopter crashed.

Meanwhile, the day after, the *Washington Post* reported that, for the second time in a month, tourists in Germany were in legal trouble for violating German laws prohibiting the exhibition of Nazi symbols and gestures.

The contrast between Charlottesville and Germany dramatically underlines how distinctive is the American approach to hate speech specifically -- and freedom of speech more generally -- when compared to the approaches of a host of Western and Eastern democracies.

Modern American free-speech doctrines begin with the presumption that a wide array of political and other messages and symbols are protected by the Constitution's First Amendment, no matter how extreme and hurtful they may be. Significant constitutional protection – protection that doubles down when governments seek to suppress expression *because* of its virulent *content* – is afforded to all speech unless it becomes "unprotected" by crossing one of several strictly defined lines.

In the Charlottesville demonstration neo-Nazi and white-supremacist demonstrators had a constitutional right to stage their march, provided they met neutral permitting requirements. Neither their provocative viewpoints nor the symbols they used to express them could be a basis for denying them access to "the marketplace of ideas." As a leading 1948 Supreme Court decision claimed, speech "may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Of course, any Charlottesville participants who committed criminal *acts* can be prosecuted for violating relevant laws. And any rally speakers or participants spewing hate speech lost their claim to First Amendment protection if their speech fell into one of these "unprotected" speech categories:

*“Incitement” (words “directed to inciting or producing imminent lawless action in circumstances likely to incite” such action),

*“Fighting words” (words spoken to an individual that would cause the average person to immediately react with violence), or

*Speech creating an unacceptable “Hostile Audience” situation (when a speaker’s words stir up a clear and present danger of an immediate breach of the peace uncontrollable by reasonable police protection).

Still, American free-speech doctrines give authorities little ability to suppress hate-speech or its associated symbols from the outset.

In that way, American free-speech law stands apart not only from Germany, whose notorious Nazi past gives it special reason for suppressing Nazi salutes and swastikas, but also from Britain, its former commonwealth cousins, and a wide array of Western and Asian democracies. These pursue a more “communitarian” approach, in which the right to speak one’s mind is overtly balanced against other social needs, including having all community members feel securely accepted and fully valued.

Constitutional scholars, judges, and the public have long debated the pros and cons of America’s “preferred position” for speech in the constellation of social values. But the strong American constitutional-law allergy to viewpoint-based censorship is firmly ensconced in recent case law supported by a broad array of ideologically “conservative” and “liberal” judges.

So, it appears likely that Americans will continue to deal with the social and political consequences of our exceptional commitment to tolerate – as a legal matter -- viewpoints we abhor.