

Editorial Board: The bounds of free speech

Amid series of controversial speakers at UW, we must consider how to resist harmful speech without restricting constitutional liberties

by The Badger Herald Editorial Board

Since the Supreme Court incorporated the First Amendment to apply to the states in 1925, conversations about the balance between free speech and other social values have intensified. Arguably the most contentious conflict exists between freedom of speech and egalitarian social values, creating issues when free speech causes harm to marginalized communities.

The First Amendment allows for broad protections of speech. For example, content-based restrictions on speech — those that limit speech based on its message — are subject to strict scrutiny, the highest level of judicial review. Any measure that restricts speech based on its content must serve a compelling governmental interest and be narrowly tailored to serve that purpose alone. When the government limits speech, it must do so in the least restrictive way possible.

There are only a few categorical exceptions to the content-based restrictions that are permitted under the First Amendment, such as true threats or criminal incitement. The Supreme Court has chosen to interpret these exceptions narrowly and has largely refused to expand the kind of speech that is not protected under First Amendment protections.

One court case that continues to trouble some Americans is *Snyder v. Phelps*, where the Supreme Court ruled in 2010 that the First Amendment shields speech that intentionally causes emotional distress. In *Matal v. Tam*, the Supreme Court reaffirmed the idea that hate speech does not count as a categorical exception to the First Amendment.

As a result, government entities have little power to regulate even harmful speech. This is exacerbated in the university context when student organizations invite controversial individuals to speak on campus. Recent visits from speakers like Ben Shapiro and Matt Walsh have been met with calls for the University of Wisconsin to have them removed. Unless their speech reaches one of the categorical exceptions to the First Amendment, however, UW has little power to unilaterally prevent hateful speech.

To fully comprehend the complexity of freedom of speech, we must acknowledge the weight words carry. Words aren't simply syllables strung together — they have the power to mobilize ideologies and behaviors. As a result, freedom of speech can come into tension with social equality, as hateful speech perpetuates oppressive power structures.

Members of marginalized groups are often the recurring targets of hate speech. In fact, minority communities encompass more than 70% of the people targeted by hate crimes and hate speech on social media, according to the United Nations. This speech is exacerbated by unregulated speech on social media. After Elon Musk bought

Twitter, reducing the regulation of hate speech on the platform, the use of the n-word on the platform increased by almost 500% within 12 hours, according to the Brookings Institution.

People who use their constitutional freedom to speak hatefully can impose tangible impacts on marginalized communities based on historical power imbalances that speech can perpetuate. When hateful expression is allowed in the name of free speech, it reinforces structures of oppression.

It is critical that UW responds to hateful speakers — not only to acknowledge the harm their speech inflicts, but also to support impacted communities. In the context of broad free speech protections, UW has the responsibility to

are civilian protests against other forms of free speech a legal right, they should be encouraged to facilitate a healthy democracy. Community members who organize in response to harmful rhetoric can help foster discussion around why such hate should not be tolerated.

April 4, many UW students received an email with the subject line “Homosexuality and Christ Talk this Thursday” from Badger Catholic through the RSO outreach via All Students email address. The email invited students to attend an event with guest speaker Kim Zember.

Students receive these emails because they are enrolled at UW and because the organization is a Registered Student Organization. RSOs can send one email per semester to all students at a

RSO.

UW failed to identify or condemn Zember as an anti-LGBTQIA+ speaker. Unless speech constitutes true threats, incitement of criminal activity or another categorical exception to the First Amendment, UW cannot censor speakers. It is a public university and that would be a constitutional violation of free speech. But doing nothing in the face of hateful speakers is unacceptable.

For one, when vetting the text of the RSO Outreach emails, UW should consider whether it is misleading. The Badger Catholic email was vague and did not make clear the hateful content of Zember's message. When this is the case, UW should send out a supplemental email with more context about controversial speakers, including resources and community spaces to better prepare and support students in the face of hateful speech.

In the absence of UW's open condemnation of harmful speech, students can and should do something. We live in a democracy where everyone has the right to free speech. The cost of having this right is the persistent need to fight the expressions of bigotry it permits. Hateful expressions are not a consequence of the First Amendment as a conduit for ideas but a broader American culture that perpetuates these ideas in the first place.

We live in a country where transgender people are victimized at staggering rates, a country founded on a distorted view of equality and a country built by enslaved people on stolen land. Our history has repeatedly empowered bigots to weaponize freedom of speech against vulnerable communities, and it is this — not free speech — that represents the root of hateful expression.

Fortunately, the same right that permits hateful rhetoric on campus also permits students to protest this rhetoric. Instead of calling on UW to censor hateful speakers, we must openly oppose harmful speech, share resources with one another, promote inclusive campus groups and build community around a shared goal of empowering marginalized groups.

Freedom of speech and social equality are not mutually exclusive. Instead of calling for censorship in the face of harmful speech, we must use the rights we have to engage in productive counterprotest. Within the framework of the First Amendment, members of a democracy have the ability and responsibility to respond when free speech is abused.

It is the wielding of free speech — not the constraining of it — that provides an avenue to push back against the hateful discourse the First Amendment allows.

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UW legally must allow most controversial speakers on campus — but they could provide more resources for targeted students.

support students harmed by free speech without resorting to censorship.

When a student group invites a speaker to campus who spreads harmful ideas, UW cannot prevent that. But, given that freedom of speech and freedom of protest are both protected by the First Amendment, UW also cannot prohibit counter-protests that may arise against speakers.

There is a fundamental difference between freedom of speech and freedom of consequence. When a community reacts to a harmful speaker, that is an example of a logical repercussion for spreading ideas that hurt people. Not only

reduced fee. Students who wish to be removed from these mass emails can choose to do so under the Family Education Rights and Privacy Act, FERPA.

Before sending out the mass emails, UW reviews the text of the email to ensure RSOs are adhering to UW's policies. The Center for Leadership & Involvement has a responsibility to every campus organization to send these emails if they follow UW's policies. But UW also has a responsibility to its students, particularly those who are often the target of harmful speech, to condemn harmful speech being promoted by any